



July 11, 2012

VIA ELECTRONIC DELIVERY

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

RE: *In Short* Workshop; FTC Project No. P114506

Dear Secretary Clark:

Facebook appreciates the opportunity to participate in, and comment on, the Federal Trade Commission's workshop, *In Short: Advertising & Privacy Disclosures in a Digital World*, which thoughtfully tackled issues surrounding disclosures in today's online environments.

Facebook agrees with the Commission that the online environment has changed drastically since the Commission issued its guidance in 2000. Perhaps because mobile broadband was still nascent, the U.S. government did not even track its usage at that time. But more recent census data show a steep incline in its adoption, with mobile broadband users increasing to 80 million in 2009 from 25 million the previous year.¹ Similarly, while social networking had not yet emerged in 2000, nearly a decade later two-thirds of online adults in the U.S. (or half of all U.S. adults) reported having used social networking sites.²

These social networking platforms are used for a wide variety of purposes. Some use social networking to stay in touch with friends and family, or reconnect with old acquaintances; some look for employment or crowd-fund business ventures; some create connections with or otherwise tell their friends about their favorite places, products, or services; and some organize and fight for political or social causes.

¹ See U.S. Census Bureau, *Statistical Abstract of the United States: 2012, Section 24, Information and Communications*, at 712 (2012), <http://www.census.gov/prod/2011pubs/12statab/infocomm.pdf>.

² Pew Internet & American Life Project, *65% of Online Adults Use Social Networking Sites* (Aug. 26, 2011), <http://pewinternet.org/Reports/2011/Social-Networking-Sites.aspx>.

Given these divergent motivations and different functionalities among the various communications platforms, the panelists at the *In Short* workshop were right to recognize the importance of flexible, technology-neutral guidance that takes due account of the rapid pace of, and the value created by, technological change. Building on this discussion, Facebook encourages the Commission to follow three principles that we believe will help consumers better understand advertising disclosures, regardless of the medium, while preserving the flexibility necessary to encourage and accommodate innovation and free speech:

- *First*, to provide clear guidance to industry about when notice is needed, the Commission’s standard for determining whether a disclosure is “material” should depend on the likelihood of deception or harm to the consumer.
- *Second*, the Commission’s guidance should recognize that there are many ways in which disclosures may be communicated and support industry’s efforts to develop abbreviated disclosures or icons — which can serve as practical, simple, and effective means for conveying information to consumers.
- *Third*, advertisers should remain responsible for making disclosures to consumers because advertisers have control over the nature of their activities and the details needed to make consumers aware of material information.

These three principles, which are discussed in more detail below, will help ensure that consumers receive disclosures that are meaningful and readily understandable, while helping to maintain an environment conducive to technological innovation.

I. The Commission’s Materiality Standard Should Take into Account Whether a Consumer Is Likely to Be Deceived or Harmed.

The Commission has long held that not all promotional content requires a disclosure. It has instead required notice only where the additional information is “material.”³ Today, social media platforms, such as LinkedIn, foursquare, Pinterest, Twitter, and Facebook, are developing at a rapid pace and are creating new opportunities for everyone, from the largest global brands to the smallest local startups, to engage with users about their products and services in exciting, innovative ways.

One of the ways in which advertisers are using these social media platforms is to encourage their customers to get the word out more broadly. As consumers increasingly engage with brands online, it has become even more important that the Commission’s threshold for determining when disclosure is required focuses on those scenarios where a consumer is likely to be deceived or is at risk of actual harm.

³ See, e.g., 16 C.F.R. § 255.5 (requiring disclosure of “material” connections between an endorser and the advertiser); Fed. Trade Comm’n, *Dot Com Disclosures: Information about Online Advertising*, at 5 (2000), <http://www.business.ftc.gov/sites/default/files/pdf/bus41-dot-com-disclosures-information-about-online-advertising.pdf> (explaining that disclosures are sometimes necessary to provide consumers “material” information).

In addition, as long as a reasonable consumer using these social media tools understands how they work, and therefore appreciates how much weight to give a particular message, consumers are unlikely to be deceived or harmed and the need for disclosure diminishes. In this respect, platform providers might choose to educate consumers on how certain features of the platform function. For example, Facebook’s Help Center provides consumers information about various Facebook features, including the “Like” button, News Feed, and our advertising and business solutions.⁴ As consumers develop an understanding of the platform and its functionalities and expect that the platform may be used by advertisers and consumers to provide content related to brands, further disclosures about such practices become less useful.

Specifically, the Commission should consider applying a context-dependent approach to determining whether, and how, advertising disclosures should be made. The Commission has long considered the totality of the circumstances to determine whether a practice is unfair or deceptive, and this approach is especially appropriate as practices become less standardized and consumers increasingly incorporate brand messages into their conversations. Advertisers engage with consumers in a wide variety of ways. For example, a brand might offer consumers coupons, free products, exclusive web content, early access to a new collection, or virtual “badges” for engaging with the brand online. A rigid, one-size-fits-all approach might not be able to accommodate all of the different facts and circumstances. In contrast, a context-dependent standard that requires advertising disclosures only when consumers are likely to be deceived or misled will help provide flexibility while also ensuring that consumers are protected.

II. Icons and Abbreviations Offer Practical Solutions for Clear and Effective Advertising Disclosures.

Advertising disclosures on communications platforms with screen, character, or other functional limitations entail unique challenges, and regardless of the platform, consumers want — and expect — disclosures to be short and to the point. Icons and abbreviations offer practical solutions for achieving simplicity and brevity while also putting consumers on notice of material information.

Icons are regularly used by government, businesses, and social movements to express a message because visual cues can be especially effective at catching consumers’ attention. For example, the Food and Drug Administration recently expressed support for an industry group’s self-regulatory front-of-package nutrition labeling, which uses icons to quickly notify consumers about the calories, saturated fat, sodium, and sugar in each serving.⁵ Transportation systems around the world depend heavily on the use of icons — such as traffic signals and crosswalk markings — to ensure travelers’ safety. Over time, the three arrows symbol and pink ribbons have become synonymous with recycling and breast cancer awareness, respectively. And remote controls and consumer devices often use standard icons to symbolize power, play, record, and stop commands.

⁴ See Facebook Help Center, <http://www.facebook.com/help/>; <https://www.facebook.com/help/?page=103918613033301> (explaining the “Like” button); <http://www.facebook.com/help/?page=132070650202524> (describing the News Feed); <https://www.facebook.com/help/ads-and-business-solutions> (explaining ads and business solutions).

⁵ Caroline Scott-Thomas, *FDA Offers Support in Industry Roll-Out of Facts Up Front Labeling*, Foodnavigator-usa.com (Feb. 24, 2012), <http://www.foodnavigator-usa.com/Regulation/FDA-offers-support-in-industry-roll-out-of-Facts-Up-Front-labeling>.

While many of these icons now seem intuitive, there is always a period of time when consumers must learn to associate the icon with a particular message. For example, the “| |” icon does not inherently convey “pause,” but this message is now universally understood. The need for a learning curve does not mean the use of icons should be rejected; rather, it means efforts should be made to educate the public on their intended meaning. When Twitter began supporting the use of hashtags to represent a discussion topic, for instance, the hashtag was known only to users of early Internet chat services. But by educating its users on the hashtag’s meaning,⁶ Twitter was able to make the hashtag a widely understood symbol. Indeed, the Commission even promoted its use of the hashtag #FTCdisclose to live-blog the *In Short* workshop to the public.

Icon-based solutions offer a practical, understandable alternative to dense notices. Given that industry groups and governments alike have supported the use of icons to make disclosures in other contexts, including to identify specific advertising practices,⁷ Facebook encourages the Commission to promote the use of icon-based disclosures regardless of the format or medium.

III. Advertisers Should Remain Responsible for Disclosures in Advertising.

Facebook, like many other social media platforms, is committed to helping ensure that users understand how Facebook works, including how we deliver ads and how users can connect with each other through the platform. For example, our users can click through to our “About Facebook Advertising” page directly from an ad, which explains in easy-to-understand terms why ads exist, how ads are created, and how users can impact the ads they see.⁸ And, as noted above, our Help Center provides consumers information about various Facebook features, including the “Like” button, Pages, and News Feed.

There was agreement among the panelists participating in the workshop that platforms should not be held responsible for ensuring that all the communications occurring on the platforms contain appropriate disclosures.⁹ It is well-settled that the primary responsibility for avoiding unfair and deceptive claims rests with the advertiser (or its agents), and not the communications platform or

⁶ See, e.g., Twitter, *What Are Hashtags (“#” Symbols)?*, <https://support.twitter.com/articles/49309-what-are-hashtags-symbols>.

⁷ Digital Advertising Alliance, *DAA Program Commended by US Regulators*, <http://www.aboutads.info/> (describing White House, Federal Trade Commission, and Department of Commerce support for the DAA’s use of the Advertising Option icon); 4A’s, *FTC Releases Final Privacy Report; Acknowledges Industry Progress* (Apr. 2, 2012), http://www.aaaa.org/advocacy/gov/news/Pages/040212_ftc_privacy.aspx (quoting Chairman Leibowitz’s remarks that “[t]he DAA and AdChoices has made extraordinary strides We are all pulling in the same direction.”).

⁸ See About Facebook Advertising, <https://www.facebook.com/about/ads/>.

⁹ Robert Weissman, President of the consumer group Public Citizen, rejected the suggestion that platforms should bear responsibility, saying that “the duty rests with the advertiser, not the platform.” Fed. Trade Comm’n, *In Short: Advertising & Privacy Disclosures in a Digital World, Session 2 Transcript*, at 22 (May 30, 12), http://htc-01.media.globix.net/COMP008760MOD1/ftc_web/transcripts/053012_FTC_sess2.pdf. Jim Dudukovich, a representative of the Word of Mouth Marketing Association, agreed, indicating that a discussion of platform responsibility is a “red herring.” *Id.* And while Stacey Ferguson encouraged platforms to facilitate advertising disclosures, Robert Weissman explained that although platforms are free to take on that role as a business decision, there is no legal requirement to do so. *Id.*

medium.¹⁰ This commonsense approach is appropriate because the parties actually making the claims, whether advertisers or consumers acting on their behalf, control the creation of the content and often are the only entities with full knowledge of the ad’s purpose, claims, and substantiation.

For example, where an advertiser launches an affiliate marketing program with a social media component, the advertiser knows the identity of the affiliates, the affiliates’ motivations for endorsing the advertiser’s products or services, and the consideration provided in exchange for the promotion. The advertiser also is the only entity in a position to contractually restrict how the person communicates the message. Similarly, where a consumer is incentivized to market to other consumers on behalf of an advertiser, the consumer is the party with the most information and control. To be clear, as explained above, not all relationships will be material and need to be disclosed, but for those circumstances where disclosure *is* required, the entity making the claim should remain responsible for ensuring that an adequate disclosure is provided.

Providers of communications platforms such as television and radio channels, billboards, newspapers, magazines, and social media tools, in contrast, do not control the content and are not privy to the relationship between the advertiser and the endorser — except in rare circumstances where the communications platform, in addition to serving as the distribution platform for the advertising message, is also the content creator.¹¹ Because platform providers typically have little to no insight into the motivations underlying a user’s communication, it would be incredibly difficult, and overly burdensome, for the platforms to try to regulate or enforce a user’s advertising disclosures.

Placing responsibility on social media platforms for providing advertising disclosures also would be fundamentally at odds with the predominantly content-agnostic manner in which they operate. Facebook and similar social media platforms provide an open forum through which users can connect, communicate, and freely express themselves on issues of their own choosing. This approach fosters a number of beneficial, unanticipated uses. For example, social media platforms enabled the citizens of Egypt and Tunisia to organize grassroots efforts in 2011 to displace their political regimes.¹² And social media platforms have lowered the barrier to entry for fledgling companies with great ideas because

¹⁰ See, e.g., Letter from Mary K. Engle, Associate Director, Division of Advertising Practices, Fed. Trade Comm’n, *Re: Premiere Radio Networks, Inc., FTC Matter No. 062-3168* (July 9, 2007) (suggesting that as a “hybrid entity,” Premiere Radio Networks would not be liable for deceptive advertising as a radio program producer, but could be in its capacity as a producer of the commercial advertising message itself). This position is also consistent with Congress’s express intent to hold third parties who publish content through online platforms responsible for the content of their messages, rather than the online platform providers. For example, Section 230 of the Communications Decency Act shields interactive computer services from liability based on content provided by third parties, unless the platform induced or contributed materially to the allegedly illegal content. See 47 U.S.C. § 230.

¹¹ In limited circumstances, the Commission has found a communications platform liable for false or deceptive advertising. But such liability was based not on the platform’s transmission of the ad, but rather on its production of the ad or its knowledge that an ad included false or deceptive claims. See, e.g., *In the Matter of Campbell Mithun LLC*, 133 F.T.C. 702 (2002) (challenging advertising agency’s role in actually preparing food ads that contained misleading nutritional claims); *In the Matter of ValueVision Int’l, Inc.*, 132 F.T.C. 338 (2001) (consent order) (holding home shopping television channel liable based on its role in making and disseminating deceptive weight loss claims). Such cases are the exception, not the rule.

¹² See generally Natana J. DeLong-Bas, *The New Social Media and the Arab Spring*, Oxford Islamic Studies Online, http://www.oxfordislamicstudies.com/Public/focus/essay0611_social_media.html.

small businesses can creatively harness the power of social media to introduce their products and services in otherwise untapped markets.¹³ Imposing obligations on social media platform providers to prescribe the permitted format and content of advertising disclosures could unintentionally chill users' speech and stifle creativity and innovation.

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By embracing these three principles as it revisits its 2000 *Dot Com Disclosures* guidance, the Commission can ensure that advertisers have flexible, practical solutions that both protect consumers and facilitate business innovation in the decade to come.

Respectfully submitted,

/s/

Susan Cooper
Lead Advertising and Product Counsel
Facebook

¹³ See, e.g., Katie Johnston Chase, *Creating Buzz, One Day At a Time; Low-Key, Low-Cost Marketing Hits Social-Media Sites*, Boston Globe, at 5 (Feb. 20, 2010), http://www.boston.com/business/technology/articles/2010/02/20/low_key_low_cost_online_marketing_taps_social_media_sites/. Nearly one in three small businesses in the United States use social networking sites to market their products and services. See Press Release, Network Solutions, *U.S. Small Business Reaches Innovation Glass Ceiling* (July 2010), <http://www.networksolutions.com/smallbusiness/press-release/?channelid=P99C425S627N0B142A1D38E0000V100> (noting that small business that are successful in innovation and marketing are more likely to use online advertising and are more likely to expect to profit from social media).