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Federal Trade Commission
Office of the Secretary
Room H-113 (Annex I)
600 Pennsylvania Avenue, N.W.
Washington, DC 2058

Re: Dot Com Disclosures, FTC Matter No. P114506

Dear Sir/Madam:

These comments to the Federal Trade Commission's (the "FTC" or "Commission") request for information regarding the Dot Com Disclosure business guidance publication are filed on behalf of National Association of College Stores, Inc. ("NACS"). NACS is a trade association based in Oberlin, OH that is comprised of over 3,100 college and university stores across the United States. Since its founding in 1923, NACS has taken a proactive leadership role in addressing issues impacting the college store industry and promoting retail best practices amongst its members. NACS appreciates the effort that the Commission and its staff have made to draft useful guidance to assist businesses in the development of Internet marketing materials. NACS values the opportunity to participate in this revision of the Dot Com Disclosures and to provide additional guidance to the Commission about how the Dot Com Disclosures may be modified to address the concerns of the college store industry.

EXECUTIVE SUMMARY

The dramatic increase in the number of online merchants and the practice of online sellers providing a platform for third parties to market their products requires the Commission to provide further guidance to those merchants and the public regarding how savings claims made on the Internet can be structured to avoid untruthful or misleading claims. Several examples are included below.

NACS has increasingly become aware of online retailers making broad, unsubstantiated savings claims such as "*SAVE UP TO 90%" or "50% OFF! TODAY ONLY.*" The nature of the claims, which may be made boldly at the top of a web page, in email advertisements, or via banner advertisements, attract the immediate attention of consumers but often do not provide consumers with any information in proximity to the claim to give a point of comparison for the advertised savings. Thus, the logical question is "*Save 90% off of WHAT?*" In many instances, the advertisement does not provide an answer. In fact, many advertisers are getting away with

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these broad statements without providing any clarification for the described savings; if it is provided, it is buried at the bottom of the advertisement, or several clicks from the actual claim. As a result, consumers are not informed whether the advertised savings is compared to all competitors, some competitors, or to a manufacturer's suggested retail price. This problem is compounded by the number of online retailers and the constant fluctuations of online retail prices. Thus, even if a basis for the savings claim is given, the very nature of the Internet makes it difficult, if not impossible, for parties to adequately monitor their competitors' prices to ensure that the savings claims are properly substantiated.

Another troubling aspect of these claims is that, in some instances, they may be made by online web sites offering a retail platform to multiple sellers. These platform providers may make claims that the prices offered on their site are "*60% LESS*" or that consumers may "*SAVE UP TO 70%*" by shopping on their platform. The basis for these claims is not only unclear, but it is also difficult to conceive how the platform provider is able to substantiate the claim when sellers are constantly adding new products to the platform, or otherwise changing their prices. Traditionally, sellers have had to ensure they had "up-to-date" substantiation for savings claims; however, it is unclear how these platforms are able to have such substantiation when the prices are controlled by third party sellers that are often changing their prices. Further, even if these platforms are able to substantiate the technical truthfulness of their claims with up-to-date evidence, it is unclear whether these sellers have enough substantiation for the claim to be reasonably understood and non-misleading. For example, in some instances, an advertiser may substantiate a 90% savings claim by the sales of only one seller on a platform, but consumers would not know the basis of the comparison without reviewing all potential sellers and, even then, may not understand that the claim is atypical when compared to other sellers.

Accordingly, NACS recommends that the Commission consider revising the Dot Com Disclosure guidance to (i) require that an advertiser include the basis for the comparative savings claim in close proximity to the claim or, in the alterative, in a clear and conspicuous disclosure on the page that the claim is made; (ii) require that advertisers update their savings claims to ensure that they have appropriate substantiation to reflect online price fluctuations; and (iii) require that the number of items available at the maximum savings should comprise a significant percentage, at least 10%, of all the items in the offer.

COMMENTS

I. BACKGROUND

The landscape of retail markets has changed dramatically since the Dot Com Disclosures were written in 2000. In 2000, online shopping was still in its infancy and individuals typically had only one or two options for the purchase of certain items on the Internet. Furthermore,

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consumers were not as accustomed to purchasing goods via the Internet, which led to more thoughtful and diligent purchasing patterns.

This is dramatically different from the retail environment provided by the Internet in 2011. Today, one Internet search for a single item may result in hundreds of thousands of results. Consumers, who are now much more accustomed to making purchases via the Internet, spend very little time deciding between the online sellers. These hundreds of thousands of Internet retailers have less than a second to lure a potential customer, so they must aggressively market their products to attract the fleeting attention of consumers utilizing computers and devices that offer even less room for advertising, such as mobile phones and iPads®. Retailers must therefore use exceptionally aggressive sales claims, such as "*SAVE UP TO 90% OFF*" or "*50% OFF ALREADY REDUCED ITEMS*." Before the Internet, these claims were made by retailers only rarely. Now, retailers are forced to tout exceptional sales on a monthly, far more frequent basis in order to attract the attention of technologically savvy shoppers who are skilled at searching for the lowest prices.

This is complicated by the fact that the prices of goods online are constantly fluctuating. Thus, the global market for one product can change dramatically in one to two days, simply as a result of one seller announcing a "sale" on a particular item. For instance, a recent review of a popular e-commerce site found that a particular item was being sold at $173.01 on March 10, 2011. Less than twenty four hours later, the same site was selling the same item for $159.27.[1] This is largely because online retailers routinely engage in pricing strategies whereby they change the prices of goods and services to prevent competitors from having insight into their pricing practices.[2] For instance, a study published in 2004 found that over a 19 month period there was considerable turnover in what one company claimed was the lowest price for 36 popular consumer electronics.[3] A more recent study in 2008 found that online retailers, on average, adjusted their prices for various consumer electronics every nine days.[4] It could be assumed that in 2011, after the recession made the online shopping market even more competitive, prices change even more often.

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[1] *Amazon.com*: Managerial Accounting, http://www.amazon.com/gp/product/007337961 (last visited on March 11, 2011) (on file with author).

[2] Baye, M.B., J.Morgam, P. Scholten, Temporal Price Dispersion: Evidence from an Online Consumer Electronics Market, *Journal of Interactive Marketing* 100-115 (2004).

[3] *Id.* at 6. The study also observed that the lowest price for a particular product ranged from $104 to $114 during this same period. *Id.* at 15.

[4] Schneider, H. and Albers, S. 2008. Retailer Competition in Shopbots. SSRN Working Paper. Available at SSRN: http://ssrn.com/abstract=1078505.

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These rapidly changing prices are driven by the ease and low output cost of changing an online price as compared to changing the price at a brick and mortar store. An e-commerce site can change its prices hourly simply by altering a few lines of text on its web site.[5]

Another development dramatically impacting the online retail market is the practice of established online sellers providing a "platform" for third parties to market and sell their products. These platforms, which are akin to offline "flea markets," allow multiple sellers to market their own products and set their own prices. Accordingly, a large percentage of items sold through seller platforms are priced by the individual seller rather than by the established online retailer. These individual sellers may attribute whatever value they choose to the items they are selling. Further, these seller platforms allow individuals to regularly add new items to the site, which means that over the course of one day the range of prices for an item can fluctuate significantly. Such fluctuations occur regularly, due to the dynamic nature of the platform. For example, the price for one product may change when a new seller joins the platform, adding a product that is priced lower (or higher) than the same product displayed by current sellers. Similarly, another seller may decide to "unload" all of its stock for a product by lowering the price of the product dramatically.[6] These sales tactics – which may occur quite regularly – lead to price fluctuations for a product across the market. Thus the platform provider, who is placing the advertisements across the Internet and via emails directly to customers, may have little to no control over the actual pricing of the products sold on its platform. This makes discount and sales pricing claims even more concerning, since it is unclear how these platform providers are ensuring the claims that they are making are accurate and up-to-date, and capable of being substantiated with the appropriate level of evidence.

II. Legal Analysis

A. Requested Revisions to the Dot Com Disclosures

The changes referenced above have led to an increased need for guidance on pricing and sales claims made via the Internet. Through its Dot Com Disclosures, NACS asks the Commission to provide detailed guidance on disclosures and substantiation for savings claims made on the Internet. In particular, NACS asks the Commission to consider revising the Dot Com Disclosures to include the following requirements for advertisers making savings claims:

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[5] Kannan, P.K. P.K. Kopalle, Dynamic Pricing on the Internet: Importance and Implications for Consumer Behavior, *International Journal of Electronic Commerce* 5(3), 63-83 (2001).

[6] *See, e.g.*, Amazon.com, https://catalog-retail.amazon.com/abis/syh/DisplayCondition/ref=dp_sdp_sell?_encoding=UTF8&coliid=&qid=1300388063&asin=0547167024&sr=1-3&colid=&ld=AMZDP (last visited March 17, 2011).

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1. The Basis for the Advertised Savings Should Be Clearly Disclosed in Close Proximity to the Claim.

First, NACS asks the Commission to consider revising the Dot Com Disclosures to require advertisers to include a basis, or threshold, for the advertised savings in close proximity to the claim. For example, an advertiser claiming consumers who shop on its web site may "*SAVE UP TO 50%*," would be required to include a notation in close proximity that explains that the "*Savings are based on a comparison of leading competitors' pricing.*"

Such a disclosure is necessary to ensure that consumers are not duped into believing they are achieving savings that are, in fact, unrealistic, unsubstantiated and possibly untrue. For instance, without providing disclosures in close proximity to these savings claims, a consumer is likely to believe that she may receive the savings as compared to the pricing of all other equivalent goods or services sold in the marketplace for as long as the claim is made. Because this is a reasonable interpretation, legal precedent indicates that the advertiser would have to substantiate it.[7] And, as the Commission is well aware, in order for an advertiser to support this very realistic and reasonable interpretation of the claim, unless the retailer provides a basis for the claimed savings, it would have to routinely monitor the sales prices offered by ***all*** of its competitors to ensure the claim is accurate and capable of being substantiated.[8] Given the breadth of the online market, it seems that this evidence is virtually impossible for a retailer to provide and, even if it had the evidence with respect to one competitor, it is very unlikely that it would have up-to-date and accurate support for the claim in comparison to ***all*** of its competitors. Thus, it is very likely that the retailers making these aggressive savings claims, which are certainly attractive to shoppers, do not have the appropriate level of evidence to support the claimed savings.

Requiring a disclosure to clarify the advertised savings would negate this problem, as it would mean that retailers would be forced to provide the threshold for their aggressive savings claims. Thus, an advertiser claiming that one can "*SAVE UP TO 50%*" by shopping on its web site would have to delineate the point of comparison for the claimed savings. This point of comparison may reference a single competitor, such as "*AS COMPARED TO PRICES ON XYZ.COM,*" or a particular category of competitors, such as "*AS COMPARED TO NON-SALE PRICES OFFERED BY LEADING COMPETITORS.*" This would decrease the risk of an innocent consumer falling prey to an online retailer touting outrageous and broadly worded savings that are, in fact, based on the prices advertised by only one competitor, based on its own previously artificially inflated price, or without any basis whatsoever.

[7] *See In the Matter of Liggett & Myers Tobacco Co.*, 55 F.T.C. 354 (1958) (finding unpersuasive the argument that the claim "Chesterfields are milder," should be interpreted as "milder than some other cigarettes" rather than milder than cigarettes generally); *Priceline.com Inc.*, NAD Case #4073 (8/4/03).
[8] *Cambridge Pavers, Inc.*, NAD Case #5127 (12/17/09).

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2. <u>The Savings Claims Must be Up-to-Date and Accurate.</u>

Next, NACS asks the Commission to require advertisers to ensure that the savings claims are up-to-date and accurate, reflecting the current pricing in the market for competing products. For example, ABC Company may post an advertisement on its web site that its products are "*UP TO 80% OFF!*" ABC Company may have conducted some due diligence prior to making the claim, to ensure that the claim was accurate as compared to X Y and Z companies. However, let's imagine that X Y and Z companies change their prices after viewing ABC Company's advertisement; suddenly, ABC Company's claim becomes arguably false and/or deceptive. NACS asks the FTC to consider implementing a requirement that advertisers ensure all savings claims are up-to-date and accurate to prevent false or deceptive claims.

This scenario with ABC Company is entirely probable and likely occurs quite regularly on the Internet, given the constant fluctuations in pricing on the Internet. These frequent fluctuations complicate the ability of an online retailer to possess adequate substantiation for its savings claims. As stated initially, the Internet model makes it very easy for a seller to check his prices against one or two competitors; however, the breadth of the Internet makes it impossible for a seller to check the prices in comparison to all competitors. Further, unlike traditional print advertisements, which were only available for the applicable newspaper or flyer printing, the Internet makes savings claims arguably permanent and widely available. Thus, the Commission should consider adding a requirement to the Dot Com Disclosures stating that advertisers must ensure that the savings claims are accurate and up-to-date at the time they are made, as well as for each day or week thereafter.

Further, the development of online seller "platforms" also makes it difficult for companies to substantiate their savings claims because such arrangements impact a company's ability to routinely ensure that the savings claims made on its web site are substantiated and up-to-date. For example, a web site such as eBay.com may have thousands of auctions for Tiffany® jewelry; if eBay were to advertise "*TIFFANY® JEWELRY 95% OFF!*" it would need to ensure that these touted savings are accurate at the time the claim is made and for the duration of the claim. This is entirely reasonable, and in line with the Commission's guidance and precedent.[9] As the Commission is well aware, it has been a longstanding precedent that savings claims must be substantiated prior to dissemination.[10] These online sales platforms should be held to the same standard and the Commission should include guidance in the Dot Com Disclosures to ensure that all sellers – even those with online sales platforms – ensure that savings claims are

[9] *See* Federal Trade Commission, *FTC Policy Statement Regarding Advertising Substantiation*, http://www.ftc.gov/bcp/guides/ad3subst.htm (last visited July 20, 2011).
[10] *See, e.g., In the Matter of Spitfire, Inc.*, F.T.C. Docket No. C-3737 (April 28, 1997) (requiring a company to cease and desist from making cost savings claims without competent and reliable scientific evidence that substantiates the representation).

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up-to-date and accurate at the time they are made.[11] This would ensure that consumers are not lured into a web site as a result of claims that are unsubstantiated, untrue and potentially deceptive.

3. The Claimed Savings Must Apply to a "Significant Percentage" of Items.

Finally, NACS asks the Commission to revise the Dot Com Disclosures to explicitly delineate the percentage of items that must be available at the claimed savings. For example, if an advertiser is touting that one may "*SAVE UP TO 80%*" by shopping on its web site, NACS asks the Commission to consider requiring that advertiser to ensure that a "significant percentage" of items are available at an 80% discount prior to making the claim.

This is consistent with case precedent and federal guidance addressing savings claims. Specifically, the Commission has held that the use of the phrase "up to" requires an advertiser to have substantiation that an "appreciable number" of consumers acting "normally and expectably" under the circumstances are able to achieve the maximum savings claimed.[12] Similarly, the National Advertising Division ("NAD"), in several of its decisions involving "up to" claims, has followed this precedent, determining that the number of sales at the maximum savings should comprise a "significant percentage" of all the items in the offer.[13]

If the Commission is hesitant to include such an arguably broad requirement in the Dot Com Disclosures, NACS asks that it consider providing an explicit percentage as a threshold for the claimed savings. In this regard, the Better Business Bureau Code of Advertising ("BBB Code") has provided specific guidance on savings claims containing the phrase "up to." The BBB Code requires that the number of items available at the maximum savings should comprise a significant percentage, typically 10%, of all the items in the offering. It would be helpful to the industry if the Commission considered implementing a similar standard.

Setting such a standard would ensure that aggressive retailers conduct a certain level of due diligence prior to announcing a specific savings claim. This, in effect, will protect consumers from falling prey to advertisers touting exceptional savings that are based on factors that are fleeting, such as constantly changing prices, or otherwise unknown to the purchaser. Further, it will also apply to the retail sales "platforms," which may tout savings that are based

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[11] NACS notes that the NAD has maintained that frequent fluctuations in pricing do not excuse an advertiser from monitoring the marketplace to ensure that the "up to" savings claims are accurate at the time they are made, and NACS believes the FTC should adopt a similar policy in the revised Dot Com Disclosures. *See, e.g., Expedia, Inc.*, NAD Case #4993 (04/03/09).
[12] *See Plaskolite, Inc.*, 101 F.T.C. 344, 350 (1983).
[13] *See Cimo, Inc. d/b/a Hotwire*, NAD Case #3946 (8/20/02); *Priceline.com*, NAD Case #3724 (03/30/01); *E-Campus.com, Inc.*, NAD Case #3689 (09/01/00).

only upon the sales price of one merchant offering a single product via the platform. By requiring these sellers to ensure that a "significant percentage" (or at least 10%) of the items are available at the claimed savings, the Commission will be forcing online advertisers to consider the accuracy of their claims and conduct some level of research before touting exceptional savings.

III. CONCLUSION

Based on the changes in the online retail marketplace, NACS requests that the Commission consider the above information when determining whether or not to revise the Dot Com Disclosures. More specifically, NACS requests that the Commission provide companies with guidance on how to properly draft savings claims for online retail stores so that the claims are appropriately limited through the use of disclosures. Further, NACS requests that the Commission provide guidance on the proper means of substantiating savings claims online when prices frequently fluctuate.

Sincerely,

Marc L. Fleischaker   Rachel G. Lattimore