

United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Enforcement Policy Statement on Deceptively Formatted Advertisements

The Federal Trade Commission issues this enforcement policy statement regarding advertising and promotional messages integrated into and presented as non-commercial content.¹ The statement summarizes the principles underlying the Commission’s enforcement actions, advisory opinions, and other guidance over many decades addressing various forms of deceptively formatted advertising.

Section 5 of the FTC Act prohibits “unfair or deceptive acts or practices in or affecting commerce.” As the Commission set forth in its 1983 Policy Statement on Deception, a representation, omission, or practice is deceptive if it is likely to mislead consumers acting reasonably under the circumstances and is material to consumers – that is, it would likely affect the consumer’s conduct or decisions with regard to a product or service.² In determining whether an advertisement, including its format, misleads consumers, the Commission considers the overall “net impression3(e23-2(oj6 t)-2o(t)-2bJa)42(2de)4(r)3(s)-1()]TJ -18.6]TJ -223nnall “nss.46Ja2der

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also considered that affixed to each ad was a small, stick-on note containing what appeared to be a personalized, handwritten message, with the recipient's first name and saying, "Try this. It works! J."

During the 1980s, after the Federal Communications Commission removed its ban on program-length commercials, such advertisements, known as infomercials, began to air on television and radio.¹¹ Concerned about the increasingly blurred line between advertising and non-promotional content, the Commission brought cases alleging that deception occurs when infomercials are presented as regular television or radio programming, such as a news report or talk show. In the Commission's first such case in 1989, the Commission challenged a television infomercial that opened with the statement, "Welcome to 'Consumer Challenge,' hosted by Jonathan Goldsmith," and went on to describe the program as one that "examines popular new products for you," with the help of investigative reporters.¹² It then announced that the day's program would investigate a particular brand of sunglasses, posing the question to viewers: "[N]ew Product innovation or consumer rip-off?" In evaluating the sunglass infomercial, the Commission asserted that its format was likely to mislead consumers into believing that it was "an independent consumer program ... that conducts independent and objective investigations of consumer products," including for the company's sunglasses. Since bringing that case, the FTC has charged that numerous other television and radio infomercials were deceptively formatted. In nearly every such case, the Commission has issued an order requiring a clear and prominent disclosure, at the beginning of an infomercial and again each time ordering instructions are given, informing consumers that the program is a "PAID ADVERTISEMENT" for the particular product or service advertised.

More recently, the Commission has brought a series of cases concerning ads disguised to look like news reports on weight-loss pills and other products, where a purported journalist tested the advertised product and authored the story.¹⁴ The ads used devices such as news-related names and headlines suggestive of a local television station, trademarks of established news companies, reporter by-lines, and reader comment sections to create that false impression. In one case, the Commission alleged the format was deceptive despite the presence of a small-print disclaimer “Advertorial” in the top border of some websites.¹⁵ Consumers reached all these fake news websites by clicking on ads presented as attention-getting news headlines, which frequently appeared on legitimate news websites.

In another recent case, the Commission challenged as deceptive a website purported to originate from an independent scientific organization. The Commission alleged that dietary supplement marketers misrepresented that their website promoting the health benefits of their children’s supplements was an independent, objective resource for scientific and other information on treating a specific health condition, and that they failed to disclose their relationship to the website.¹⁶

The Commission also has challenged advertisements misrepresenting that a government agency endorsed or was affiliated with a product or service. For example, one such case against a seller of mortgage relief services concerned radio ads formatted to appear as public service announcements from the United States government, which began, “Please stay tuned for this important public announcement for those in danger of losing their home” and prominently featured the word “federal.”¹⁷ A federal district court found these radio ads deceived consumers,

¹⁴ See, e.g., Complaint at 4-5, 8-9, *FTC v. Circa Direct LLC*, No. 11-cv-2172 (D.N.J. Apr. 18, 2011) (stipulated order); Complaint at 3-4, 6-7, *FTC v. DLXM LLC*, No. CV 11-1889 (E.D.N.Y. Apr. 18, 2011) (stipulated order); Complaint at 3-4, 6-7, *FTC v. Coulomb Media, Inc.*, No. 211-cv-11618 (E.D. Mich. Apr. 15, 2011) (stipulated order).

¹⁵ See Complaint at 6, *FTC v. Circa Direct LLC*; see also Memorandum in Support of Plaintiff’s Motion for a TRO at 14, *FTC v. Circa Direct LLC* (Apr. 18, 2011). Similarly, i

observing that the defendants “intended to cause consumers to associate [those responsible for the ads] with the federal government so that consumers would be more likely to believe that [they] were credible and stable.”¹⁸ The Commission similarly has alleged that direct mail mortgage loan modification ads sent in official-looking brown envelopes with a window and a Washington, D.C. return address identifying the sender as the “NHMC Department of Financial Records” or “Nations Housing Modification Center” were deceptive.¹⁹

In 2002, when online search was a relatively new medium, FTC staff issued guidance concerning the potential for consumers to be deceived by paid ads formatted to appear as the regular search results that search engines return in response to consumers’ queries.²⁰ The Commission concurs with the staff’s conclusion, as articulated in the 2002 guidance and updated guidance issued in 2013,²¹ that consumers ordinarily would expect a search engine to return results based on relevance to a search query, as determined by impartial criteria, not based on payment from a third party. Knowing when search results are included or ranked higher based on payment and not on impartial criteria

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B. Misleading Door Openers

Other formats that mislead consumers about a commercial message's nature or purpose also have been alleged or found to be deceptive, such as misleading sales visits and calls and emails with falsified sender information. An early example of such a challenge was a 1976 case against an encyclopedia seller.²² A salesperson would "disguise his role as a salesman and appear as a surveyor engaged in advertising research" or salespeople would "approach prospects' homes in the guise of delivering . . . gifts or prizes without identifying themselves as salesmen, or that the purpose of their visit is to sell encyclopedia."²³ The Commission order required the respondents' sales representatives to present a card that clearly disclosed the purpose of the visit before entering a prospect's home.²⁴ Subsequently, the Commission's Deception Policy Statement categorized this practice as a "misleading door opener," citing it for the general proposition that, "when the first contact between the seller and a buyer occurs through a deceptive practice, the law may be violated, even if the truth is subsequently made known to the purchaser."²⁵

In 1994, concerned about deception and abuse occurring in the telemarketing of goods and services, Congress enacted the Telemarketing Fraud Act,²⁶ which prohibited the use of deceptive door-openers in telemarketing. That Act, among other things, outlawed as an abusive practice a telemarketer's failure to "promptly and clearly disclose . . . that the purpose of the call is to sell goods or services" when that is the case.²⁷ The Commission implemented Congress's

intent to prohibit this practice when it promulgated the Telemarketing Sales Rule.²⁸ In enforcing that Rule, the Commission has brought cases against telemarketers who misrepresented that calls were from, or made on behalf of, companies with which consumers had done business, such as banks and credit card companies.²⁹

When Congress passed the CAN-SPAM Act,³⁰ among the practices the law was intended to address were emails that “mislead recipients as to the source or content of such mail.”³¹ Specifically, Congress concluded that “[m]any senders of unsolicited commercial electronic mail purposefully disguise the source of such mail” and “include misleading information in the messages’ subject lines in order to induce the recipients to view the messages,

A. An Advertisement's Format Can Mislead Consumers as to Its Nature or Source

In evaluating whether an ad's format is misleading, the Commission considers the net impression the advertisement conveys to reasonable consumers, not statements in isolation.⁴⁴ Ads can convey claims by means other than, or in addition to, written or spoken words, such as visual or aural imagery and the interaction

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Commission has required audible disclosures to be delivered in a volume, cadence, and speed sufficient for ordinary consumers to hear and understand them.⁶⁰

To be effective, a disclosure also generally must be made contemporaneously with the misleading claim it is intended to qualify. For example, disclosures that subsequently inform consumers of a natively formatted ad's commercial nature after they have clicked on and arrived at another page will not cure any misleading impression created when the ad is presented in the stream of a publisher site. This approach also reflects and is consistent with long-standing public policy, as codified in the CAN-SPAM Act⁶¹ and Telemarketing Fraud Act⁶² and found in Commission cases,⁶³ that material misrepresentations as to the nature or source of a commercial communication are deceptive, even if the truth is subsequently made known to consumers.

B. Misleading Claims about the Nature or Source of Advertising Are Likely Material

Deception occurs when an ad misleads consumers about a material fact.⁶⁴ Material facts are those that are important to consumers' choices or conduct regarding a product.⁶⁵ Misleading representations or omissions about an advertisement's true nature or source, including that a party other than the sponsoring advertiser is the source of the advertising, are likely to affect

⁶⁰ See, e.g., Final Order and Judgment at 8, *Direct Mktg. Concepts, Inc.* (radio disclosures must be "in a volume and cadence sufficient for an ordinary consumer to hear"); Agreement Containing Consent Order at 3, *Carrot Neurotechnology, Inc.*, FTC File No. 142-3132 (Sept. 17, 2015) (consent accepted pending public comment) (necessary disclosures under the order must be "in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand"); Free Annual Credit Disclosures, 16 C.F.R. § 610.4(a)(3)(iv) ("Audio disclosures shall be in a slow and deliberate manner and in a reasonably understandable volume and pitch.").

⁶¹ 15 U.S.C. §§ 7701-7713 at 7704(a)(2).

⁶² 15 U.S.C. §§ 6101-6108 at 6102(a)(3)(C).

⁶³ See, e.g., *supra* notes 22, 25, 34 and accompanying text.

⁶⁴ *Deception Policy Statement*, 103 F.T.C. at 182.

⁶⁵ *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992) ("a claim is considered material if it 'involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding a product'") (quoting *Cliffdale Assocs., Inc.*, 103 F.T.C. at 165). Material information may influence consumer behavior apart from the purchase of a product. *Deception Policy Statement*, 103 F.T.C. at 182 n.45. A material misrepresentation is one "the reasonable person would regard as important in deciding how to act, or one which the maker knows that the recipient, because of his or her own peculiarities, is likely to consider important." *Id.* (citing Restatement (Second) of Torts, § 538(2) (1965)).

consumers' behavior with regard to the advertised product or the advertisement.⁶⁶ Consumers with such a misleading impression, for example, are likely to give added credence to advertising messages communicated and to interact with advertising content with which they otherwise would have decided not to interact.⁶⁷

The Commission presumes that claims made expressly and claims the advertiser intended to make are material.⁶⁸ The Commission also considers certain misleading formats to be presumptively material. Depending on the facts, false claims that advertising and promotional messages reflect the independent, impartial views, opinions, or experiences of ordinary consumers or experts are presumed material.⁶⁹ Similarly, the Commission views as material any misrepresentations that advertising content is a news or feature article,⁷⁰ independent product

⁶⁶ There are some exceptions, where consumers might not act differently if they were to identify certain forms of advertising as such. For example, if a branded product is included in
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