

Before the
FEDERAL TRADE COMMISSION
In Short Workshop, FTC Project No. P114506

COMMENTS SUBMITTED BY:
PROMOTION MARKETING ASSOCIATION, INC.

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Federal Trade Commission
Office of the Secretary
Room H-113 (Annex I)
600 Pennsylvania Avenue
Washington, D.C. 20580

Re: Workshop About Advertising and Privacy Disclosures in Online and Mobile Media:
Comments on Behalf of the Promotion Marketing Association/In Short Workshop,
FTC Project No. P114506

The Promotion Marketing Association, Inc. (“PMA”) respectfully submits these comments in response to the Federal Trade Commission’s (“FTC”) request for public comments on potential modifications to *Dot Com Disclosures: Information About Online Advertising* (“Dot Com Disclosures”), the guidance document that advises businesses on how federal advertising law applies to advertising and sales on the Internet.

I. About the PMA

The PMA, established in 1911, is the premier trade association representing the over \$1 trillion integrated marketing industry. The PMA is a central resource for research, education, and collaboration for marketing professionals. The PMA membership includes many of the leading Fortune 500 companies in the consumer products and services industries, advertising, marketing and promotional agencies, retailers, service providers, media companies and online and mobile platform providers. . PMA members have actively embraced the use of new media technologies as a platform for conducting their promotional marketing campaigns because these technologies afford our members the ability to engage with their customers in a highly targeted and interactive manner. Many of the campaigns that the PMA members conduct such as sweepstakes, contests, games, mobile couponing and loyalty programs are inherently complex and typically involve fairly detailed rules and regulations. Thus, while PMA is deeply committed to establishing industry standards and best practices designed to ensure that consumers fully understand the terms of any promotional offers presented, PMA also believes that any modifications to the guidelines must take into account many of the challenges presented by these new media platforms such as limited real estate, cross platform differences and constraints of syndicated content.

II. Background

On August 9, 2011, the PMA submitted Comments to the FTC on the potential modification of the Dot Com Disclosure Guidelines. Those comments addressed the technological advances that have substantially re-shaped the contours of the online environment since the FTC issued the Dot Com Disclosures in 2000. For example, as noted in PMA’s original comments, when the Dot Com Disclosures were originally issued persons could only log onto the Internet via a

“wired” computer in a fixed location. Mobile platforms were limited to phone and SMS and the social media platforms that today dominate communications by and among consumers and marketers did not even exist. Indeed, the landscape has shifted even further during just the one year period since the FTC initially solicited comments on this issue. A recent Nielsen survey^(fn 1) indicates that over one-half of Americans with a mobile phone/wireless service subscription use a “smart phone” – i.e., a mobile phone with a mobile computing platform and greater computing ability and more advanced features than a “regular” phone. As a result of this rapidly evolving technological landscape, PMA urged FTC at that time to conduct additional research, including holding workshop hearings with relevant stakeholders to fully understand and appreciate all of the changes that have occurred in the online world since 2000, and to avoid adopting an overly prescriptive approach that would deprive marketers of the flexibility they need to adapt to changing technologies. The FTC did conduct a public workshop on May 30, 2012 in which PMA participated. PMA applauds the FTC for the very meaningful and insightful manner in which it has approached this issue and appreciates the opportunity to be a part of this important initiative, whose outcome will have a profound impact on the manner in which marketers will be able to utilize new and emerging media platforms for their campaigns in the future.

III. General Guiding Principles and Recommendations

The rapid pace at which technology is evolving makes the creation and implementation of regulatory solutions quite challenging. No set of rules or guidelines, no matter how artfully or imaginatively drafted, can fully anticipate the future course of web and mobile based technologies. Therefore, any attempt to propose specific rules or guidelines based upon the current media landscape and infrastructure is inherently flawed, as any such rules or guidelines will likely be rendered obsolete even before the ink dries.

Accordingly, PMA respectfully submits that the FTC embrace general principles rather than hard-and-fast rules in revising the Dot. Com Disclosures. Reliance on general principles has the crucial advantage of allowing the FTC and marketers to adapt to the new technologies as they develop. While the current Dot.com Disclosures are based on some general principles, PMA believes that even some of these principles require re-evaluation in light of the practical constraints presented by some of today’s popular media platforms.

PMA believes that there are a number of key guiding principles that the FTC should consider in determining what specific changes should be made to the Dot.com disclosures:

First, given the rapid pace of technology and the differences in functionality and infrastructure that exist among the various media platforms, any guidelines issued by the FTC must be flexible and fluid. The FTC should provide marketers with more rather than less flexibility as to when, how and where disclosures must be made. In particular, PMA respectfully suggests that the FTC’s approach as to what constitutes “clear and conspicuous” disclosure may need to be reevaluated in light of the very real space constraints presented by some of the new media platforms and changes in consumer behavior. In particular, PMA would urge the FTC to adopt a more flexible approach to the “clear and conspicuous” standard, which recognizes that what constitutes “clear and conspicuous” disclosure must be viewed more contextually and may depend on a variety of factors such as the media platform that is being used, the nature of the relationship between the marketer and the consumer, the type of offer being presented, the nature of the product and the materiality of the information being presented. Given the realities of the current technological

landscape, we believe such factors are equally if not more relevant than factors such as the proximity and placement of a disclosure to the triggering term.

Secondly, PMA believes that in revising these guidelines, the FTC must acknowledge the changes that technology has caused in the way consumers receive and interact with content. The current Dot.com disclosure guidelines reflect a linear view of advertisements and tend to evaluate the adequacy of disclosures based on the four corners of a static advertisement. While such an approach, which focuses on elements such as color, size and type of text and on placement and proximity of disclosures to a triggering term may have been appropriate at a time when the internet meant a static web page, those concepts are not relevant to the current environment and do not reflect actual consumer behavior. Today's consumer is expert at multitasking and has become highly sophisticated at navigating through multiple locations to locate important information. Equally important, the path to purchase is neither a straight nor single line. Because most campaigns today are offered across multiple platforms there are a variety of paths through which a consumer may travel before ultimately reaching the point at which a purchase decision must be made. Thus, PMA would respectfully submit that the concept of what constitutes "clear and conspicuous" disclosure must be evaluated based on the consumer's entire purchase path as distinct from any particular screen or page.

Third, PMA would respectfully submit that the FTC must take a more lenient approach to the use of hyperlinks and similar mechanisms that direct the consumer to other locations for more qualifying information. The notion that certain information can never be disclosed through the use of a hyperlink ignores the practical reality that certain media platforms are so limited in real estate (i.e. 140 characters on Twitter; 160 characters in SMS) that it would be virtually impossible to disclose any meaningful information in such a manner. Thus, in determining whether information can properly be disclosed through the use of a hyperlink, FTC should consider not only the nature of the information and its materiality, but the platform on which it is being presented. Greater leniency and flexibility in the use of hyperlinks should be afforded on platforms with more limited real estate.

Similarly, while PMA agrees that hyperlinks should be properly labeled when possible to indicate the nature or importance of the disclosure, given the likelihood that more rather than less information will need to be disclosed in this manner in the future, more generic labels may sometimes be necessary and appropriate. PMA recommends that FTC again adopt a more fluid approach that would permit a more generic type of label where the type of information that is being linked to falls into multiple categories. PMA would also support the development of a more universally recognized symbol such as "I" which, with proper consumer education, could be readily understood to stand for the disclosure of important information.

Fourth, consideration of what constitutes "material" information must also be looked at contextually based on the relationship between the consumer and the business and based upon reasonable consumer expectations. The example of the mobile offer for a "free" cup of coffee presented at the workshop is illustrative of this principle. While the hours of operation and limits on the size and flavor of coffees on which the offer is available might traditionally be considered "material" limitations, if the offer is targeted to a narrow group comprised of members of the coffee shop's loyalty program, those conditions are already likely known to the recipients of the offer and would not need to be disclosed. Given the highly targeted nature of many offers being presented today, a one size fits all approach to disclosure, is simply not appropriate.

PMA would also like to reiterate its views expressed during the public workshop regarding the concept of requiring a check box or similar mechanism to evidence affirmative consent for negative option offers. PMA would strongly urge the Commission to avoid adopting such a prescriptive and rigid approach to affirmative consent. As an initial matter, a check box by its nature is a mechanism that will not work on all media platforms. Thus, imposing such a requirement would amount to a defacto ban on the use of such offers in certain media. Secondly, a check box in concept seems inherently antithetical to the concept of technological innovation. With the continued development of smart phones, tablets and other technology, it is impossible to predict today what mechanisms may exist in the future that would be equally effective as a means of evidencing consent. To avoid potentially stifling innovation, the FTC should adopt a flexible and fluid approach that permits any mechanism that clearly evidences affirmative consent.

PMA would also suggest that references to “banner” ads in the Dot.com Disclosure Guidelines be replaced by the term “teaser” ads, which more appropriately reflects the current media landscape.

Finally, PMA would urge the FTC to publish for more specific comment any proposed modifications to the Guidelines before final publication. Given the importance of this issue and the profound impact it will have on the future of digital and mobile commerce, PMA believes it would be useful to allow industry to comment on any specific proposed modifications or changes the FTC is considering before they become final.

We hope that the foregoing comments are useful to the FTC in its efforts to modify the Dot. Com Disclosures in a manner that is beneficial to the consumer and business alike.

NOTES:

- (1) The actual figure is 50.4%. Nielsen Survey “State of the Appnation – A Year of Change and Growth in U.S. Smartphones,” of March 2012.