

MEMORANDUM

PRIVILEGED AND CONFIDENTIAL

TO: ESPC

FROM: D. Reed Freeman

DATE: June 1, 2012

FILE: 68223-0000001

RE: FTC Workshop: In Short: Advertising and Privacy Disclosures in a Digital World

We write to provide you with a summary of the Federal Trade Commission (“FTC” or “Commission”) workshop called “In Short: Advertising and Privacy Disclosures in a Digital Age,” held May 30, 2012. The FTC convened the workshop to **update the Dot Com Disclosures**, which illustrate how businesses can provide clear and conspicuous disclosures in online advertising, consistent with the FTC Act’s requirement to disclose material facts in a clear and conspicuous manner.

Just as the Dot Com Disclosures were designed to give businesses practical, flexible advice about how to apply consumer protection principles in the online space, this undertaking is designed to update the Dot Com Disclosures in the face of the challenges of modern technology: smaller screen sizes, social media limitations, and changing notions of privacy. Ultimately the purpose of improved advertising and privacy disclosures is to allow consumers to make smart choices about their online lives, so that they have the positive experiences needed for e-commerce to thrive.

The FTC is accepting comments on the workshop until July 11, 2012. See <https://ftcpublic.commentworks.com/ftc/inshortworkshop/>. The FTC will incorporate those comments into a report on the workshop. There is no timetable for the report, but the FTC is aiming for a release this fall.

The workshop itself was organized into four panel discussions, with several short presentations. FTC staff moderated the discussions, with panel members drawn from various stakeholders.

EXECUTIVE SUMMARY

In her introductory remarks, Commissioner Ohlhausen:

- ◆ Touted *self-regulation* as a flexible way to respond to modern needs and create a set of best practices; and
- ◆ Noted that self-regulation was usually most effective when *backed up by law enforcement authority*.

These were the only substantive pronouncements by the FTC staff. In the panels, FTC staff moderated, but did not comment on the topics, and demurred when asked questions.

Major themes that emerged from the conference included:

- ◆ *Context matters*: The device, the offer, the consumer, etc.
- ◆ The *principles of consumer protection law are probably still correct*, and technology must adapt to them, not vice-versa.
- ◆ *Placement, prominence and timing* of disclosures are even more important.
- ◆ *Balance*: Companies need to give enough information, but not so much that they overwhelm consumers. At the same time, the FTC needs to give guidance on how to disclose, but not over-regulate and stifle innovation.

PRESENTATION: USABILITY RESEARCH

The workshop began with a brief presentation by Jennifer King, a researcher who studies how people interact with computers. She suggested methods of improving disclosures based on scientific research into how people actually use computers and mobile devices. Her presentation highlighted three findings:

1. *People are goal-oriented*. People tend to focus only on the information necessary to complete their immediate task. Thus, to get users to read disclosures, those disclosures have to be placed proximately to and in the context of the goal.
2. *People read selectively*. Reading on screens is difficult, so users tend to scan pages in an F-shaped pattern for information most relevant to them. Important disclosures should therefore have a visual hierarchy, with clear clues to content. This can be accomplished by headings, bullet points, charts, and other ways.
3. *Present disclosures do not work*. Disclosure comprehension is low on desktop computers; it is even lower—about 19%—on mobile phones. Translating modern disclosure practices to the mobile space simply will not work.

PANEL 1: Universal and Cross-Platform Advertising Disclosures

This panel considered if and how FTC-required disclosures need to be altered to be effective across multiple platforms. In particular, it looked at what it means for an online ad to be clear, conspicuous, and not misleading.

The panel considered several topics:

Placing disclosures behind hyperlinks:

- ◆ The panel generally agreed that:
 - The text of the link should inform consumers what the disclosures were about;
 - The disclosure link should be placed near the “call to action” (e.g., the “Buy Now!” button);
 - More material disclosures should be placed more prominently.
- ◆ Ms. Goldstein, from the Promotion Marketing Association, urged flexibility and leniency, and suggested that sometimes generic link labels like “Disclosures” are necessary due to the number of needed disclosures.
- ◆ Ms. Greenberg of the National Consumers League agreed that flexibility is good, but rejected the suggestion that generic labels are ever necessary.

Scrolling down to or past disclosures to complete a transaction:

- ◆ The panel generally agreed this was acceptable now, as long as there is some indication that scrolling is necessary.

Placing material disclosures in the Terms of Service:

- ◆ Everyone agreed this should not be done.

Disclosures in location-based ads on mobile devices:

- ◆ Everyone agreed that this is a nuanced question, depending on the device, the offer, the restrictions, the consumer, and even the state.
- ◆ Ms. Goldstein again urged leniency and flexibility, noting that given limited real estate, proper disclosures are difficult; the important question is whether the decision to purchase the item would be affected.
- ◆ Ms. Greenberg pushed back, asking how hard it is to suggest the substance of a limitation, even in a mobile ad.
- ◆ Mr. Singer, from the Texas Attorney General’s Office, noted that limited real estate is not an excuse for omitting a material modification of the offer; there must be some signal to the consumer of the limitation.

Offer design:

- ◆ The panel agreed that no formats should be prescribed; design issues should be left to the designers, and based on consumer science.

PANEL 2: SOCIAL MEDIA ADVERTISING DISCLOSURES

This panel discussed how disclosures should be made *between consumers* in the social media space. The issue in this context is how to let other consumers know that one has been compensated in some way for a recommendation. The discussion was divided into three general topics:

Disclosure in Non-Space-Restricted Environments (e.g., blogs):

- ◆ Panelists generally agreed that:

- A disclosure, in the blogger’s own voice, that is clear and in proximity to the ad statement, is ideal;
- A disclosure at the end of a blog entry is acceptable;
- A “Disclosures” link in the sidebar is unacceptable
 - There is no call for the reader to click on it, and those reading through an RSS reader, for example, would never see it.
- ◆ Paid endorsements on consumer review sites (e.g., Pinterest) should also be disclosed
 - Either through a text disclosure, or indicating the endorser with an icon.

Disclosure in Space-Restricted Environments (e.g., Twitter):

- ◆ The panel could not agree on an acceptable Twitter disclosures:
 - “Ad” and “#spon” may be effective, but require consumer education;
 - Links to disclosures may not indicate that the tweet is an ad;
 - Subsequent tweets with disclosures may get lost in the conversation.
 - Certain products may just be impossible to advertise on Twitter (e.g., pharmaceuticals);
- ◆ Ms. Ferguson, a blogger, suggested that the solutions to these difficulties should come from the platform, perhaps by developing a unique format to indicate ads.
- ◆ Ms. Cooper, from Facebook, called that a “slippery slope,” because it is impossible for the platform, which is not a party to the communication, to detect the motivation of the person making the statement.

Disclosures with only a Single Indicator of Approval (e.g., a Facebook “like”):

- ◆ Ms. Cooper suggested that the best—and possibly only—way to disclose a paid “like” (or similar) would be for the user to indicate it in text attached to the “like.”

Panelists noted several times that the value of social media advertising comes from the authenticity of the recommendations, and agreed that regulations prescribing particular types and forms of disclosure could destroy that authenticity.

PANEL 3: MOBILE ADVERTISING DISCLOSURES

This panel considered how to give clear and conspicuous disclosure in the mobile space, where consumer expectations and engagement may be different, and screen sizes are usually smaller. The panel covered several topics:

Mobile Ad Graphic Design:

- ◆ The panel generally agreed that websites should be designed to account for viewers on mobile devices:
 - Some saw this as a matter of good business;
 - Many suggested new websites should “start with mobile” when designing;
 - Ms. Yamuder of Dunkin’ Brands and Mr. Schellhase of Groupon resisted the necessity of designing for mobile in the first instance, noting that it is difficult to design a one-size-fits-all solution;

- Ms. De Mooy of Consumer Action noted that good functional design is particularly important on slower and older phones.
- ◆ The panelists agreed on the value of “Responsive Design,” which is flexible HTML5 code that can rearrange pages based on the specific device used to view them.

Mobile Ad Content:

- ◆ The panel agreed that disclosures should be prioritized and proximate to the call to action, even in the mobile space.
 - Ms. De Mooy urged the panel to consider “just-in-time” disclosures.
- ◆ Disclosures should also be designed to attract user attention.
 - Many on the panel saw this as a matter of brand perception as well as law.

Understanding Consumers:

- ◆ The panel agreed that it is important to have more understanding of what consumers are doing, because this drives the relevant disclosures.
- ◆ Mr. Schellhase and Mr. Halpert of the Internet Commerce Coalition agreed that a flexible and contextual approach is required, both by advertisers and the FTC.
- ◆ Most on the panel agreed that the “old rules” of consumer protection still apply in the mobile space.
 - Ms. Yamuder, however, indicated that it was not clear that this was so, because of the variety of uses, technologies, and distribution channels.

PANEL 4: MOBILE PRIVACY DISCLOSURES

The first three panels discussed how to make disclosures required by the FTC and other law. This panel examined the difficulties of making privacy disclosures in the mobile space. This panel featured four smaller presentations about what companies are doing to make mobile privacy disclosures more effective:

1. Ms. Westerman of Create With Context, Inc., reviewed research that her organization has been doing, attempting to **design an effective method of notifying consumers about their privacy choices at the relevant time**. At present they are designing a notification icon that activates when information is being collected, and developing consistent privacy policy headings, to ease understanding.
2. Ms. Kloek of the Association for Competitive Technology (a consortium of app developers) highlighted a series of **privacy information icons** ACT members are developing. She also touched on the concerns of app developers, noting that they want to know how best to **inform consumers in order to build trust**.
3. Mr. Brock, representing PrivacyChoice, discussed the **database of privacy knowledge** that his organization has collected to create a **resource center for developers**. He highlighted a tool they have created to assist developers in writing succinct, clear policies that still conform to the overall app design.
4. Mr. Trilli of TRUSTe described the tools that TRUSTe is developing to help websites and developers, including a tool to **design privacy policies in a way readable by**

both consumers and machines, so that browsers or devices can easily display the most relevant privacy information to consumers. He noted that **consumers are relying on others to tell them what they need to know** about their mobile and online privacy.

Between the presentations, the panel discussed various topics:

Transparency:

- ◆ The panel agreed that timing of disclosures is important:
 - Ms. Cranor, a Professor at Carnegie Mellon University, reported on research that context-less disclosures at the time of app download, such as Android’s “permissions,” are essentially meaningless to consumers.
 - Ms. Dixon of the World Privacy forum encouraged regular, multi-channel (e.g., via email, Facebook, Twitter) disclosures.

Privacy Policy Presentation:

- ◆ The efficacy of privacy icons was debated:
 - Ms. Cranor noted that the DAA Ad Privacy icon is not well understood, and that pictograms are generally bad at conveying abstract concepts like privacy;
 - Mr. Brock suggested that with so many privacy permutations, icons may not be effective;
 - Ms. Westerman expressed confidence that with time and research, a solution can be found, but it is too early to abandon icons;
 - The moderator noted that just in this panel there had been 3 sets of privacy icons presented, prompting Ms. Cranor to note the need for consistency.
- ◆ The panel agreed that layered notices, including headings and subheadings, are useful for motivated consumers, but that most still will not read them.
- ◆ Many agreed that platforms—e.g., browsers and OS developers—need to improve methods for disseminating privacy information, including by supporting machine-readable privacy policies and requiring their use.

Outreach and Education:

- ◆ The panel agreed that outreach and education are necessary, not just to consumers, but also to developers.
 - Both desire guidance and require tools to allow them to understand their role in the mobile advertising context.