

## CLIENT ALERT

### Upcoming FTC Disclosure Workshop

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On September 15, 2016, the FTC will hold [Putting Disclosures to the Test](#), a workshop on methods to “test the effectiveness of [] disclosures to ensure consumers notice them, understand them, and can use them in their decision-making.” The FTC is “especially interested in learning about the costs and benefits of disclosure testing methods in the digital age.” The FTC’s measured and careful description belies the significance and potential impact of the workshop.

Disclosures play a key role in virtually every aspect of the FTC’s policy and enforcement activities in the consumer protection arena, including [general advertising](#), [native advertising](#), [online marketing](#), [environmental marketing](#), [certifications and endorsements](#), and privacy and data security policies such as those for [mobile devices](#), to name but a few. In 2014, the FTC conducted [Operation Full Disclosure](#), an investigation focused exclusively on disclosures in television and print ads. The investigation resulted in 60 warning letters and follow-up activity for allegedly putting information important to consumers – *e.g.*, price terms, additional purchase requirements, bases for comparisons, conditions of “free” or “risk free” trials, and differences between highlighted and actual products, usage, and results – in mouse print or making it “otherwise easy to miss or hard to read.” In addition, other federal and state enforcement entities and self-regulatory bodies such as the Better Business Bureau’s Advertising Self-Regulatory Council routinely look to the FTC’s disclosure practices for guidance.

As articulated in the FTC’s [1983 Deception Statement](#), FTC disclosure principles initially developed through FTC case law under the deception prong of Section 5 of the FTC Act:

Depending on the circumstances, accurate information in the text may not remedy a false headline because reasonable consumers may glance only at the headline. Written disclosures or fine print may be insufficient to correct a misleading representation. Other practices of the company may direct consumers’ attention away from the qualifying disclosures. Oral statements, label disclosures or point-of-sale material will not necessarily correct a deceptive representation or omission.

...

Qualifying disclosures must be legible and understandable. In evaluating such disclosures, the Commission recognizes that in many circumstances, reasonable consumers do not read the entirety of an ad or are directed away from the importance of the qualifying phrase by the acts or statements of the seller.

(citations omitted).

Over time, the FTC has developed guidance for disclosures in specific circumstances, such as the linked materials, above. The FTC also commonly cites broad disclosure principles, including that disclosures must be “clear and conspicuous” (sometimes worded as “clear and prominent”) to prevent deception, that the “4Ps” (prominence, presentation, placement, and proximity) can help to assess whether a disclosure is sufficiently clear and conspicuous, and that the burden is on marketers to establish that a particular disclosure is appropriate to the circumstances and effective. Those principles and guidance are based on a combination of FTC history and expertise, principles established through litigated cases and settlements, and information

derived from workshops such as the upcoming one on September 15. To date, however, the FTC has not relied heavily on extrinsic evidence of consumer perception and understanding when determining the effectiveness of disclosures, and it does not typically require marketers to conduct consumer tests before using specific disclosures.

Notwithstanding FTC disclosure guidance and principles, however, businesses find gray areas and gaps when crafting disclosures. Businesses that are unlucky enough to find themselves on the receiving end of an FTC inquiry regarding specific disclosures may discover that those gray areas and gaps are filled by FTC staff interpretations regarding the effectiveness of a particular disclosure, even though FTC staff also assert that marketers are better positioned than the FTC to determine whether a disclosure is clear and conspicuous and whether the disclosure is effective, *e.g.*, “[Who knows better than advertisers how to convey information clearly and conspicuously?](#)” FTC staff have also indicated their belief, including in speeches and workshops, that the most effective way to minimize the risk of a claim being deceptive may be to include all material information in the primary claim and thus avoid the need to make disclosures. As a result, there is currently tension and a lack of clarity regarding the FTC’s position on the viability and effectiveness of disclosures.

In pre-rollout consultations and post-rollout disputes with FTC staff, it is fairly unusual for either FTC staff or businesses to cite extrinsic evidence of consumer perception and understanding when supporting positions regarding specific disclosures. This subjective component of developing FTC-compliant disclosures can be frustrating and also challenging for companies that are diligently trying to make compliant claims but that have complex layers of information to disclose. Challenges arise, for example, with goods and services involving technical standards that consumers may not be familiar with, mobile device applications that combine a variety of data collection activities with small screens, other privacy- and data security-related disclosures, interconnected devices for which traditional disclosures are not possible, and new offerings for which reasonable minds may differ about which information is material and thus what disclosures are required. In addition, it may not be practical or cost-effective for businesses to either conduct extensive disclosure testing in advance or to convey all information in primary marketing claims rather than in disclosures.

To the extent that FTC staff is skeptical about the effectiveness of disclosures for conveying material information to consumers, the September 15 workshop could provide some much-needed extrinsic evidence about the continued utility of disclosures and point the FTC in the direction of some additional disclosure “rules of the road” to augment existing FTC guidance and general principles. However, depending upon the agenda, the panelists, and the scope of the studies presented, the workshop could also provide the FTC with a basis for further limiting the use of disclosures, for requiring extrinsic evidence for certain types of disclosures, or for imposing additional disclosure-related practices. Stay tuned.

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