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April 8, 1999



Donald S. Clark, Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Re: Interpretation of Rules and Guides for Electronic Media —
FTC File No. P974102

Dear Secretary Clark:

The Federal Trade Commission has requested public comment on how to interpret and apply the Commission's rules and guides to new forms of electronic media, including the Internet. A prime focus of the Commission's request for comments, and one that will be explored in detail during the May 14, 1999 workshop, is what types of disclosures on the Internet are made "clearly and conspicuously" as required or advised in many of the Commission's rules and guides.

In traditional media (e.g. print, television and radio), the Commission has considered a number of factors, such as placement, duration, distracting factors and timing, in determining whether a disclosure is clear and conspicuous. The Commission's use of these factors was based on an abundance of extrinsic evidence, including studies of consumer behavior and generally recognized marketing principles, which had been developed over many years of experience with print, television and radio advertising. For example, in Thompson Medical Co., 104 F.T.C. 648, 797-98 (1984), the Commission ruled that visual disclosures in respondents' television ads were insufficiently clear and conspicuous.:

The disclosures were placed in the middle of the ads and were distracted from by the conceptually uncorresponding audio message being communicated while they were on the screen. Studies of consumer behavior show that individuals will better remember either information presented to them first (primary effect) or information

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presented to them last (recency effect), depending upon the delay between presentation of the messages and evaluation of the recipients' responses.

See also Kraft Inc., 114 F.T.C. 40, 124 (1991) (Disclosures in television ads found not to be effective on the ground that "[g]enerally recognized marketing principles suggest that, given the distracting visual and audio elements and the brief appearance of the complex superscript in the middle of the commercial, it is unlikely that the visual disclosure is effective as a corrective measure."

Unfortunately, in the *Federal Register* Notice, the Commission suggests that these same principles should apply to advertising on the Internet. Of particular concern is the Commission's assertion that for a disclosure to be "clear and conspicuous" a consumer should be exposed to it "without having to take affirmative action, such as scrolling down a page, clicking on a link to other pages, activating a pop-up, or entering a search term to view the disclosure." On the contrary, the Internet is a dynamic, affirmative action medium where consumers normally click and link to other screens for additional information. The Commission's apparent rejection of the linking capabilities of the Internet is counter-intuitive. At the least, without competent studies evaluating consumers' use of linking, scrolling, etc., the Commission should not transpose anachronistically to the Internet those factors utilized to determine what constitutes "clear and conspicuous" disclosure in traditional media.

Most of the factors set forth by the Commission in the *Federal Register* Notice for evaluating clear and conspicuous disclosures on electronic media suffer from this same infirmity.

Unavoidability: The Commission's suggestion that disclosures must be "unavoidable," as described in the Notice, appears to be based on the assumption that relevant information must be on the initial screen of the web site and always be on the same screen as the triggering representation, or alternatively, that the disclosure must be in a frame that remains constant whatever linking or scrolling is done by the consumer. As discussed above, such a rigid requirement of "unavoidability" ignores the linking capability of the Internet and unfairly burdens advertisers and consumers. Rather than encourage creativity, such a requirement would stifle innovation and rapidly become outdated as technologies change.

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Access To Disclosures: The Commission suggests that required disclosures remain accessible to consumers at all times when visiting a web site. Given the ease with which consumers click, scroll, page forward and page back, this is a reasonable requirement and one which encourages rather than stifles the ever-changing nature of the Internet.

Proximity And Placement: The Commission's assertion that disclosures on the same screen as the trigger representation are likely to be more effective than those on separate screens again ignores the linking technology available on the Internet and mistakenly assumes that consumers expect all relevant information to be on the same page. As pointed out previously, proximity notions relevant to traditional media are inapplicable to the Internet where consumers readily and easily take advantage of its linking capabilities.

Prominence: Here again, application of rigid prominence requirements ignores the fact that consumers readily and easily seek out information on the Internet. What is or is not "prominent" in print or television ads has little relevance to the Internet where consumers control what they see and how long they see it. Without further studying information about consumers' use of linking and scrolling, the Commission should not impose rigid requirements applicable to other media.

Non-distracting Factors: While all can agree that Internet consumers should not be distracted from seeking out information, application of what were viewed as distracting factors applicable to traditional media have little or no relevance to the Internet. Again, the Commission should not impose rigid standards without far more study and experience as to what messages are understood by Internet consumers. Moreover, consumers have differing browsers, screen sizes, banner ads, etc., all of which may affect what the consumer sees. Thus, advertisers are in no position to evaluate what may or may not be distracting elements in an ad when they have little control over what consumers actually see on their web sites.

Repetition: Repetition of disclosures, as suggested by the Commission, is an obsolete concept as applied to a linking-based medium. Moreover, requiring unnecessary repetition of disclosures on the Internet may cause advertisers to stop providing valuable information to consumers altogether. Further, requiring such unnecessary repetition may cause consumers to ignore these messages and significantly diminish their effectiveness.

Audio And Visual Presentation: Once again, relying on research applicable to traditional media, the Commission states that disclosures should be made in the same mode (audio or visual or both) in which a triggering or relevant claim is presented. Until more is known through research

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and experience as to what messages are perceived by Internet consumers, any requirement that disclosures be provided in the same mode as triggering claims should not be imposed. Unlike traditional media, Internet consumers have control over what information they see, and for how long. Past research about what makes disclosures effective on traditional media is not applicable to the Internet.

In sum, for the Commission to impose rigid rules on Internet disclosures ignores the dynamic nature of the Internet and would stifle the creativity that has characterized the rapid development of electronic commerce. Further, the imposition of rigid rules based on current technology would become obsolete almost immediately. Rather than proscribing how disclosures should be made on the Internet with overly invasive rules, the Commission should use a case by case approach in evaluating whether a disclosure is effectively communicated to an Internet consumer. In response to the question posed in the *Federal Register* Notice as to whether the Commission's underlying assumptions about consumers' perceptions with respect to Internet advertisements are accurate, the answer must be a resounding "no." Rather than relying on obsolete and irrelevant assumptions concerning consumer perceptions, the Commission should proceed on a cautious case by case basis. Only when meaningful evidence of consumer behavior in the new and dynamic Internet medium is available should the Commission consider formulating more generalized rules and guides for Internet advertising.

Respectfully submitted,

A handwritten signature in cursive script that reads "Hugh Latimer". The signature is written in black ink and is positioned above the printed name.

Hugh Latimer

HL:djy