

Before the
Federal Trade Commission
Washington, D.C.

In re

Digital Advertising Business Guidance
Publication

P114506

COMMENTS OF
THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)

In response to the Request for Information released June 3, 2022,¹ the Computer & Communications Industry Association (“CCIA”)² submits the following comments:

I. Introduction

CCIA is pleased to participate in the Commission’s revisiting of its guidance publication “.com Disclosures: How to Make Effective Disclosures in Digital Advertising” (March 2013) (the “Guidance”).

Since the first iteration of the Guidance in May 2000, the Commission has made clear that its consumer protection authority applies to online advertising. Since the March 2013 revisions, the Guidance has emphasized that “clear and conspicuous online disclosures ... are necessary pursuant to the laws the FTC enforces.”³ And, of course, the Guidance does not supplant the agency’s plenary authority under Section 5 of the FTC Act, 15 U.S.C. § 45, to issue rules and to investigate and remedy any type of advertising conduct that is found to be deceptive or unfair.

In this effort to “modernize” the Guidance to reflect the technological advances of the last decade,⁴ the Commission need not jettison the core goals, policies, or recommendations that the

¹ 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>.

² CCIA is an international, not-for-profit trade association representing a broad cross-section of communications and technology firms. For 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. A list of CCIA members is available at <https://www.cciagnet.org/members>.

³ Guidance at 1.

⁴ FTC Looks to Modernize, *see supra* n.1.

Guidance sets forth. The aim of this proceeding should be to explain how agency policy applies to the new advertising arrangements that we find in the digital ecosystem. In a word, the Guidance needs a refresh, not a rewrite.

As it has done since 2000, the Guidance should remain focused on disclosures in advertising and the information given to online consumers in connection with offers and proposed transactions. Moving far afield to questions of design and architecture would not fit within the purview of the Guidance.

Finally, the FTC should be mindful, as it always has been, of the need to remain technologically neutral and flexible. Adopting a prescriptive approach when these technologies are still nascent may ultimately be off the mark and create a framework that is inapplicable to later technological developments. For example, in order to serve both consumers and advertisers, the Guidance should allow disclosures to be customized for the organic look of a given platform, which will evolve as the platform innovates. The Guidance should continue to be provided in broad strokes, setting forth principles rather than prescriptions. In this way, the Guidance will remain a valuable tool for businesses to use as they plan online advertising activities; consistency and stability of message should be the policy aim for this exercise.

II. Consumer Behavior in the Online Marketplace

In revisiting the Guidance, the Commission should continue to rely on established practices for presenting effective disclosures. Disclosures must be clear and conspicuous in order to prevent deceptive advertisements.⁵ The “clear and conspicuous” tenet seeks to ensure that consumers notice a disclosure and perceive the notice in connection with the relevant advertisement. Formatting characteristics of disclosures have consistently impacted how consumers perceive messaging, and advertisers continue to use proven techniques with respect to the proximity and prominence of disclosures.⁶

⁵ See *Commission Enforcement Policy Statement in Regard to Clear and Conspicuous Disclosure in Television Advertising*, Federal Trade Commission (Oct. 21, 1970), <https://www.ftc.gov/news-events/news/press-releases/1970/10/commission-enforcement-policy-statement-regard-clear-conspicuous-disclosure-television-advertising>.

⁶ See *.com Disclosures: How to Make Effective Disclosures in Digital Advertising*, Federal Trade Commission (March 2013), <https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf>.

A. Proximity of the Disclosure to the Advertisement.

As the Guidance explains, disclosures are more effective when they are placed in close proximity to the relevant advertisement. To frame connections from a consumer’s perception, research shows that information should be carefully layered by placing disclosures together in a visible location and format while keeping in mind that people pay more attention to information on the first page.⁷ Disclosures should be placed close to the advertisement claim being substantiated, and the key takeaways should be placed at the top of a page rather than being buried deep within content. In addition, the use of white space frames the context for consumer interpretation.⁸ If the triggering advertisement claim is followed by white space and the need to scroll down, then the consumer likely will miss the disclosure.

The Commission has also encouraged advertisers to consider ads as a whole in “.com Disclosures,” and this approach continues to strengthen the efficacy of disclosure perception. For instance, research shows that disclosures identifying the brand or company representing the triggering advertisement increases consumer detection rates.⁹ The explicit identification of associated companies is especially helpful as the sources vary and familiar brands draw further attention. To consider advertisements and disclosure notices as a whole, the formatting must be considered in terms of how different screens may portray the information. What works on one screen may not be transferable to “a computer monitor, tablet or a mobile device.”¹⁰ Disclosure notices must be adaptable to different layouts to ensure the notice remains visible. Overall, ensuring that there is a coherent display of triggering claims and disclosures remains the key component in formulating clear and effective advertisements.

B. Prominence of the Disclosure.

Consumers can quickly digest disclosures when the information conveyed is limited to simple and relevant terms. The FTC previously established in the Guidance the need for

⁷ Angela A. Hung *et al.*, *Effective Disclosures in Financial Decisionmaking*, RAND (2015), https://www.rand.org/content/dam/rand/pubs/research_reports/RR1200/RR1270/RAND_RR1270.pdf.

⁸ *Id.*

⁹ Eyal Peer and Dalia Shilian, *Improving Consumers’ Ability to Detect Native Advertising Using Identified Disclosure*, Social Science Research Network (Mar. 9, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782578.

¹⁰ *Improving Online Disclosures with Behavioral Insight*, OECD Digital Economy Papers, No. 269 (Apr. 2018), https://www.caa.go.jp/policies/policy/consumer_policy/international_affairs/pdf/international_affairs_190628_0004.pdf.

simplicity in advertising disclosures to enhance consumer literacy,¹¹ and recent research continues to support these effective standards.

Technical definitions should be broken down for the audience, and the length of the disclosure should be limited to what the consumer must know.¹² Absent that refinement, consumers face a greater risk of information overload. Studies show that excessive and complex notices “can ‘freeze’ consumers’ decision-making,” which leads to choices based on incorrect or irrelevant information.¹³ Using simplified terms that are easy for individuals from all backgrounds to understand will provide disclosures that are “more behaviorally informed.”¹⁴ Such non-complex information disclosures also enable less experienced consumers to think more critically, which increases consumer protection and welfare.¹⁵

The current guidelines relating to size, color, and graphics have been proven to distinguish disclosures in support of consumer literacy. More prominent design choices for disclosures draws greater consumer attention. In a behavioral study, consumers performed best — meaning they chose the best loan — when the disclosure identifying the loan with the higher annual percentage rate appeared at the top in large font rather than at the bottom of the page in small font.¹⁶

The Guidance already has improved the effectiveness of disclosures and has increased consumer literacy. Providing transparency through disclosures has also increased consumer trust and has made concealment a tactic that is no longer viable for companies.¹⁷ Despite these advancements, the formatting of disclosures can be effective only when consumers are willing to pay attention to the notice and to incorporate the information into their decision-making.¹⁸ Consumer literacy has improved, but further implementations will not dictate whether consumers choose to utilize the advertising notices provided. Research now focuses on users’ attitudes

¹¹ Guidance at 21.

¹² See Niyati Agrawal *et al.*, *Impact of Information Disclosure on Consumer Behavior*, Dvara Research (Mar. 2021), <https://www.dvara.com/research/wp-content/uploads/2021/03/Impact-of-Information-Disclosure-on-Consumer-Behaviour.pdf>.

¹³ Rafe Mazer *et al.*, *Applying Behavioral Insights in Consumer Protection Policy*, Consultative Group to Assist the Poor (June 2014), <https://www.cgap.org/sites/default/files/researches/documents/Focus-Note-Applying-Behavioral-Insights-in-Consumer-Protection-Policy-Jun-2014.pdf>.

¹⁴ *Id.*

¹⁵ *Effective Disclosures in Financial Decisionmaking*, *supra* note 7.

¹⁶ *Improving Online Disclosures with Behavioral Insight*, *supra* note 10.

¹⁷ Leslie K. John *et al.*, *Ads That Don’t Overstep*, Harvard Business Review (Jan.-Feb. 2018), <https://hbr.org/2018/01/ads-that-dont-overstep>.

¹⁸ *Id.*

toward influencers, because disclosures have successfully brought to light the commercial nature of posts.¹⁹

One area, however, that warrants increased attention is ensuring that content creators, particularly influencers, are apprised of the agency’s guidelines for the online marketplace. The Commission should consider amplifying its efforts to publicize the Guidelines to this sector of the e-commerce ecosystem.

III. Considerations of Audiences and Demographics

Questions regarding how advertising technologies might affect particular segments of society have been raised recently in various legislatures, particularly with regard to algorithms.²⁰ State legislatures, for example the Minnesota State Legislature, have considered in this last legislative session whether online content and advertising might adversely impact minors. If advertisements and advertising design cause harm to any group of persons in the United States, however defined, this conduct should be addressed.

To the extent that the Commission has concerns, we encourage it to study whether disclosures around audience and demographics can address potential concerns regarding the impacts of advertising on particular groups, as well as understand the potential privacy impacts of such disclosures on individuals. Ad Libraries could be one mechanism for exploring transparency in this area.

IV. Multi-Party Selling Arrangements

Multi-party selling arrangements (or “MPSAs”) bring together distinct, but interrelated, sets of customers, resulting in increased access to market for both sellers and buyers. From online services like restaurant reservations to travel booking, to locating reputable home-repair tradespeople, MPSAs are a new kind of online commercial “matchmaker”.

But the relationships underlying this new online arrangement are not new. Since the advent of supermarkets, department stores, and third-party compilations of professionals of all types (Martindale-Hubbell, for example), businesses have been creating — for a fee —

¹⁹ Zofia Saternus *et al.*, *The effects of advertisement disclosure on heavy and light Instagram users*, *Electron Markets* (May 31, 2022), <https://link.springer.com/article/10.1007/s12525-022-00546-y#citeas>.

²⁰ For example, H.R. 8152, the American Data Privacy and Protection Act, presently includes provisions regarding assessment of how algorithms might effect discrimination against protected minorities.

centralized spaces where purveyors of goods and services are assembled for the evaluation of consumers. Online MPSAs are simply more efficient. More than that, they actually provide *more* information about the items they display, because the “real estate” of a webpage often is much larger than the space allowed on grocery store shelves and standees.

The Guidance already speaks well to the MPSA-consumer relationship. Its central theme is that online disclosures should be “clear and conspicuous,” a tenet that applies equal to a transaction facilitated by a MPSA as to a traditional seller-buyer transaction. “Clear and conspicuous” means that the reasonable consumer will, without significant effort, see and understand the disclosure.²¹ As the 2013 Guidance states, “the ultimate test is whether the information intended to be disclosed is actually conveyed to consumers.”²² With that being the Guidance’s core mission — one focused on ensuring consumers’ ready access to information — the Commission already has in large part addressed its expectations for MPSA disclosures.

Most importantly, the three principles of advertising as explained in the 2013 Guidance easily map to MPSAs:

1. Advertising must be truthful and not misleading;
2. Advertisers must have evidence to back up their claims (“substantiation”); and
3. Advertisements cannot be unfair.²³

If the Commission decides to modernize the Guidance, it should make clear that what an MPSA displays to a consumer about a product or service must adhere to these principles.

The more precise suggestions in the Guidance that flow from these principles — proximity and placement, hyperlinks, and pre-transaction display²⁴ — likewise apply easily to MPSAs. Where a consumer transaction is initiated and facilitated with an MPSA, she or he is entitled to see pertinent information about the good or service well in advance of clicking “Purchase” and in a manner that offers, rather than hides, what they should know. There is no reason to establish any special treatment for MPSAs in this regard. Indeed, the benefit of publishing a Guidance document that is more principles-based than prescriptive lies in the fact that new commercial arrangements, regardless of technology used, are addressed and covered not because they are overtly identified but because the Guidance speaks to the required *results* for

²¹ Guidance at 6.

²² *Id.* at 1.

²³ *Id.* at 4.

²⁴ *Id.* at 12-14.

the consumer, not the means used to reach the consumer.

V. Advertising in the Metaverse

The metaverse is a new iteration of cyberspace that, writ large, provides a more immersive experience of interacting with technology. The development of this space has not yet been fully realized. It was only just recently that investment really picked up in the area.

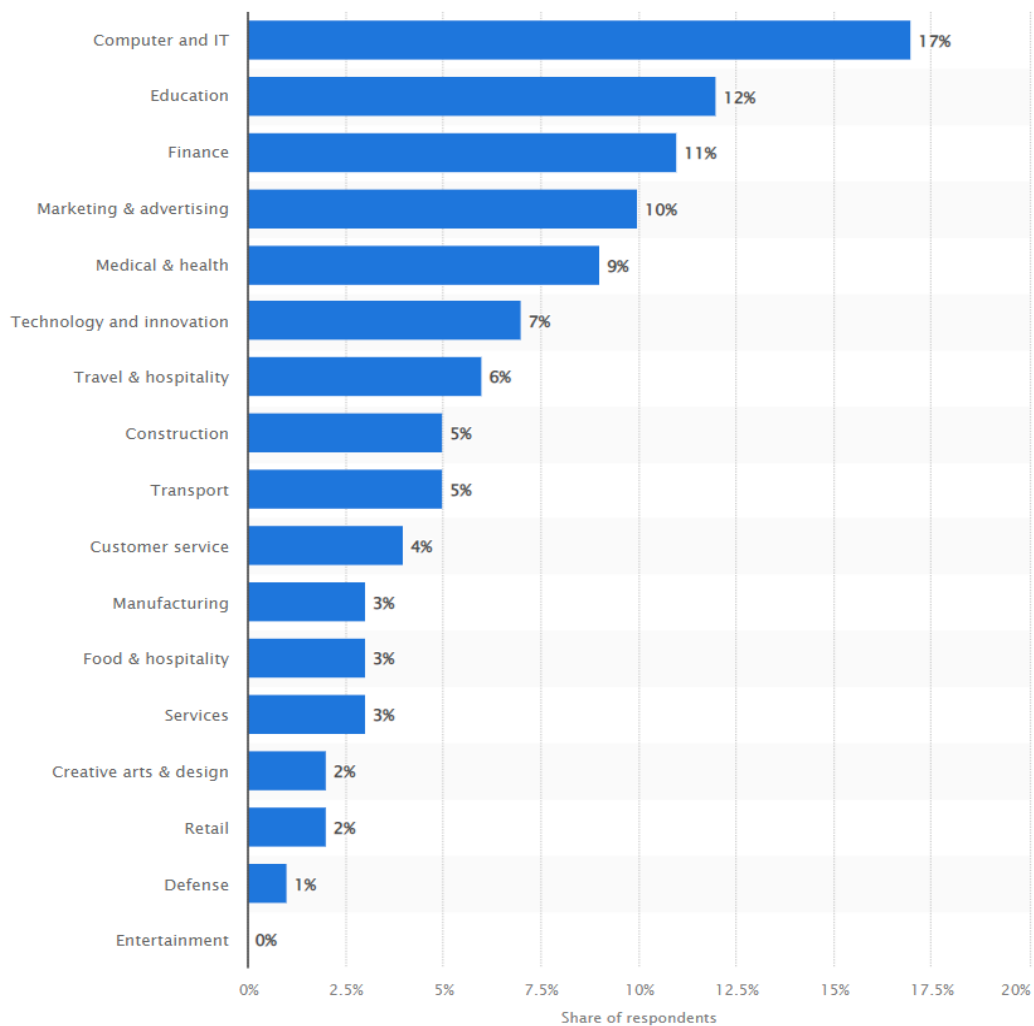
A 2022 study involving 200 respondents from companies that have invested in metaverse technologies shows that 67% of them believe that the metaverse will start ‘booming’ only in the next 5 years, with another 13% claiming we are still 10 years away from the technology’s highest potential.²⁵

Never before has any innovation had such a great number of cross-industry investors to build out these technologies, with potential applications cutting across industries in everything from health care and education to arts and entertainment. According to a March 2022 survey of companies from select countries that have already invested in the metaverse, the computer and Information Technology sectors were the most likely to have done so already, with 17 percent of companies having invested. The education sector comes in second with 12 percent of responding businesses having decided to pursue this investment avenue.²⁶ One can find almost any type of company investing in the Metaverse, as the following graph shows:²⁷

²⁵ See Sortlist, *When do you think the metaverse will start booming?* Statista, <https://www.statista.com/statistics/1302240/metaverse-business-boom/>.

²⁶ See Sortlist, *Leading business sectors worldwide that have already invested in the metaverse as of March 2022*, Statista, <https://www.statista.com/statistics/1302091/global-business-sectors-investing-in-the-metaverse/>.

²⁷ *Id.*



Considering the disruptiveness and the cross-sector nature of this technology, the Commission should keep a light hand in its oversight. In order to allow this market’s potential to come to fruition, regulation should preserve “an open and unconstrained environment for innovation, free from undue chilling effects and other powerful disincentives.”²⁸ Metaverse-focused guidelines that are adopted too prematurely would present the risk of being ineffective, unneeded or, even worse, harmful.²⁹

²⁸ *Id.*

²⁹ “Beyond depriving society of the benefits of the individual innovation, broad regulation produces more peripheral (but no less severe) damage in the form of chilling effects.” Christopher Riley, *The Need for Software Innovation Policy*, 5 J. ON TELECOMM. & HIGH TECH. L. 589, 595 (2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=910045.

VI. Conclusion

The Commission should consider updating the Guidance to reflect recent developments in both advertising technology and consumer-protection laws, but should not substantively change the Guidance to treat this iteration of the online commercial ecosystem differently than it has treated online advertising for decades.

Respectfully submitted,

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