

Client Update

FTC Emphasizes the Importance of Testing Disclosures

NEW YORK

David H. Bernstein
dhbernstein@debevoise.com

Jeremy Feigelson
jfeigelson@debevoise.com

Michael Schaper
mschaper@debevoise.com

Megan K. Bannigan
mkbannigan@debevoise.com

Anna Domyancic
adomyancic@debevoise.com

Youngbin Son
yson@debevoise.com

On September 15, 2016, the Federal Trade Commission (“FTC”) hosted a workshop entitled “Putting Disclosures to the Test.” As FTC Chairwoman Edith Ramirez pointedly said in her keynote, the FTC is “committed to asking hard questions about the effectiveness of disclosures” and “aim[s] to highlight the importance of empirical analysis of disclosures and encourage marketers, businesses, and other organizations to test their own disclosures and learn from researchers.” Scrutiny in this area thus seems certain to increase.

The FTC uses “disclosure” generally to refer to information that affects consumer welfare. “Disclosure” includes, for example, a designation that a product review on social media is a paid endorsement. Disclosure also includes the details in a privacy policy about how a smartphone application may collect and use consumers’ personal information. Notice to customers after a data breach is another example. Disclosure may also include information clarifying an advertising claim.

The FTC has shown growing interest in ensuring that companies’ disclosures are actually effective.¹ The workshop examined different testing and evaluation methods, providing a roadmap of available steps for companies to prepare for potential scrutiny.

¹ See, e.g., FEDERAL TRADE COMMISSION, [COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING \(March 2013\)](#) (addressing disclosures in the context of smartphones, tablets, and apps); FEDERAL TRADE COMMISSION, [THE FTC’S ENDORSEMENT GUIDES: WHAT PEOPLE ARE ASKING \(May 2015\)](#) (providing guidance specific to social media marketing disclosures); [In re Warner Brothers Home Entertainment Inc., FTC File No. 152-3034, \(July 11, 2016\)](#) (settling charges that company failed to make adequate disclosures that video game reviews on social media were paid content; in its [blog post](#) about the case, the FTC said “[t]he disclosure should be hard to miss. . . . [I]t has to stay on screen long enough for you, the viewer, to be able to read it. [Y]ou are more likely to notice the disclosure if it’s both spoken and visible on screen.”).

WHAT TYPES OF DISCLOSURES WILL SATISFY THE FTC?

The basic principles are well-settled, dating back to pre-Internet days: Disclosures must be clear, conspicuous and timely. In evaluating whether disclosures are clear and conspicuous, the FTC will consider the “4Ps”: prominence, presentation, placement and proximity. The FTC has long frowned on disclosures that are in easy-to-miss fine print or that appear outside the focal point of an advertisement. The FTC historically favors disclosures in plain language and syntax that is clear for the expected consumers, with the relevant information and no more—*i.e.*, avoiding information overload.

Today, of course, advertising is increasingly being distributed through digital platforms, in “native” formats, on mobile devices and on social media. Companies also are increasingly reliant on privacy policies, terms of service and the like to secure customers’ consent to a range of data collection and usage practices. The FTC thus sees it as timely to ask what sort of disclosures really work in this changing world.

WHAT TYPE OF EMPIRICAL EVIDENCE MIGHT SATISFY THE FTC?

At the workshop, the FTC participants emphasized the importance of testing the effectiveness of disclosures and encouraged marketers to test. The workshop included presentations by speakers from a range of disciplines—academics, industry survey experts, and an FTC in-house researcher. The workshop sessions explored various methods of testing disclosures, such as:

- Surveying consumer ad recognition in different formats of disclosure—*e.g.*, text, audio, and/or video—to determine which format is most noticeable and understandable. The panelists cautioned not to assume that utilizing multiple disclosure formats will mean consumers are more likely to notice and comprehend the disclosure because, in some situations, multiple disclosure formats can be more distracting than helpful.
- Surveying consumer understanding of different variations of the disclosure language to determine which language returns the highest recognition, including recognition that the content at issue is paid advertising (a particular issue with native and social media advertising).
- Conducting mall-intercept surveys to determine when and where in a physical store consumers are most likely to notice and read disclosures.
- Surveying how well users of smartphone apps remember the privacy disclosures depending on the point in time when disclosure is made—*e.g.*, in

the app store, before app use, during app use or after app use—to determine when is the best time to present the disclosures.

- Surveying consumers' past experiences with data breach notifications to understand how often they receive those notifications, what they do in response, and how they perceive the cost of data breach.

Panelists suggested that many of these surveys can be conducted quickly and cost-effectively through online crowdsourcing platforms such as Amazon Mechanical Turk.

Workshop participants also discussed non-survey testing techniques, such as eye-tracking software, to determine where consumers tend to focus their attention. These tools may help companies determine whether consumers are actually reading the disclosures and which placement may be more noticeable. Panelists suggested that companies partner with research universities to conduct these studies.

The panelists were in agreement that no single methodology is objectively superior, suggesting that using multiple methodologies may be advisable. In addition, the panelists suggested that, even if a disclosure was initially tested for effectiveness, companies should periodically test and evaluate the disclosures again to confirm that the disclosures remain effective. As studies have shown, consumers are more likely to notice novel and unexpected information.

The workshop's exploration of testing disclosures in these ways is a departure from current practice. While the FTC's and experts' interest in the topic demonstrates that gathering empirical evidence regarding the effectiveness of disclosures may become more important in the future, requiring extensive pre-testing of disclosures in the ways discussed at the workshop would likely be an undue burden on advertisers. Nevertheless, these techniques may be effective for use during a post-advertising challenge and may well support injunctive relief or other remedies.

OTHERS ARE ALSO WATCHING

Notably, the FTC is not the only agency to have shown an interest in the effectiveness of disclosures. For example, the Children's Advertising Review Unit ("CARU") was recently critical of disclosures used on EvanTube—a popular YouTube channel (3.3 million followers, over \$1 million in annual revenues) featuring Evan, a young boy whose father posts naturalistic videos of him reviewing toys and other subjects of interest to children. EvanTube earns significant revenue from toy companies, either through traditional pre-roll ads

or (of more concern to CARU) through sponsored content—that is, advertisers who compensate the family for being featured in the videos themselves.

CARU found EvanTube’s disclosures of the latter to be ineffective, despite language such as “brought to you by” or “sponsored by” because there was no evidence that the children who are EvanTube’s target audience actually understood those messages. Upon CARU’s recommendation, EvanTube agreed to enhance its disclosures—specifically, given that it is an audiovisual medium, the channel must now include an audio disclosure that the video is an “ad” or “advertising,” and must do so at the beginning of any new sponsored content.

Are we moving toward a world where marketers and advertisers must possess empirical evidence of the effectiveness of their disclosures, just as they traditionally must possess empirical evidence to support their factual claims? Time will tell. For now, companies seeking to stay ahead of the enforcement curve can benefit from studying the record of the recent workshop, and keeping an eye on future actions from the FTC.

* * *

We would be pleased to discuss the issues raised in the workshop with our clients and friends.