



July 7, 1998

Secretary
Federal Trade Commission
Room H-159
Sixth and Pennsylvania Ave., N.W.
Washington, D.C. 20580

**RE: Interpretation of Rules and Guides for Electronic Media —
Comment, FTC File No. P974102**

Dear Sir,

The Promotion Marketing Association, Inc. ("PMA") is the premier trade association representing the interests of promotion marketers, including more than 700 manufacturer, retailer and promotion supplier member companies. Also included among PMA's members are promotion agencies, law firms, incentive marketers, fulfillment organizations, and sampling and couponing companies in the United States and abroad. PMA membership also consists of various agencies and other suppliers providing vital services to promotion marketers, such as printing, production, fulfillment and promotion administration to marketers engaged in the conduct of sweepstakes promotions.

PMA was founded in 1911 and conducts educational seminars and conferences, publishes PMA's Law Bulletin, Law & Business Analysis & Planning Report, *Promotion Marketing Law Handbook, Outlook*, a bi-monthly membership newsletter, as well as a wide variety of other information publications, and provides other services pertaining to the promotion marketing industry.

PMA appreciates the FTC's invitation to submit its views on the very timely and important issues raised by the Federal Trade Commission in its *Federal Register* Notice of May 6,

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1998 requesting public comment on how to interpret the application of the Commission's rules and guides to new forms of electronic media, including the Internet.^{1/}

PMA agrees with the Commission's recognition that there are unique features of the new electronic media that offer opportunities for effectively making disclosures that may not be available in traditional forms of electronic media, such as television and radio. However, PMA is concerned that many of the Commission's suggestions for applying its rules and guides to the new forms of electronic media would require more stringent and burdensome types of disclosure than have been required for traditional media, apparently simply for the reason that the Internet offers the technology to implement such new approaches to disclosure, *e.g.*, Commission suggestions regarding prominence, repetition, audio and visual presentation and the concept of an "understood" button following disclosures. Rather than imposing unnecessary burdens on industry, the Commission should identify those features of Internet technology that offer the opportunity to make disclosures clearly and conspicuously in the least burdensome manner.^{2/}

^{1/} Whereas the Commission embarked on rulemaking proceedings in the areas of pay-per-call technology and telemarketing in light of evidence of significant abuses in those media, there is no evidence in the record to support the conclusion that such a level of abuse is occurring on the Internet or that the Commission is not able to address the abuse that may be occurring with its existing powers under § 5 of the FTC Act. *See Global World Media Corp.*, (FTC Dkt. No. C-3772) 1997 FTC Lexis 314 (Oct. 17, 1997); *Comtrad Industries, Inc.*, (FTC Dkt. No. C-3719) 1997 FTC Lexis 62 (Feb. 25, 1997), in which the Commission tailored a disclosure standard for the specific facts of each case.

^{2/} PMA also seeks the Commission's confirmation that the basic regulatory parameters that the agency created in 1995 for the Telemarketing Sales Rule, 16 C.F.R. Part 310, remain intact. In 1995, the FTC purposefully removed all references to computer modems and connections from the definition of "telemarketing." Thus, PMA asks the Commission to confirm that the use of a computer modem, in and of itself, which allows a marketer to advertise its products and services, is not "telemarketing."

Specifically, PMA requests that the Commission confirm that 16 C.F.R. § 310.6(e) of the

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Finding less burdensome approaches to the application of Commission rules and guides would conform to current federal policy with respect to government involvement in the Internet, as expressed in the White House document, entitled "A Framework for Global Electronic Commerce," that was released on July 1, 1997. The Framework, which articulates the Clinton Administration's strategy and principles for fostering public confidence in the use of the Internet for commerce, notes that the Internet has the potential to "revolutionize retail and direct marketing" and strongly cautions government regulators to avoid unnecessary regulations in order to allow electronic commerce to grow:

For [the Internet's] potential to be realized fully, governments must adopt a non-regulatory, market-oriented approach to electronic commerce, one that facilitates the emergence of a transparent and predictable legal environment to support global business and commerce . . .

Governments can have a profound effect on the growth of commerce on the Internet. By their actions, they can facilitate electronic trade or inhibit it. Knowing when to act and — at least as important — when not to act, will be crucial to the development of electronic commerce. ["A Framework for Global Electronic Commerce," pages 1-2]

Telemarketing Sales Rule exempts Internet and other electronic communications. This would ensure that marketers who place advertisements on the Internet asking consumers to call them to purchase a good or service would not be subject to the Telemarketing Sales Rule. On the other hand, in its Notice, the Commission has proposed that the term "direct mail solicitation" include electronic communications that are "individually addressed and capable of being received privately." Although PMA generally agrees with the Commission's position, the PMA encourages the Commission to hold a public meeting to discuss the boundaries of "direct mail solicitation." For example, the Commission should invite further discussion concerning whether advertisements provided via push technology constitute direct mail solicitation.

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Because the Internet is an international medium, the Framework presents a set of principles intended to guide government action not only in the United States, but also in other countries as well, in order to support the growth of electronic commerce. Clearly, the principles set forth in the Framework are intended to apply to actions by United States government agencies such as the potential policy statement currently under consideration at the Commission with respect to the application of its rules and guides to the Internet. For that reason, PMA urges the Commission to consider its decisions in the context of the Framework's principles.

The second and fourth principles of the Framework are particularly relevant to the current proceeding. The second principle states that "governments should avoid undue restrictions on electronic commerce." This principle recognizes that the rapid growth of the Internet and the "break-neck speed of change in technology" make government regulation, based on the look and feel and technology characterizing the Internet, at any one point in time likely to be inapplicable and inappropriate as time passes. PMA urges the Commission to avoid applying rigid disclosure requirements to a medium still in its infancy and which is rapidly changing. Technical standards frozen in 1998 technology will stifle the development and use of technology that may provide new and better means of disclosing information to consumers.

The Framework's fourth principle urges "governments [to] recognize the unique qualities of the Internet." The Commission's *Federal Register* Notice soliciting public comment on how consumers use the Internet and how the Commission should apply its rules and guides to new electronic media is consistent with the fourth principle's request that "[e]xisting laws and regulations that may hinder electronic commerce should be reviewed and revised or eliminated to reflect the needs of the new electronic age." However, PMA believes that many of the Commission's suggestions in the *Federal Register* Notice appear to seize on certain unique qualities of the Internet, not to ease burdens on industry, but to impose new requirements, not possible in other forms of

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electronic media, simply because Internet technology would allow such new approaches to disclosure. Such a result would be contrary to the overall theme and purpose of the Administration's Framework, and contrary to the mission to provide adequate and reasonable disclosure of material information to consumers.

Not only does United States government policy urge minimal government involvement in the Internet, but United States constitutional law mandates that any regulation of advertising must be consistent with First Amendment rights to free speech, as articulated over the years in Supreme Court cases. In the *Central Hudson* case in 1980, the Supreme Court held that New York's ban on public utility advertising violated the First Amendment.^{3/} In reaching that decision, the Court created a four-part balancing test to determine the validity of a state's regulation of commercial speech.^{4/} The balancing test has been used to evaluate commercial speech in several subsequent cases. In *44 Liquormart Inc. v. Rhode Island* in 1996, the Court again applied the *Central Hudson* four-part test to determine that Rhode Island's ban on alcoholic beverage advertisements violated the First Amendment.^{5/} The Court noted in that case that "speech restrictions cannot be treated as simply another means that government may use to achieve its ends."^{6/} Furthermore, Justices Stevens, Kennedy and Ginsburg concluded that the common-law also

^{3/} *Central Hudson Gas and Electric Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557 (1980).

^{4/} *Id.* at 566. The balancing test requires the court to determine: (1) whether the speech falls within the category of free speech; (2) whether the government possesses a substantial interest in restricting the speech; (3) whether the regulation advances the interests of the government; and (4) whether the regulation utilizes the least restrictive possible means. *Id.*

^{5/} *44 Liquormart, Inc. v. Rhode Island*, 116 S.Ct. 1495 (1996). Rhode Island banned alcoholic beverage advertising in an effort to decrease liquor sales. *Id.*

^{6/} *Id.* at 1512.

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demands a higher level of scrutiny when regulation targets non-misleading commercial speech.^{7/}

The Supreme Court took its most recent step toward full First Amendment protection for commercial speech in the context of the Internet in *Reno v. ACLU*.^{8/} In *Reno*, the Court evaluated whether the Communications Decency Act of 1996 ("CDA") violated the First Amendment.^{9/} In reviewing the CDA, the Court recognized that "neither before nor after the enactment of the CDA have the vast democratic fora of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry."^{10/} Justice Stevens, writing for the Court, found that this lack of regulation stems from the fact that communications over the Internet are actively sought after and not accidentally acquired.^{11/} Justice Stevens argued that "[o]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."^{12/} Based on this reasoning, the Court granted Internet communication full First Amendment protection.^{13/} As these Supreme Court rulings demonstrate, the Commission must proceed cautiously in interpreting how to apply its rules and guides to the Internet in order to assure that such interpretations do not interfere with non-deceptive commercial speech which is protected by the First

^{7/} *Id.* at 1507-08.

^{8/} *Reno v. ACLU*, 117 S.Ct. 2329 (1997).

^{9/} *Id.* The CDA regulated electronic transmission of indecent or patently offensive materials.
Id.

^{10/} *Id.* at 2351.

^{11/} *Id.* at 2343. The Court compared accessing the Internet to dialing phone-sex telephones lines which were at issue in *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989).

^{12/} *Reno*, 117 S.Ct. at 2344.

^{13/} *Id.* at 2343. Full First Amendment protection was not given to obscene material because that is a recognized free speech exception. *Id.*

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Amendment.

UNIQUE QUALITIES OF THE INTERNET

While PMA is pleased that the Commission recognizes that the Internet incorporates unique features not available in traditional forms of electronic media, as indicated earlier, PMA is also concerned that the Commission's analysis of such features has initially led to tentative conclusions contrary to federal policy and constitutional law. PMA believes that the Commission should analyze the application of its rules and guides to the new electronic media by giving primary consideration to the most unique aspects of Internet technology such as the linking capability.

The ability of Internet users to link to additional information about a subject, by simply clicking on designated words or icons, offers opportunities for new approaches to disclosures, as required or advised by Commission rules and guides, that would be consistent with the unique ways in which consumers actually use Internet technology. By recognizing the linking capability as a viable means of effectively making necessary disclosures, the Commission would not only be adopting policy less burdensome than approaches suggested in the *Federal Register* Notice, but it would also be acting in a manner less likely to inhibit commercial speech that is not misleading or deceptive.

FACTORS USED TO EVALUATE CLEAR AND CONSPICUOUS DISCLOSURES ON ELECTRONIC MEDIA

The most significant guidance that could be offered by the Commission in a policy statement on the application of its rules and guides to new electronic media would be an indication of what types of disclosures on the Internet would be considered by the Commission to be "clear and conspicuous," as required or advised in many of the rules and guides. PMA believes that the

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factors discussed in the *Federal Register* Notice suggest approaches to disclosure that are more burdensome than necessary to assure effective non-deceptive communication on the Internet. Described below are PMA's views on the factors listed in the *Federal Register* Notice.

Unavoidability: The Commission suggests that consumers should be exposed to necessary disclosures "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." To eliminate all forms of unique features of the Internet, as viable alternative approaches to "clear and conspicuous" disclosure, ignores not only the unique nature of this new medium (contrary to the principles of the White House Framework) but also the way in which the Internet is actually used by consumers.

The Internet is a linking-based medium. It is dynamic, not a static page of print from which all relevant information must be obtained. The Commission's suggestion that disclosures must be "unavoidable" as described in the Notice seems to be based on the assumption that all relevant information must be on the same screen as the representations that trigger the need for the disclosure. Consumers readily click and link to other screens for additional information when using the Internet. This linking capability of the Internet should be embraced by the Commission as a viable approach to disclosure rather than rejected.

In *The Matter of America Online, Inc.*, No. C-3787, 1998 FTC Lexis 25 (Mar. 16, 1998) (decision and order)^{14/}, the Commission required that required disclosures in the context of online advertising and promotion appear "clearly and prominently during the final registration process, and prior to the Consumer incurring any financial obligation or liability." In that case, an

^{14/} See also *CompuServe, Inc.*, (FTC Dkt. No. C-3739) 1998 FTC Lexis 27 (Mar. 16, 1998), and *Prodigy Services Corp.* (FTC Dkt. No. C-3788) 1998 FTC Lexis 26 (Mar. 16, 1998),

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online service was using terms such as “free,” “without risk,” “without charge” and “without further obligation” throughout its advertising and promotional material in all media. “Clearly and prominently” meant that the disclosure was to be of a size, shade and duration sufficient for an ordinary consumer to notice, read and comprehend it, and the disclosure could not be “avoidable” for reasons other than the consumer's failure to read it. Rather than mandating that disclosures be placed in a specific relationship to the triggering terms, as the Notice suggests, the Commission simply required that all relevant terms and conditions be disclosed prior to the consumer incurring any financial obligation. Thus, the Commission construed “unavoidability” more narrowly than the discussion in the *Federal Register* Notice seems to suggest. Therefore, the Commission should not interpret “unavoidability” more broadly than requiring that a consumer be given the opportunity to view the required disclosures before a taking on any financial commitment.

PMA recognizes that it may be necessary to be certain that some types of disclosures are actually noticed before consumers place orders, such as disclosures about the availability of written warranties or disclosures about the expected time of shipment. PMA agrees that it would be appropriate to require those types of disclosures to be “unavoidable” to those consumers, who actually place orders, by requiring such disclosures on the screens where orders are to be entered. PMA agrees with the Commission's approach to “unavoidability” in the *America Online* case, but would oppose any definition of the term “unavoidability” that inhibits the ability of advertisers or marketers to utilize hypertext links or any other online technique to disclose clearly and prominently in connection with online communications.

Access to Disclosures: The Commission suggests that necessary disclosures should remain accessible to consumers at all times when visiting a Web site. This approach suggests that disclosures can be presented on pages other than pages with triggering representations, provided the disclosure page remains accessible. PMA agrees that this would be a reasonable requirement.

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Disclosures that are accessible to consumers by hyperlinking from a page with triggering representations to another page with the disclosures should be considered clear and conspicuous, provided that the words or icons on which consumers must click to access the disclosure pages are prominently displayed in close proximity to the triggering representations. PMA would oppose requiring such linking words or icons on every page of a Web site, including those with no representations requiring qualifying disclosures.

For example, the Guides Against Deceptive Pricing^{15/} and the Guide Concerning Use of the Word “Free” and Similar Representations^{16/} require disclosure of the terms and conditions applicable to the receipt of a “free” item “at the outset” of the offer. To comply with this requirement, it should be acceptable to indicate that certain conditions apply (*e.g.*, “with the purchase of X”) and to provide easy access to a page with details about those conditions. Such access might take the form of an icon prominently placed providing a hypertext link to the page with details. The icon might use language such as “click here for details.” Similarly, disclosures describing the nature of a reference price (*e.g.*, “regular price”) should be accessible to consumers by clicking on an appropriately worded and prominent icon. As long as an explanation of the reference price is easily accessible by clicking an appropriately identified icon, the Commission should not require such disclosures to be made on the same page as the reference price claim.

Proximity and Placement: The Commission suggests that disclosures should also be placed in proximity to the representations requiring qualification. This approach again ignores the unique linking technology available on the Internet and assumes that consumers expect all relevant information on the same page.

^{15/} 16 C.F.R. Part 233 (1998).

^{16/} 16 C.F.R. Part 251 (1998).

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PMA suggests that representations that trigger the need for certain disclosures can be effectively qualified by placing, in close proximity to triggering representations, appropriately worded icons or statements that enable consumers to link to a page with the necessary disclosures. Such linking icons or statements should, of course, be prominently displayed and be of sufficient size or contrasting color to attract attention. However, the Commission should not specify any particular type size, color or placement of such linking devices, including any requirement to always place such devices in a frame on the relevant screen. As noted in the White House Framework, any such specific requirements could become quickly outdated.

PMA recognizes that certain representations, such as the word "Free," require at least a disclosure of basic applicable conditions (*e.g.*, "with purchase of X") on the same page with the triggering statement, but details about such basic conditions (such as specific model or price point information) should be considered clear and conspicuous if easily accessible by clicking on a prominent and conspicuously placed linking icon or statement near the triggering representation.

Prominence: The Commission's discussion of prominence indicates a desire to identify specific technologies that the Commission would identify as inappropriate. Again, PMA believes such an approach contradicts the principles articulated in the White House Framework.

The Commission's policy should encourage use of linking devices of sufficient size, contrasting color and proximity in order to attract the attention of consumers reading triggering representations on one page and allow consumers to easily access the required disclosure on another page. The Commission should not specify type size, color, placement or types of graphics nor prohibit certain specific approaches in its policy statement.

Non-Distracting Factors: Consistent with the views expressed above, PMA would

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agree that no element that may distract consumers from the linking device (allowing access to disclosures) should be used. Clearly, distracting consumers would not be consistent with the position stated above that linking devices should be prominently placed near triggering representations in a manner designed to attract attention. Again, however, PMA urges the Commission not to specify display technologies that may appear to the Commission in today's view of the Internet to be distracting, since technology specific policy statements are not likely to remain appropriate for this dynamic medium over time.

Repetition: Repeating disclosures in conjunction with triggering claims, as suggested by the Commission, is not necessary in a linking-based medium such as the Internet. Appropriately placed icons or notices allowing access to pages with disclosures, as suggested above, would attract attention and create sufficient opportunity for consumers to have access to necessary disclosures. The only repetition which would be appropriate would apply to those types of disclosures that are necessary to be placed on the pages on which orders are placed (in order to be "unavoidable," as discussed above), as well as on other disclosure pages accessible through icons placed near triggering representations.

Audio and Video Presentation: The Commission suggests that disclosures be made in the same mode (either audio or visual or both) as the triggering representations. Rather than citing legal precedent for this position, the Commission's Notice cites "research." The failure to cite legal precedent supports PMA's view that no current rule or guide requires such an approach. Indeed, rules and guides currently recognize that certain qualifying disclosures in television commercials can only practically be provided in words superimposed on the screen while triggering claims are made in audio. If such disclosures are acceptable on television, a new requirement that disclosures be provided in the same mode as triggering claims should not be imposed on the Internet. Unlike television, consumers control how long a Web page remains on display and, therefore, have more

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time to read disclosures than is possible when viewing a 30-second television commercial. To add such a new requirement to the Internet again violates the principles of the White House Framework.

USE OF THE INTERACTIVE NATURE OF THE INTERNET TO ASSURE THAT DISCLOSURES ARE NOTICED AND UNDERSTOOD

At the end of the Commission's Notice, Question 19 suggests that the interactive nature of the Internet might present the opportunity to assure that disclosures are noticed *and understood* by consumers, such as by requiring consumers to click on an "understood" button. To impose such a requirement on consumers before linking to other information would be unduly burdensome to consumers, unnecessary for consumers that visit the same Web site repeatedly, and costly to Web site owners. Furthermore, such a requirement does not apply to other forms of advertising or retailing in current Commission rules and guides. The rules and guides generally refer to clear and conspicuous disclosures in advertising and, in some situations, refer to disclosures on packages, products or point of sale signing, but none of them, to the knowledge of PMA, include requirements to assure that the disclosures are read and understood. The Commission seems to be suggesting more restrictive requirements for the Internet than apply to other forms of advertising or retailing *just* because the technology permits such restrictions. Any suggestion that more disclosures and more restrictions should be required for the Internet, because technology makes this possible, contradicts Administration policy as articulated in the Framework principles cited earlier, and PMA would strongly urge that the Commission not pursue such a course of action.

COSTS AND BENEFITS OF APPLYING THE FACTORS SUGGESTED BY THE COMMISSION

It must be understood by the Commission that many of its suggestions would increase costs by appropriating valuable Internet "real estate" by requiring repetitive and unnecessary disclosures, and also impose the additional costs of foregoing disclosure of other information on the pages with

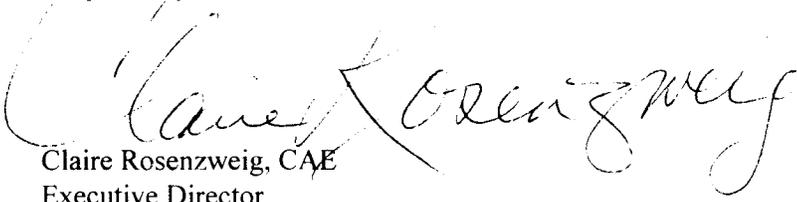
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triggering claims since disclosures, rather than use of linking icons as suggested by PMA, would take more space on the affected pages than the icons. It is also important to recognize the costs that would be imposed in terms of discouraging non-deceptive speech, due to such space limitations, and thereby adversely impacting constitutional rights of Internet advertisers.

With respect to benefits, the recommendations offered above by PMA will benefit consumers by allowing creative use of Internet technology in providing information and promotional offers on Web pages without the clutter of unnecessary detailed disclosures that could otherwise be easily accessed by clicking on prominently placed and clearly identified icons. Furthermore, PMA's recommendations will achieve the goals of the Commission because material terms and conditions would be accessible immediately via a link launched from or nearby the triggering term.

The ability to readily and easily link to pages with related information (by clicking on an icon) is a unique feature of the Internet, not available in other forms of advertising, that should be recognized and embraced in the Commission's policy statement. To suggest, as the Commission's Notice does, that disclosure (rather than icons providing links) should always be on the same screen as triggering claims, in a frame that remains constant on the screen, ignores the benefits of the Internet's linking feature and could restrict the creativity that would otherwise foster the development of electronic commerce.

Respectfully submitted,

A handwritten signature in cursive script, reading "Claire Rosenzweig". The signature is written in black ink and is positioned above the printed name and title.

Claire Rosenzweig, CAE
Executive Director