



*Promoting Convenience, Choice, and
Commerce on the Net*

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March 30, 2012
SUBMITTED ELECTRONICALLY
Federal Trade Commission

**Request for Panelist and Comments Regarding: FTC Public Workshop to Explore
Advertising Disclosures in Online and Mobile Media on May 30, 2012**

NetChoice respectfully requests that Executive Director Steve DelBianco be selected as a panelist on the FTC's Public Workshop to Explore Advertising Disclosures in Online and Mobile Media. NetChoice also provides the following comments.

NetChoice is an association of leading e-commerce and online companies, plus thousands of small businesses that rely on e-commerce. We work to promote the integrity and availability of the global Internet and are significantly engaged in privacy issues in the states, in Washington, and in international Internet governance organizations.

NetChoice has a long history of breaking down regulatory barriers, beginning with helping travel agents, contact lens suppliers, and real estate brokers whose online innovations clashed with legacy regulations that protect traditional business models.

Privacy-related laws that restrict how data can be collected, used, and shared also create barriers to legitimate online commerce.

In the past year, NetChoice has submitted comments to the FTC on the Preliminary FTC Staff Report – *Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Business and Policymakers*, and on the review of the Children's Online Privacy Protection Act (COPPA).

In addition, we submit the following comments regarding:

- (a) using the FTC's endorsement guidelines as a model for location and timeliness of certain disclosures;
- (b) clarifying that those who post on social media and similar platforms are responsible for *their own* content and that the FTC should not assign liability to the host of user-generated content;
- (c) asking that the FTC's permitting a click-through for more detailed disclosures for ads on mobile devices; and
- (d) asking the FTC to recognize that the process to update the Dot Com Disclosures should *not* address privacy disclosures as they are outside the scope of the original guidelines and may impede the greater goal of the update.

Qualifications of NetChoice Executive Director Steve DelBianco as a Panelist

Steve DelBianco has worked in the online field for over fifteen years and worked to implement parts of the FTC's original Dot Com Disclosure guidelines. As NetChoice's Executive Director, Steve works with NetChoice members to set and execute the coalition's agenda to promote the integrity and availability of the Internet, in the states, in Washington, and at global Internet governance organizations.

Steve is a well-known expert on online consumer protection, Internet governance, and Internet taxation. He has provided expert testimony in eight Congressional hearings and in dozens of state legislative hearings. Most recently Steve was a panelist at the ABA/FCBA 7th Annual Privacy Symposium.

For over a decade, Steve has been a powerful advocate for NetChoice positions to the National Conference of State Legislatures as well as the American Legislative Exchange Council, where he was named Private Sector Member of the Year.

Regarding Internet governance, Steve has three times been elected as policy chair for ICANN's Business Constituency. He's participated in all five meetings of the UN's Internet Governance Forum (IGF) and is a leader at the IGF-USA.

This experience in Internet governance and multi-stakeholder processes makes Steve a unique panelist who can shed light on the benefits and pitfalls of such processes.

Steve is frequently quoted on technology issues in the media, including a segment on *60 Minutes* to expose barriers to innovation in residential real estate.

Before his work at NetChoice, Steve was founder and president of Financial Dynamics, an IT consulting firm that he led through the evolution of industry trends. Under Steve's leadership, Financial Dynamics grew to over \$20 million in revenues by 1997.

Today, Steve continues to advise and invest in early stage companies as a partner in venture capital funds. In addition, he served as Vice Chairman of the Board of the Virginia Economic Development Partnership.

Steve holds degrees in Engineering and Economics from the University of Pennsylvania, and an MBA from the Wharton School.

Using the FTC's Endorsement Guidelines as a Model for Dot Com Disclosures

In 2009, the FTC released its update to its Endorsement Guidelines.¹ As part of these guidelines, the FTC addressed the use of Twitter and other social media services² in which the FTC stated, "the same general principle – that people have the information they need to evaluate sponsored statements – applies across the board, regardless of the advertising medium."³

We ask that the FTC carry this principle forward into the Dot Com Disclosure updates and only require disclosures that provide the information needed to consumers when the actionable or commissionable click occurs.

¹ FTC, *FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising* (Oct. 2009).

² See, FTC, *The FTC's Revised Endorsement Guides: What People are Asking*, 3-5 (June 2010).

³ *Id.* at 5.

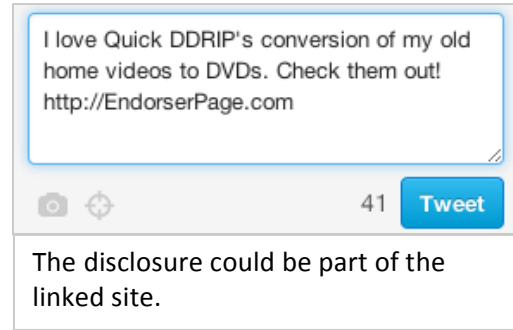
For example, a Twitter posting is limited to 140 characters. In this example, the disclosure could occur when the consumer lands on the page linked in the tweet.⁴

As long as the most important information is included and reasonably obtainable, it should comply with any updated disclosure guidelines.

While this example flows from the original examples in the Endorsement Guidelines, the underlying principles hold up for use as Dot Com Disclosures.

This means that these principles could apply to statements made on social networking sites like Facebook, MySpace, and Google Plus.

We suggest that, as long as the consumer is able to access the necessary disclosures directly, the FTC should sanction such disclosures.



Identifying the Correct Source of Liability for Disclosures Made on Social Media and Similar Platforms

NetChoice agrees that those who post content should be liable for proper disclosure. However, NetChoice asks the FTC to acknowledge that hosts of content posted by others (third-parties) are not liable for improper disclosures by these third-parties.

Take for example, the twitter posts of Nike, a third-party. If Nike engaged in improper disclosures as defined in the FTC's Endorsement Guidelines,⁵ Twitter should not be responsible for those mistakes. The same should be true for postings made on social networking sites like Facebook, MySpace, and Google Plus.



The FTC's limiting the liability of the host of content from the actions of a third-party makes sense under Section 230 of the Communication Decency Act⁶ that protects such intermediaries. With the protections afforded to them through § 230, social networking businesses have raised investment capital, invented new services, and led America to become the dominant player in social media.

⁴ So the link in the tweet itself would not go the product's page, but the endorser's. From there the actionable link to the product page could be clicked. So the necessary disclosures could reside on the endorser's page and not necessarily in the tweet itself.

⁵ We are not suggesting that Nike has done any of these actions.

⁶ 47 U.S.C. § 230.

In fact, § 230 is so important that Congress has twice ratified its existence, noting “it is the policy of the US ... to preserve the vibrant and competitive free market that presently exists for the Internet”⁷ by using § 230 “to prevent lawsuits from shutting down websites and other services on the Internet.”⁸

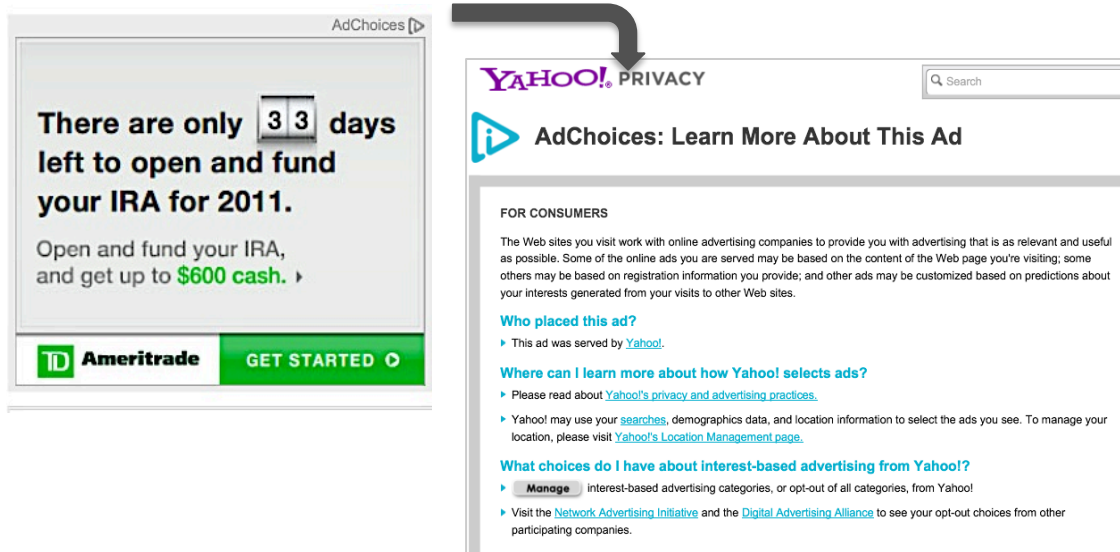
We suggest that the FTC follow § 230 guidance and clearly acknowledge that content hosts are not liable for the lack of disclosures made on their sites by third-parties.

Permitting a Click-Through For Detailed Disclosures For Ads on Mobile Devices

We ask that the FTC allow mobile ads to use click-through for notice and choice⁹, the same opportunity granted to the DAA’s Self-Regulatory Program.¹⁰

The FTC has several times noted how disclosures via mobile apps are limited by screensize.¹¹ To help alleviate this problem, we recommend the FTC find that ads on mobile devices can off-load these disclosures via a click-through to another screen or application.

Moreover, using a click-through can provide clearer information to consumers since more screen space is available – thus eliminating a “10-point font” problem.



This AdChoices Icon provides a click-through to the “Learn More About This Ad” where consumers can manage their choices. This example is from a desktop platform, but the principles can be the same.

⁷ *Milgram v. Orbitz Worldwide*, 16 A.3d 1113, 1122 (N.J. Super. Ct. 2010).

⁸ *Id.*

⁹ FTC, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations For Businesses and Policymakers*, 54 (May 2012) (“[The DAA] has developed a notice and choice mechanism”).

¹⁰ *Id.* (“the DAA’s accomplishments are notable”).

¹¹ See e.g., Press Release, *FTC Will Host Public Workshop to Explore Advertising Disclosures in Online and Mobile Media on May 30, 2012* (Feb. 29, 2012) (“How can effective disclosures be made on social media platforms and mobile devices ... that limit the space available for disclosure?”).

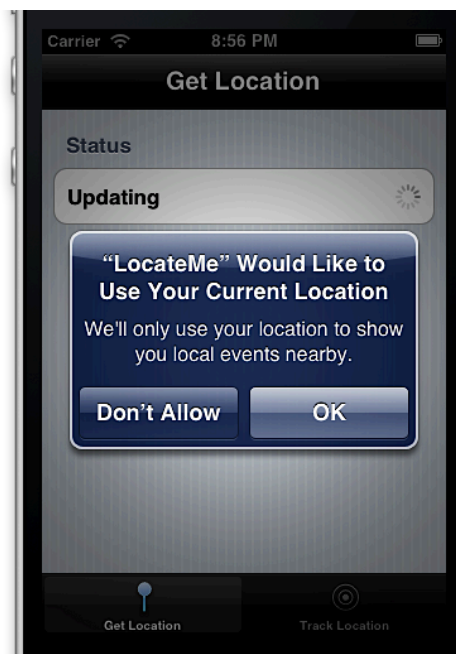
By explicitly authorizing click-through disclosures for ads on mobile devices, consumers will have clearer information and the FTC is able to maintain tech-neutrality between standard and mobile disclosures.¹²

Click-Through for Location-Based Mobile Ads

When addressing the issue of location-based ads, we recommend that the Commission incorporate click-through *and* consent mechanisms.

Location based advertisements are sometimes delivered when the consumer is passively at a specific location, not when they are actively using their mobile device. To maintain the effectiveness of this technology while providing consumers notice and choice, ads should be allowed to obtain consumer opt-in consent to the collection of geolocation information when the program is first installed or activated. This consent would continue until the user opts-out of the collection. However, the opt-out of collection would be available via a click-through placed within each location-based ad.

This approach allows consumers to control the sharing of their geolocation in a just-in-time manner - consumers can enjoy the underlying functionality on which a location-based ad functions while also being able to easily deactivate sharing.



This Update to the Dot Com Disclosures Should *Not* Address Privacy Disclosures

We ask that the FTC avoid addressing privacy disclosures as they are outside the scope of the original guidelines and may impede the greater goal of the update.

Given the release of the FTC's *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations For Businesses and Policymakers*, some may call for a discussion of privacy policies as part of the Dot Com Disclosures. However, privacy disclosures were not part of the original Dot Com Disclosures and, therefore, are outside the scope of discussion in these proceedings.

The FTC news release, *FTC Will Host Public Workshop to Explore Advertising Disclosures in Online and Mobile Media on May 30, 2012*, states, "[a]ny revisions will be consistent with the goals of the original guidelines."¹³ Since the original Dot Com Disclosures only addressed "advertising and sales,"¹⁴ discussions of privacy disclosures contradict the press release.

¹² Press Release, *FTC Will Host Public Workshop to Explore Advertising Disclosures in Online and Mobile Media on May 30, 2012* (Feb. 29, 2012) (stating that "consumer protection laws apply equally to online and mobile marketers, and to other media"); FTC, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations For Businesses and Policymakers*, 31 (May 2012) ("The Commission agrees that a flexible, technology-neutral approach towards developing PETs is appropriate to accommodate the rapid changes in the marketplace and will also allow companies to innovate on PETs.").

¹³ Press Release, *FTC Will Host Public Workshop to Explore Advertising Disclosures in Online and Mobile Media on May 30, 2012* (Feb. 29, 2012) (emphasis added).

Moreover, we worry that discussions of privacy could derail the disclosure conversation and are already being addressed separately by the Commission.

Conclusion

We look forward to working with the Commission as this process moves forward and welcome the opportunity to serve on a panel. Also, we welcome the opportunity to further expand upon our comments and answer any other questions that may arise.

Respectfully submitted,



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NetChoice is a coalition of leading online services and e-commerce companies, with the shared goal of promoting convenience, choice and commerce on the Net. More information about NetChoice can be found at www.netchoice.org

¹⁴ See, FTC, *Dot Com Disclosures* (May 2000).