DREHER TOMKIES LLP

ALERT

FOR CLIENTS AND FRIENDS OF DREHER TOMKIES LLP

October 15, 2014

FTC SENDS WARNING LETTERS TO COMPANIES ON DECEPTIVE ADVERTISING

As part of its new "Operation Full Disclosure" initiative, the Federal Trade Commission (FTC) sent warning letters to more than 60 companies that failed to make adequate disclosures in their television and print advertisements. This group included 20 of the 100 largest advertisers in the country. The FTC did not disclose the recipients of the letters and cautioned that just because a company did not receive a letter does not mean that the company's advertisements are compliant or not being scrutinized by FTC staff. The FTC sought to send letters to a diverse group of industries and advertisers.

The FTC found numerous issues with the advertisements its staff reviewed, specifically mentioning advertisements that: (i) quoted the price of the product but did not adequately disclose conditions for obtaining that price, (ii) failed to adequately disclose an automatic billing feature, (iii) failed to adequately disclose the details relating to a "risk-free" trial period and (iv) made absolute or broad statements but contained inadequate disclosures explaining limitations and exceptions to those statements.

Though Operation Full Disclosure focused on television and print advertisements, the FTC notes that consumer protection laws apply to all forms of advertising, including internet advertising as described in the FTC's recently updated .com Guidelines.

The FTC recommends the following guidelines referred to as the "4Ps" to help advertisers evaluate whether a disclosure is clear and conspicuous:

- Prominence: Advertisers should consider whether the disclosure is big enough for consumers to read easily. The FTC specifically warns against fine print disclosures, stating that consumers should not have to scan an ad with a magnifying glass in order to identify material details of the deal. TV advertisers must consider varying screen sizes. The FTC has also challenged disclosures that have flashed on the screen for a brief period, stating that consumers should not have to be speed readers to grasp the message.
- Presentation: Disclosures must be worded in a way that consumers can easily understand. Advertisers must avoid burying important information in a dense block of text or using difficult to read fonts. Critical information should be clearly conveyed to consumers.
- Placement: The geography of the disclosure matters. The disclosure must be where consumers are likely to look. The FTC specifically cautions against placing disclosures at the bottom of the page or screen, perpendicular to the main text or in small type in the upper left hand corner of a full advertisement.
- Proximity: The FTC warns that the disclosure must be close to the claim it modifies. The FTC utilizes the maxim "what the headline giveth, the footnote cannot taketh away," and warns against using asterisks to clarify headlines.

The FTC declines to impose specific rules and instead utilizes a "big picture perspective," reminding advertisers that "clear and conspicuous" is a performance standard, not a font size and, when in doubt, rethink your ad. The FTC is stepping up its activity in this area. The Consumer Financial Protection Bureau is likely close behind. We can help review advertising for these and other concerns.

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