



Comments of

TechFreedom

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In the Matter of

.com Disclosures: How to Make Effective Disclosures in Digital Advertising

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I. Introduction

TechFreedom welcomes the Federal Trade Commission’s Request for Information² as it considers revising the Commission’s existing guidance on effective disclosures in digital advertising (“Guidelines”).³ The Guidelines provide “staff guidance [on] the making of clear and conspicuous online disclosures ... necessary ... to the laws the FTC enforces.”⁴ The Commission staff is “looking to update the guides to make clear that online tricks and traps will not be tolerated” and “ensure that the guides are helping honest businesses treat consumer fairly, rather than being used as a shield by firms looking to deceive.”⁵ We support this motivation and this objective. The Guidelines are a valuable resource for lawyers and businesses, and they should reflect the agency’s most current thinking and enforcement practice.

Founded in 2010, TechFreedom is a nonprofit think tank dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes the ultimate resource: human ingenuity. Wherever possible, we seek to empower users to make their own choices online and elsewhere. TechFreedom has, over the last decade, weighed in on significant issues over which the FTC has jurisdiction:

- We identified key principles of the 2010 Horizontal Merger Guidelines and 2020 Vertical Merger Guidelines that should be maintained in any revisions to the Merger Guidelines.⁶
- We advocated for proper process in revising the 2010 Horizontal Merger Guidelines and 2020 Vertical Merger Guidelines.⁷

² FTC Press Release, *FTC Looks to Modernize its Guidance on Preventing Digital Deception* (June 3, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-looks-modernize-its-guidance-preventing-digital-deception> [hereinafter *Digital Deception Press Release*]; *FTC Staff Requests Information Regarding Digital Advertising Business Guidance Publication* (June 3, 2022), <https://www.regulations.gov/document/FTC-2022-0035-0001>.

³ Federal Trade Commission, *.com Disclosures: How to Make Effective Disclosures in Digital Advertising* (Mar. 2013), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-Guidelines/130312dotcomdisclosures.pdf> [hereinafter *.com Disclosures*].

⁴ *Id.* at 1.

⁵ *Digital Deception Press Release*, *supra* note 2.

⁶ TechFreedom, *Comments on Request for Information on Merger Enforcement* (Apr. 21, 2022), <https://techfreedom.org/wp-content/uploads/2022/04/TechFreedom-Comments-Merger-Guidelines-April-21-2022.docx.pdf>.

⁷ Letter from TechFreedom to Federal Trade Commission Chair Lina Khan and Assistant Attorney General Jonathan Kanter (Mar. 24, 2022), https://techfreedom.org/wp-content/uploads/2022/03/TechFreedom-Letter-on-Process-to-Revise-Merger-Guidelines_Final_Signed.pdf.

- We recommended that the FTC retain the “without unduly burdening legitimate business activity” clause in the agency’s mission statement when drafting the FTC’s Strategic Plan for 2022-2026.⁸
- We challenged the FTC’s authority to issue binding rules on non-compete and exclusive contract terms.⁹
- We analyzed the law and impact of non-compete agreements in the tech sector and warned that insufficient study has been done to merit a rulemaking proceeding.¹⁰
- We responded to, and critiqued, a petition for rulemaking calling for the FTC to ban exclusive agreements.¹¹
- We urged caution in rescinding prior FTC Policy Statements without thorough examination and provision of replacement guidance.¹²

II. The Commission Should Allow for Multiple Requests for Public Comment and Public Workshops to Analyze Possible Revisions to the Guidelines

In May 1998, the Commission sought public comment on its proposal to issue a policy statement regarding the applicability of its rules and guides to electronic media, such as e-mail, CD-ROMs, and the Internet.¹³ In support of its effort, the Commission held a public workshop on May 14, 1999 to discuss the issues raised in its initial notice and in the comments received in response to the notice.¹⁴ It also solicited comments on the workshop discussion (including, especially, the mock advertisements shown during the workshop),

⁸ TechFreedom, *Comments on Draft FTC Strategic Plan for FY2022-2026* (Nov. 30, 2021), https://techfreedom.org/wp-content/uploads/2021/11/FTC-2021-0061-0010_attachment_1.pdf.

⁹ TechFreedom, *Comments on Petition for Rulemaking to Prohibit Worker Non-Compete Clauses; Petition for Rulemaking to Prohibit Exclusionary Contracts* (Sept. 30, 2021), <https://techfreedom.org/wp-content/uploads/2021/10/FTC-UMC-Rulemaking-Authority-FTC-Comment-9.30.2021-FINAL.pdf>.

¹⁰ TechFreedom, *Comments on Request for Public Comment Regarding Contract Terms That May Harm Fair Competition* (Sept. 30, 2021), <https://techfreedom.org/wp-content/uploads/2021/10/Comments-FTC-Non-Compete-UMC-Rulemaking-10.2021.pdf>.

¹¹ TechFreedom, *Comments on Petition for Rulemaking to Prohibit Worker Non-Compete Clauses; Petition for Rulemaking to Prohibit Exclusionary Contracts* (Sept. 30, 2021), <https://techfreedom.org/wp-content/uploads/2021/10/FTC-UMC-Rulemaking-Authority-FTC-Comment-9.30.2021-FINAL.pdf>.

¹² See Letter from TechFreedom to Chair Lina Kahn regarding Comments for July 1 Open Commission Meeting in re Unfair Methods of Competition Policy Statement (June 30, 2021), <https://techfreedom.org/wp-content/uploads/2021/07/TechFreedom-FTC-Open-Meeting-Comments-6.30.21-Investigations.pdf>.

¹³ Federal Trade Commission, Interpretation of Rules and Guides for Electronic Media; Request for Comment, 63 FR 24996-01 (May 6, 1998).

¹⁴ Federal Trade Commission, Announcement of Date of Public Workshop on the Interpretation of Rules and Guides for Electronic Media, Procedure for Requesting to Participate, and Request for Submission of Advertisements, 64 FR 14156-02 (Mar. 24, 1999). Twenty-five groups, including businesses, trade associations, and consumer organizations, participated in the workshop discussion.

post-discussion.¹⁵ In May 2000, the Commission released *Dot Com Disclosure: Information about Online Advertising*. The guidance “represent[ed] the cooperative efforts of government, communications experts in industry and consumer groups to achieve fair and informative online advertising for consumers.”¹⁶

In May 2011, because “the online world ha[d] changed dramatically,” Commission staff sought comment in support of updating the May 2000 guidance.¹⁷ After three public comment periods and a public workshop,¹⁸ the updated and current guidance, *.com Disclosures: How to Make Effective Disclosures in Digital Advertising*, was released in March 2013.¹⁹

The Commission has announced an intention to revise the current Guidelines. We recommend that any process to revise the Guidelines conform to past practice and allow for multiple comment periods and at least one, but preferably more, public workshops to analyze any proposed revisions.

III. The Current Guidelines’ Flexible Approach to What Constitutes “Clear and Conspicuous” Disclosure Should Be Maintained in Future Guidelines

The Guidelines are a very useful and instructive statement²⁰ of the staff’s perspective on whether a required disclosure, in a digital ad, is “clear and conspicuous.” The Guidelines provide

¹⁵ See transcript, Interpretation of Rules and Guides for Electronic Media at 15-16, 312-313 (May 14, 1999), https://www.ftc.gov/sites/default/files/documents/public_events/interpretation-rules-and-guides-electronic-media/wkshptranscript.pdf.

¹⁶ Press Release, *FTC Staff Issues Guidelines on Internet Advertising* (May 3, 2000), <https://www.ftc.gov/news-events/news/press-releases/2000/05/ftc-staff-issues-Guidelines-internet-advertising>.

¹⁷ Press Release, *FTC Seeks Input for Revising Its Guidance to Businesses About Disclosures in Online Advertising* (May 26, 2011), <https://www.ftc.gov/news-events/news/press-releases/2011/05/ftc-seeks-input-revising-its-guidance-businesses-about-disclosures-online-advertising>.

¹⁸ Press Release, *FTC Will Host Public Workshop to Explore Advertising Disclosures in Online and Mobile Media on May 30, 2012* (Feb. 29, 2012), <https://www.ftc.gov/news-events/news/press-releases/2012/02/ftc-will-host-public-workshop-explore-advertising-disclosures-online-mobile-media-may-30-2012>; Public Workshop, *In Short: Advertising & Privacy Disclosures in a Digital World* (May 30, 2012), <https://www.ftc.gov/news-events/events/2012/05/short-advertising-privacy-disclosures-digital-world>; Transcript, *In Short: Advertising and Privacy Disclosures in a Digital World* (May 30, 2012), https://www.ftc.gov/sites/default/files/documents/public_events/short-advertising-privacy-disclosures-digital-world/finalworkshoptranscriptaugust72012.pdf.

¹⁹ *.com Disclosures*, *supra* note 3.

²⁰ Our understanding is based, in part, on the experience of the drafter in counseling clients prior to his most recent tenure at the FTC, and, in part, on our discussions with counsel who regularly use the Guidelines to advise and counsel clients.

FTC staff guidance concerning the making of clear and conspicuous online disclosures that are necessary pursuant to the laws the FTC enforces. ... It is intended only to provide guidance concerning practices that may increase the likelihood that a disclosure is clear and conspicuous. ... The ultimate test is not the size of the font or the location of the disclosure, although they are important considerations; the ultimate test is whether the information intended to be disclosed is actually conveyed to consumers.²¹

Through commentary and a series of twenty-two examples, the Guidelines present the staff's perspective on why examples of a required disclosure are likely to be considered more or less effective than alternatives at conveying pertinent, relevant information in a clear and conspicuous manner. The Guidelines recognize that "[t]here is no litmus test for determining whether a disclosure is clear and conspicuous, and in some instances, there may be more than one method that seems reasonable."²² Staff takes a "totality-of-facts" approach to determining whether a disclosure is clear and conspicuous:

Required disclosures must be clear and conspicuous. In evaluating whether a disclosure is likely to be clear and conspicuous, advertisers should consider its placement in the ad and its proximity to the relevant claim. The closer the disclosure is to the claim to which it relates, the better. Additional considerations include: the prominence of the disclosure; whether it is unavoidable; whether other parts of the ad distract attention from the disclosure; whether the disclosure needs to be repeated at different places on a website; whether disclosures in audio messages are presented in an adequate volume and cadence; whether visual disclosures appear for a sufficient duration; and whether the language of the disclosure is understandable to the intended audience.²³

Through the examples and corresponding narrative, the Guidelines suggest better (but not required) approaches to making a disclosure clear and conspicuous. Notably, they do not impose requirements or limitations on the form of what constitutes a clear and conspicuous disclosure. Rather, the Guidelines allow and support flexibility in how a disclosure is presented to consumers and in evaluating whether the content, placement, and scope of a disclosure is clear and conspicuous. This flexible approach allows for innovation in the form or presentation of disclosures as advertising platforms evolve, as applied to different

²¹ *.com Disclosures*, *supra* note 3, at 1.

²² *Id.* at 2.

²³ *Id.* at i-ii.

products, different situations, and different target audiences, and to different qualifying information. The totality-of-facts approach is the foundation for the Guidelines' usefulness and effectiveness in counseling and advising companies and in obtaining their adherence to good practices.

We recommend that this flexible, totality-of-facts approach be maintained, the concern that "some companies are wrongly citing the guides to justify practices that mislead consumers online"²⁴ and the interest in expanding the Guidelines to address the "ubiquitous use" of "dark pattern techniques" notwithstanding.²⁵ If the Commission is concerned that parties are relying on the Guidelines to defend disclosures that staff believe are not clear and conspicuous, we suggest any future Guidelines expand and revise the examples to indicate these parties' specific errors of interpretation.

IV. Future Guidelines Should Continue to Eschew a Prescriptive Approach to Disclosures

Sellers have an incentive to provide easily usable information that is relevant to consumers. A regulator's incentive is to provide any information that some might find useful.²⁶ To date, the Guidelines have not been treated as a vehicle to require specific disclosures.²⁷ The Commission should follow that same approach in any future Guidelines.

²⁴ *Digital Deception Press Release*, *supra* note 2.

²⁵ The term "dark pattern" has become nearly synonymous with design decisions that the Commission staff and leadership believe are "manipulative." Prior to articulating a standard for clear and conspicuous disclosures that would relate to design or user-interface decisions in online transactions, the Commission should define with some specificity the term dark pattern (as will be applied by the Commission), provide the empirical basis for believing that a design decision is manipulative rather than merely a disfavored choice with negative outcomes, or a choice that, while reasonable under some conditions, is confusing under others. The Commission should also articulate a basis for identifying and calculating harm from a dark pattern; many of the dark patterns identified in the literature appear unlikely to cause material harm, either individually or at scale. As an alternative to a unified single definition, the Commission (or staff) ought to articulate whether there are common characteristics across different user interface designs that identify as "dark." Very little of this, however, relates to whether a disclosure is clear and conspicuous, which is the function of the Guidelines, at least as presently followed. For an identification of activity that has been described as a dark pattern, *see* Arunesh Mathur, Jonathan Mayer, & Mihir Kshirsagar, *What Makes a Dark Pattern... Dark?*, <https://arxiv.org/pdf/2101.04843.pdf>.

²⁶ *See generally* OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU EVER WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE* chapter 6 (2014).

²⁷ In its comment on this matter, Ranking Digital Rights proposes that the Commission "create new digital advertising transparency obligations that companies must display to consumers." Comments of Ranking Digital Rights, Digital Advertising Business Guidance Request for Information at 8-9, FTC-2022-0035-0009 (Aug. 2, 2022). For the reasons noted in this section, the Commission should not use this proceeding to impose new disclosure obligations on companies operating online.

Advertising informs consumers and can have positive welfare effects,²⁸ but, under certain conditions, an ad may be deceptive or unfair, or may fail to provide information relevant to someone's decision to purchase (or not purchase) a product, service, or experience. Producers and sellers have an incentive to increase consumers' awareness of the positive attributes of a product (and the absence or limited presence of negative attributes). However, consumers may overvalue and overconsume a product (or service or experience) because they are unaware of, or have incomplete, information relevant to their purchase decision.

Government can, under some conditions, improve market performance and consumer welfare by reducing the cost of obtaining information by requiring or prohibiting certain disclosures. (The Commission may also prohibit or sanction firms that engage in deceptive or unfair advertising.) The Commission has, in various rules, prescribed certain disclosures.²⁹ Disclosures should be mandated or required only when material harm is likely to occur in the absence of such disclosures, and that harm is fully or partially ameliorated by the disclosure. However, additional disclosure will not always enhance welfare: (i) disclosures may be misunderstood or, in time, become obsolete; (ii) disclosing too much information may result in information overload; and (iii) disclosures may displace other information that may be more valuable to a consumer.³⁰ Additionally, firms may find compliance with disclosure requirements costly and complicated. For these reasons, it is not universally true that requiring additional or specific disclosures will enhance consumer decisions and consumer welfare. In practice, when the Commission adopts a substantive disclosure requirement, it does, or it should, consider whether the scope of required disclosure is, at least in some rough sense, optimal, given the constraints the Commission operates under, and the information reasonably available to the Commission.

²⁸ See the discussion, and sources cited therein, 1 BUREAU OF CONSUMER FINANCIAL PROTECTION, TASKFORCE ON FEDERAL CONSUMER FINANCIAL LAW REPORT 297- 305 (Jan. 2021), https://files.consumerfinance.gov/f/documents/cfpb_taskforce-federal-consumer-financial-law_report-volume-1_2022-01_amended.pdf. A copy of Chapter 7 of the task force report is attached as an appendix to this submission.

²⁹ See, e.g., Endorsement Guides, 16 C.F.R. §255.2; Pre-Sale Availability of Written Warranty Terms, 16 C.F.R. §702.3; Energy Labeling Rule, 16 C.F.R. §305. The Commission has, in policy statements, articulated when an advertisement is deceptive or unfair. See FTC Policy Statement on Deception, appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984); FTC Policy Statement on Advertising Substantiation, appended to *Thompson Medical Co.*, 104 F.T.C. 648, 839 (1984); FTC Policy Statement on Unfairness, appended to *International Harvester Co.*, 104 F.T.C. 949, 1070 (1984).

³⁰ See the discussion, and sources cited therein, 1 BUREAU OF CONSUMER FINANCIAL PROTECTION, TASKFORCE ON FEDERAL CONSUMER FINANCIAL LAW REPORT 311-329 (Jan. 2021), https://files.consumerfinance.gov/f/documents/cfpb_taskforce-federal-consumer-financial-law_report-volume-1_2022-01_amended.pdf.

Here, the Commission is not undertaking a process likely to identify the benefits and costs of any specific disclosure requirements, and the adoption through this process of required disclosures within digital ads would be significantly uninformed. Thus, we recommend that the Commission maintain the focus of the current (and previous) “dot com” disclosure guidance—informing interested persons of the staff’s evaluation of what constitutes “clear and conspicuous” disclosure—and forswear any broadening of the scope of a future guidance document.

V. Conclusion

The Guidelines continue to be relied on by counsel, in-house and in private practice. This suggests no significant changes are necessary to align the Guidelines with current agency practice. The most useful change would be an expansion of the examples to identify and review new issues that reflect changes in the online advertising ecosystem since promulgation of the current Guidelines. New examples should include those instances where parties are, in the staff’s view, wrongly using the Guidelines as a shield to protect behavior inconsistent with providing clear and conspicuous disclosures. Prior to incorporation of additional examples in future Guidelines, the Commission should circulate them for public comment, both written and in a public forum. Any future guidelines should also clarify if the examples and corresponding narratives in any earlier guidelines are still an accurate statement of staff’s views.

Respectfully submitted,

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