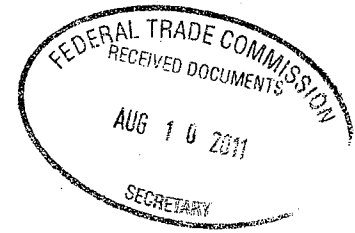


Before the
FEDERAL TRADE COMMISSION



IN THE MATTER OF DOT COM DISCLOSURES
P114506

COMMENTS SUBMITTED BY
THE PROMOTION MARKETING ASSOCIATION

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The Promotion Marketing Association, Inc. ("PMA") respectfully submits these Comments in response to the Federal Trade Commission's ("FTC") request for public comments on the potential modification 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. Introduction and Preliminary Statement

Established in 1911, the Promotion Marketing Association, Inc. ("PMA") is the premier not-for-profit organization and resource for research, education and collaboration for marketing professionals. Representing the over \$1 trillion integrated marketing industry, the organization is comprised of Fortune 500 companies, top marketing agencies, law firms, retailers, service suppliers, and academia, representing thousands of brands worldwide. Championing the highest standards of excellence and recognition in the promotion and integrated marketing industry globally, PMA's objective is to foster a better understanding of promotion and integrated marketing and its role in the overall marketing process.

Today, PMA's goal is to be the primary source for integrated marketing solutions and be the association that helps marketers achieve specific and measurable brand-building goals through resources, education, networking, and community. The PMA is the industry's advocate; and its voice has traditionally represented members in practically every type of situation, ranging from critical business issues, impacting how the industry does business, to legislative and regulatory matters concerning all aspects of integrated marketing. The PMA is headquartered in New York City with its affiliate, the PMA Educational Foundation, Inc.

Due to the depth of experience among the PMA membership with advertising online and through the use of social media and other new technologies and platforms, the PMA believes that it is able to provide the Commission with meaningful insights into the manner in which updating “Dot Com Disclosures” would impact businesses and consumers. The PMA submits that because of the dramatic changes to the online world and the emergence of new technologies and platforms through which advertisers can communicate with consumers, updating the “Dot Com Disclosures” would be beneficial to consumers as well as advertisers. The PMA further submits that in order for the well-established “clear and conspicuous” standard for evaluating advertising disclosures to continue to be a workable and appropriate standard, it must be applied in a flexible and prudent manner that reflects the realities of current and future technologies and platforms.

Due to the dramatic change in technology and media that has occurred since 2000 when the “Dot Com Disclosures” was issued and the likely significant impact of creating regulatory standards on advertisers that employ rapidly evolving advertising platforms and technologies, the PMA believes that a mere single comment period is an insufficient basis for the FTC to determine if and how the “Dot Com Disclosures” should be updated or changed. Rather, the PMA believes that the FTC should conduct a workshop or hearings that are designed to study the emerging technologies, the use of advertising and marketing on these technologies, and how the use of a “clear and conspicuous” standard for disclosures would impact both the marketing practices of companies and the benefits consumers enjoy as users of these technologies.

Simply put, the PMA believes that a methodical approach is needed to update the “Dot Com Disclosures,” so that business innovation is not stifled and the information flow between advertisers and consumers is not unnecessarily chilled. Specifically, PMA submits that:

- The FTC must fully understand and appreciate how the online world has changed since 2000 when the “Dot Com Disclosures” were first published;
- The broad consumer protection principles residing in the “Dot Com Disclosures” -- reflecting the desire for transparency, accuracy and honesty in communications between advertisers and consumers, and embracing the use of a “clear and conspicuous” standard to implement the goals of transparency, accuracy, and honesty -- are applicable to advertising on these emerging technologies and “new media,” but the FTC should interpret core principles and update current examples such that they appropriately reflect the current reality, while considering Section 5 standards that are practical and flexible enough to be applicable to future technologies and communication platforms;
- The FTC should reject any prescriptive approach that would deprive marketers of the flexibility they need to adapt to consumer day-to-day uses of (and enthusiasm for) emerging technologies; and
- The FTC should conduct workshop hearings with relevant stakeholders.

II. Changes in Technology Since the Publication of “Dot Com Disclosures” in 2000

A. The Reality

As the FTC recognizes in its call for comments, “the online world has changed dramatically since “Dot Com Disclosures” was first issued.”¹ Ten years ago, portable Internet connected devices (such as smartphones, tablets and notebook computers) were limited in capacity, connectivity and availability; and websites were designed primarily for browsing on desktop screens. Social platforms that dominate our communications and social intercourse today (like Twitter, Facebook, Skype) did not even exist a few years ago. Furthermore, mobile platforms were limited to phone and SMS, with the earliest of Blackberry services coming to market as pager devices with greyscale screens and limited email only functionality. iTunes, the “app economy,” and the iPhone with mobile broadband connectivity were not part of the

¹ <http://www.ftc.gov/os/2011/06/110610dotcomcomments.pdf>

landscape. Blogs, which emerged from web logs and bulletin boards, were simply chat-based communities with limited sharing and syndication.

Since 2000, there has been a veritable paradigm shift, where the role of advertisers is no longer merely to communicate with passive consumers who either accept or reject commercial communications. Today, consumers are the controlling agent of the message, and social media has emerged as a powerful and necessary marketing tool. For example, Twitter and Facebook allow for the promotion of posts by fans, followers and influencers. These platforms also enable companies to directly market to consumers in a variety of ways. Facebook offers companies pages on its platform for free through which the companies can connect directly with consumers. Facebook also sells advertising space to companies that may appear as “Sponsored Stories” in users’ News Feeds or as Standard Ads that appear beside users’ News Feeds. Twitter offers a similar two-tiered system for companies to communicate with its users. Companies can also pay Twitter fees to promote campaigns. Sponsorships and advertising programs are developed specifically to integrate seamlessly into various platforms and to spread virally within the individual social networks of consumers and influencers as a part of conversations taking place on social networks. Notably, while Facebook and Twitter enable advertisers to reach out to consumers in a variety of ways, they also enable consumers to actively seek out advertisers and solicit advertising and other communications by “liking” the advertiser’s Facebook page or “following” the advertiser on Twitter.

The concept of the Internet as the “world wide web” has also fundamentally changed in the past ten years. Communications spread across multiple platforms. A Tweet, for instance, can be automatically syndicated to Twitter, Facebook, LinkedIn, Google+ and more, instantly upon sending. This instant syndication may be accomplished by the advertiser’s design, or it

could be the result of a consumer's actions, or it could even be automatic settings in a consumer's social media account -- which the advertiser has neither knowledge of, nor control over. In addition, smartphones and tablets have extended reach far beyond the desktop, and geo-location technology has emerged that incorporates the real world location of a consumer in the information and advertisements a consumer receives (*e.g.*, Foursquare). Companies are also beginning to bypass browsers to communicate directly with consumers through Apps, which are dedicated programs that reside on smartphones, mobile devices, or computers, that are able to connect with the Internet directly without the use of a web browser.

When the "Dot Com Disclosures" were issued in 2000, approximately forty percent (40%) of homes in America had Internet access, only ten percent (10%) of which was high speed connection through either Cable or Digital Subscriber Lines ("DSL"),² and access to the Internet over mobile devices was non-existent. In 2010, seventy-one percent (71%) of homes in America had Internet access of which sixty-eight percent (68%) connected through broadband, and one in four Americans regularly accessed the Internet over their "smartphones."³ In 2000, text messaging using Short Message Service ("SMS") over mobile telephone networks was rare, with 14.4 million texts being transmitted monthly; however, in 2010, that number increased over 1200% to around 175 million.⁴

These changes in the way consumers communicate and the growth of these new media technologies have fundamentally changed the way in which companies market and advertise

² *Falling Through The Net: Toward Digital Inclusion*, October 2000, Department of Commerce, National Telecommunications & Information Administration, Economic and Statistics Administration retrieved on July 31, 2011 from <http://search.ntia.doc.gov/pdf/fttn00.pdf>

³ <http://www.pewinternet.org/Reports/2011/Smartphones/Summary.aspx>

⁴ http://www.ctia.org/consumer_info/service/index.cfm/AID/10323

their goods and services. According to a recent survey, seventy-two percent (72%) of companies in the United States have a social media marketing strategy, whereas in 2000, social media did not even exist.⁵ For example, the social media giant Facebook was launched in February of 2004; and Twitter in July of 2006. Advertisers have embraced social marketing channels to connect directly with consumers, and have increasingly adopted social advertising platforms designed to be less intrusive than traditional ad units, and which are more deeply integrated into social networks and conversations.

B. The Challenges

These emerging technologies have fundamentally changed the way in which advertisers and consumers now communicate. Innovations in social networking focus on real-time, readily accessible, and interactive communication - - much of which is in short-form. The majority of these new tools and technologies have been developed with cross-platform capabilities and portable devices in mind. Yet, the viewing environment is small or very limited, and the messages in these new tools and technologies are short or syndicated - - thereby providing little, if any, opportunity for communications to include disclosures of connections, identification of terms, or explanations of context.

Small screen smartphones, for example -- that rival and exceed the desktop and notebook offerings of 2000, provide worldwide Internet connectivity with integrated SMS, email and social offerings, and present tremendous benefits to consumers through their ability to make the social web accessible nearly anywhere -- present obvious challenges for advertisers to make

⁵ <http://www.kingfishmedia.com/Portals/51063/pdf/kfm-social-media-usage-2010.pdf>

meaningful disclosures or explanatory narratives on such small screens. Platforms with inherent character limitations, such as Twitter, present the same type of problem.

In addition to the size and character limitation challenges in the current environment, social media content is now often aggregated in dashboards -- which automatically search, sort, and filter relevant information from social media streams. In these dashboards, readers are often looking only at individual posts, or possibly even parts of posts, divorced from the overall feed or the profiles and backgrounds which may have provided context or disclosures. Thus, on desktops, notebooks, tablets or smartphones, disclosures and other information may not be displayed right alongside content for these users despite the best efforts of the advertiser. This is the case with contests, promotions, sweepstakes, and special offers, which are increasingly advertised on and conducted through social media communications. And, these contests, promotions, sweepstakes, and offers are highly valued by consumers, who eagerly seek them out, participate in them, and then share them with others.

III. The Need to Update the Interpretation and Application of the “Clear and Conspicuous” Standard and Provide Examples

Given the dramatic technological changes during the past ten years, the ways in which consumers rely upon and have become accustomed to these new media platforms, and the ways in which advertisers have had to adapt to the changing communication habits and expectations of their customers, “Dot Com Disclosures” now provides little, if any, meaningful practical guidance to the advertising industry. Yet, the “clear and conspicuous” standard found in FTC jurisprudence -- which serves as the legal fulcrum for “Dot Com Disclosures” -- can remain a

viable standard for evaluating online advertising disclosures, so long as it is defined in a flexible manner and appropriately applied, taking into account the relevant technology or platform.

While the “Dot Com Disclosures” reiterate one of the fundamental principles of advertising law that “[d]isclosures that are required to prevent an ad from being misleading, to ensure that consumers receive material information about the terms of a transaction or to further public policy goals, must be clear and conspicuous,”⁶ and acknowledges that “there is no set formula for a clear and conspicuous disclosure,”⁷ it focuses particularly on “proximity” and “placement” as standards -- through lenses that were applicable to the world in 2000.⁸

Accordingly, the “Dot Com Disclosures” should be updated to interpret and apply the “clear and conspicuous” standard in a way that reflects current technology and consumer behavior and can provide meaningful guidance to advertisers that can be practically implemented by them. For example, the FTC should consider adopting the principle that a disclosure, even one containing material limitations on the claim or offer being made, can be made through a hyperlink -- “one click away” -- and provide updated examples of this principle’s application in light of practical and technological limitations of the platforms being used. Similarly, in character or size limited platforms, where it may be difficult or impossible for advertisers to label hyperlinks meaningfully, the FTC should consider providing examples of universal hyperlink

⁶ “Dot Com Disclosures” at 1.

⁷ *Id.* at 5.

⁸ *Id.* at 5-14. Specifically, “Dot Com Disclosures” advises that a disclosure is more effective if it is placed near the claim it qualifies or other relevant information, and that on a Web page, the disclosure is more likely to be effective if consumers view the claim and disclosure together on the same screen. It asks advertisers to use text or visual cues to encourage consumers to scroll and avoid web pages that discourage scrolling. It also advises that hyperlinking to a disclosure on a different page might be sufficient -- but only if the disclosure is not an integral part of the claim.

labels that advertisers could use to communicate the importance of the disclosures to consumers such as “LIMITATION” or “IMPORTANT INFO”, or even an image or symbol.

In reevaluating its interpretation and application of the “clear and conspicuous” standard and updating “Dot Com Disclosures,” the FTC should consider contemporary consumer behavior and the ability of users to perform in these new media platforms. Today’s consumers access Facebook, Twitter, and Tumblr with ease, and use their phones to text messages as part of their normal daily routine. Generally speaking, today’s consumers are savvy and sophisticated, clicking on hyperlinks without pause to obtain desired information, explanation, or limitations.

IV. The Role of Section 230 of the Communications Decency Act in Multi-Party Selling Arrangements

One of the issues that the FTC staff invitation to submit comments requested information on is “what issues relating to disclosures have arisen from such multi-party selling arrangements in Internet commerce,” such as “established online sellers providing a platform for other firms to market and sell their products online.” It is the PMA’s position that the “Dot Com Disclosures” should not apply to the online sellers providing the platform in these arrangements because it could impose liability on online platform providers for another party’s failure to make adequate disclosures in violation of § 230 of the Communications Decency Act (CDA).⁹

The CDA states, in relevant part: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” As court opinions interpreting this provision have held, the CDA creates an

⁹ However, the “Dot Com Disclosures” should be applicable to those third parties who act as “primary speakers” that sell through these platforms, as they are to all other advertisers and sellers regardless of whether they are advertising or selling online or in a brick and mortar store.

immunity for qualifying platform providers that allows them to escape liability for harm caused by the speech of others. If the FTC revises the “Dot Com Disclosures” to require these platform providers to ensure that the other firms marketing and selling their products through those online platforms make the required disclosures, the regulations would then be holding the platform provider liable for that speech, or more accurately, for the failure to provide sufficient speech. Accordingly, while these standards should be applicable to third parties selling *through* these platforms, applying these standards to the platform providers themselves would be in direct conflict with the CDA.

Because the amount of information available on the Internet has expanded exponentially, and trying to proactively police all third party speech to ensure adequate disclosures would be an impossible task for platform providers, any attempt by the Commission to hold platform providers liable for the speech-related harms of its users is not legally tenable. Consequently, it is in the industry’s best interest that the FTC should make clear that the “Dot Com Disclosures” do not apply to platform providers.

V. Recommendation and Conclusion

Emerging technology has obvious benefits to consumers and advertisers alike. Many of the platforms, applications, and systems discussed in these Comments not only provide methods for consumers to engage in robust social dialogue and entertainment but opportunities for consumers to become aware of products or services they desire along with meaningful information about those products and services. Yet, given the practical constraints of certain platforms and systems in this current environment, “disclosure” in the ways envisioned by the 2000 version of “Dot Com Disclosures” simply is not possible.

Therefore, any guidance by the Commission or staff concerning the application of the “clear and conspicuous” standard to the emerging new media must be flexible and not prescriptive. The factors, for example, of “prominence” and “presentation” must be reevaluated given the unique challenges presented by the mobile environment, and hyperlinks must be considered as appropriate options, even for material disclosures, given the use by, and sophistication of, consumers in navigating through these technologies.

In particular, PMA submits that the principles, standards, and examples that the FTC could provide in this initiative should reflect several interests:

(i) protecting the core consumer protection values of transparency and accuracy that are designed to give consumers the appropriate and necessary information they need to make meaningful purchasing decisions;

(ii) allowing emerging media and technologies to develop, grow, and mature so that consumers can enjoy the benefits of communication platforms that not only enhance their commercial transactions but provide opportunities for effective social dialogue and entertainment; and

(iii) recognizing that users of these emerging technologies -- the “reasonable consumers” that the FTC seeks to protect -- are sophisticated and savvy, through their ability to navigate with ease across various platforms as well as to discern and locate information that would be relevant to their needs and the claims and offers they encounter.

Accordingly, PMA recommends that the FTC conduct a workshop or hearings that are designed to study the various different emerging technologies, the use of advertising and

marketing on these technologies, and how any changes to the "Dot Com Disclosures" would impact both a company's ability to innovate and leverage new technologies and the benefits consumers enjoy as users of these technologies.

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