§ 4.02 Guidelines for Effective Disclaimers

When disclaimers are necessary, they must be "clear and conspicuous" in order to be effective. As Justice Black, writing for the Supreme Court, recognized more than sixty years ago, "small and inconspicuous portions of lengthy descriptions" generally do not protect consumers, particularly where advertisements are "models of clarity" in presenting those aspects of the claims designed to attract consumers but "models of obscurity" in presenting disclaimers, with the unpleasant details written in small type and buried where none but the most meticulous reader would read and understand them.[1]

The Federal Trade Commission (FTC) has adopted a common-sense definition of a "clear and conspicuous" disclaimer:

> "When written, clear and conspicuous information generally is printed in a type size that a consumer can readily see and understand; that has the same emphasis and degree of contrast with the background as the sales offer; and that is not buried on the back or bottom, or in unrelated information that a person wouldn't think important enough to read. . . . When disclosures are oral, clear and conspicuous means at an understandable speed and pace and in the same tone and volume as the sales offer."[2]

The National Advertising Division of The Council of Better Business Bureaus ("NAD") has adopted a similar approach in determining whether a disclaimer is sufficiently "clear and conspicuous":

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[1] Donaldson v. Read Magazine, Inc., 333 U.S. 178, 185-186, 188, 68 S. Ct. 591, 92 L. Ed. 628 (1948).

[2] Federal Trade Commission, "Complying with the Telemarketing Sales Rule," available at http://www.ftc.gov/bcp/conline/pubs/buspubs/tsrcomp.pdf (last visited July 7, 2008). See also, Joint FTC-Federal Communications Commission Policy Statement on Advertisements for Various New Telecommunications Services, FCC 00-72 (March 1, 2000) (setting forth four principles: (1) prominence of qualifying information; (2) proximity and placement of qualifying information; (3) absence of distracting elements such as text, graphics or sound; and (4) clarity and understandability of disclosure's text). Despite this guidance, secondary literature reports that many disclaimers used over the years have failed these requirements. See: Hoy and Stankey, "Structural Characteristics of Televised Advertising Disclosures: A Comparison with the FTC Clear and Conspicuous Standard," 22 J. Advert. 47 (1993) (none of 157 commercial disclosures studied met all of FTC clear and conspicuous standards); Hanson and Kysar, "Taking Behaviorism Seriously: Some Evidence of Market Manipulation," 112 Harv. L. Rev. 1420, 1458 (1999) (study of pharmaceutical advertisements in professional journals found that 92% failed to comply with at least one FDA standard). The FDA's advertising regulations, including proscriptions on the use of disclaimers, are discussed in § 10.02 *infra*.

> "Factors to be considered in assessing whether material product information is clearly and conspicuously disclosed include: the prominence of the information that needs to be disclosed, its proximity to the underlying claim that it is intended to qualify and (particularly in the case of Internet advertising) the likelihood that consumers will have notice of the existence of this information before making a purchase."[3]

To be effective, "clear and conspicuous" disclosures also must be readily understood, using language appropriate to the targeted consumers. Thus, advertisers contemplating disclaimers must take into account the relative sophistication of their audiences. In general, more sophisticated audiences are presumed to read claims carefully and to understand fairly subtle distinctions, thus making such consumers more readily informed through the use of disclaimers.[4] By contrast, advertising directed at children requires more disclosures and disclaimers than

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[3] In re Diamond.com, NAD Case No. 3798 (closed July 24, 2001). Although there is no unified rule that applies under the Lanham Act or similar state law, courts typically evaluate disclosures and disclaimers using standards similar to those used by the FTC and NAD. See, e.g., United States v. Washington Mint, LLC, 143 F. Supp.2d 1141, 1142 (D. Minn. 2001) (requiring disclaimer to be displayed prominently at top of any advertisements, in color contrasting with background, in at least 12-point type and easily readable font, not included with other test but immediately adjacent to or below advertised product; also specifying disclaimer wording).

[4] See, e.g.:

Second Circuit: Pfizer, Inc. v. Miles, Inc., 868 F. Supp. 437, 444 (D. Conn. 1994) (advertising to physicians that included FDA-approved package insert or directed physicians to consult package insert adequately disclosed drug's limitations).

Third Circuit: J.R. Tobacco, Inc. v. ADT Security Systems, Inc., 1999 U.S. Dist. LEXIS 14393 (D.N.J. Aug. 26, 1999) (no violation of New Jersey Consumer Fraud Act where defendant explicitly disclosed potential product limitations to sophisticated business).

Seventh Circuit: First Health Group Corp. v. United Payors & United Providers, Inc., 2000 WL 549723 (N.D. Ill. May 2, 2000) (description of defendant's health plan services as "HMO," directed at health care providers who might choose to affiliate with defendant, was not deceptive where disclaimer in footnote explained defendant's definition of "HMO").

Ninth Circuit: Core-Vent Corp. v. Nobel Indus. Sweden A.B., 163 F.3d 605 (9th Cir. 1998) (promotional materials using study and stating study's limits, sent to dental offices and newsletter, were not false).

But see, Scotts Co. v. United Industries Corp., 315 F.3d 264 (4th Cir. 2002) (vacating preliminary injunction; disclaimer stating that "Crabgrass image for illustration only, as this product is for pre and early post emergent control and does not control mature plants" sufficient to make claim that product "Prevents Crabgrass up to 4 WEEKs After Germination" accurate).

advertising to adults, including the fundamental disclosure that an advertisement *is* an advertisement.[5]

[1]—Proximity and Placement

Placement in time (during radio and television broadcasts) or in space (print media and Internet) is critical to effective disclaimers. The default rule is that a disclosure or disclaimer should be presented in the same space or time as the claim it modifies because, "in many circumstances, reasonable consumers do not read the entirety of an advertisement or are directed away from the importance of the qualifying phrase by the acts or statements of the seller."[6]

Disclaimers in inconspicuous places are unlikely to be noticed and are therefore more likely to be found ineffective. An advertisement for a grape fungicide, for instance, prominently touted a study that showed its ability to keep leaves "virtually mildew-free," while competitors' products allowed "mildew infections that ranged from mild to severe." The study, however, had severe limitations, and the advertiser warned it could not "guarantee you'll be able to observe these results in the field." These limitations were revealed, inconspicuously, "in the back of the flipped-top cover of the inside portion of the brochure, in . . . the ninth and last sentence," a placement the NAD found rendered the disclaimer ineffective.[7]

In another example, an advertisement for insulation claimed that it could be installed "in a fraction of the time" or in "half the time" of other kits, revealing only in a disclaimer on a different part of the package that the comparison applied only to the advertiser's own "traditional kits," not to those of competitors. Although the disclaimer was referenced by an asterisk, "there [was] no guidance given as to where the asterisked information c[ould] be found." NAD recommended the disclosure appear, at least, "on the same (front) side of the package" as the claim it modified.[8]

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[5] See generally, § 10.08 *infra* (children's advertising).

[6] In re FTC Policy Statement on Deception (Oct. 14, 1983), available at http://www.ftc.gov/bcp/policystmt/ad-decept.htm (last visited July 7, 2009).

[7] In re Rohm and Haas Co., NAD Case No. 3663 (closed June 12, 2000). See also In re Reckitt Bencksicker, Inc., NAD Case No. 5026 (closed June 6, 2009) (disclaimer on back panel of packaging for automatic dishwashing detergent was not sufficient when superiority claim it modified was on front panel).

[8] In re Manco, Inc., NAD Case No. 3633 (closed March 23, 2000). See also, In re BMW of North America, LLC, NAD Case No. 4156 (March 17, 2004) (BMW

In another case, advertising for the allergy-relief product Chlor-Trimeton showed users of Benedryl, a competing product, falling asleep "in contexts in which people would normally be awake: at a business meeting, outdoors in the bright sunlight, and at a boxing match."[9] The clear implication was that Chlor-Trimeton does not make people drowsy. A disclaimer, however, pointed out that "[a]ll non-prescription antihistamines may cause some drowsiness." The disclaimer "appear[ed] to be on the box of Chlor-Trimeton itself," not in the advertisement, which made it "unlikely that the disclaimer would effectively dispel a viewer's mistaken impression."[10]

Many advertisements use an asterisk, dagger or other sign to direct readers to disclaimers located elsewhere. The advisability of this practice, however, diminishes as the importance of the disclosed information increases. According to the Better Business Bureau:

> "The asterisk or any other reference symbol should not be used as a means of contradicting or substantially changing the meaning of any advertising statement. . . . Whatever qualification is necessary should appear in immediate and conspicuous conjunction with such word, phrase or representation; qualification by asterisk reference is not sufficient in such cases."[11]

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advertisement for cars priced "from $40,995" was not saved by disclaimer, in small grey print on a grey background, printed sideways on the edge of a two page spread stating that the car depicted in the advertisement actually cost $58,395).

[9] Warner-Lambert Co. v. Schering-Plough Corp., 1991 WL 221107 *2 (S.D.N.Y. Oct. 15, 1991).

[10] *Id*. at *2. See also:

Third Circuit: Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharmaceuticals Co., 290 F.3d 578 (3d Cir. 2002) (antacid name "Mylanta Night Time Strength" and advertisements alluding to its efficacy at night were not saved by disclaimer "does not contain a sleep aid" because advertisements created a different impression—that the product was "specially formulated for nighttime heartburn").

Second Circuit: SmithKline Beecham Consumer Healthcare, L.P. v. Johnson & Johnson-Merck Consumer Pharmaceutical Co., 906 F. Supp. 178, 185-186 (S.D.N.Y. 1995) (same holding), *aff'd* 100 F.3d 943 (2d Cir. 1996); American Home Products Corp. v. Johnson & Johnson, 654 F. Supp. 568, 590 (S.D.N.Y. 1987) (disclaimer that "purports to change the apparent meaning of the claims and render them literally truthful, but which is so inconspicuously located or in such fine print that readers tend to overlook it, . . . will not remedy the misleading nature of the claims").

See also, FTC Policy Statement on Deception (Oct. 14, 1983), available at http://www.ftc.gov/bcp/policystmt/ad-decept.htm (last visited Feb. 14, 2010) ("[A]ccurate information in the text may not remedy a false headline because reasonable consumers may glance only at the headline. Written disclosures on fine print may be insufficient to correct a misleading representation.") (footnotes omitted).

[11] Council of Better Business Bureaus, Inc., *Do's and Don'ts in Advertising* § 19, ¶¶ 127, 129 (1996). See also: In re Abbott Labs., NARB Panel No. 128 (Aug. 2005)

The FTC has stated that consumers should be able to evaluate all relevant information—including disclaimers—before deciding on a purchase.[12] Disclaimers that appear only when a consumer has already taken affirmative steps toward purchasing a product or service generally are deemed ineffective. For example, an advertisement for low long-distance rates, which had severe restrictions that were only revealed by calling a 1-800 number, was found deceptive on exactly these grounds.[13] Rules against these sorts of disclaimers are similar to the longstanding prohibition on "bait and switch" sales practices.[14] Once consumers have determined to make a purchase, or have made substantial progress toward that end, they are likely to discount or ignore disclosures.

Some courts have regarded a hard-to-find disclaimer as evidence of an intent to deceive consumers.[15] One example deemed particularly ineffective arose in the context of sweepstakes used to sell magazine subscriptions.[16] Although no magazine subscription purchase was necessary to enter the sweepstakes, the mailings did everything possible to dispel that impression. Bold, red block letters announced that the recipient was in danger of being "dropped" if she did not "order now," the impression being that she would be "dropped" from the sweepstakes if she did not order magazines. A disclaimer announcing that "no purchase is necessary to enter or win" accompanied every mailing, but the disclaimer was "approximately one-quarter inch high

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(to be effective, "disclaimers must be (1) clear and conspicuous and (2) not contradict or substantially change the main message in the claim"); In re DirecTV & Prime TV, NAD Case No. 3799 (July 20, 2001) (rejecting disclaimer that was "at the bottom of the advertisement, distant from the claim [it was] intended to modify").

[12] See, e.g., FTC Policy Statement on Deception, N. 15 *supra* ("[W]hen the first contact between a 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.").

[13] In re Viatel, Inc., NAD Case No. 3753 (closed April 10, 2001). *Cf*., In re Advanced Care Products, NAD Case No. 3138 (closed Oct. 1, 1994) (disclaimer on pregnancy test packaging insufficient if disclaimer is not visible in context of print or TV advertisements).

[14] Guides Against "Bait" Advertising, 16 C.F.R. § 238; see also, § 3.09[3] *infra*.

[15] *Fifth Circuit:* Pebble Beach Co. v. Tour 18 I, Ltd., 942 F. Supp. 1513, 1550 n.35 (S.D. Tex. 1996) (inclusion of unobtrusive disclaimers amounts to tacit admission of likely consumer confusion and "calculated effort . . . to escape liability") (Internal citation omitted.), *aff'd as modified on other grounds* 155 F.3d 526 (5th Cir. 1998).

Seventh Circuit: McNeil-PPC, Inc. v. Guardian Drug Co., 984 F. Supp. 1066, 1072 (E.D. Mich. 1997) (fact that defendant put disclaimer on back of packages was probative of intent to confuse consumers).

[16] Legislation has since curtailed the most deceptive of these practices in the direct-mail sweepstakes area. See: § 4.05[6] *infra*, Ch. 7 *infra*, and Ch. 8 *infra*.

. . . in blue, near other letters also in blue . . . at or near the bottom of the page." As the court observed, "[i]f it is not designed expressly for the purpose of minimizing its visibility, the overall layout of the literature certainly enhances that likelihood."[17]

[2]—Prominence

Disclaimers must be legible, meaningful, of sufficient size, and remain on screen for sufficient duration to allow viewers to easily read and understand them. Small print, by itself or combined with other features such as color, contrast, and placement, is almost always deemed ineffective because consumers are unlikely to wade through a long paragraph of fine print in order to find the disclaimer.[18] In one NAD case, a department store advertisement prominently advertised "0% Interest for 1 Year." A footnote disclosed, "if payment of 1/12 of transaction amount is made for 12 consecutive months, then all finance charges assessed and paid will be refunded." In other words, interest would, in fact, be charged, but would be refunded if the customer met the payment conditions. The disclosure, however, "appear[ed] in a paragraph with other details in the same type size." NAD recommended both clarifying that interest must be paid and may be refunded and putting the important disclaimer "in larger type size than the other details."[19]

Other NAD cases involving insufficiently prominent disclaimers include: (1) a disclosure of actual phone rates that was "in extraordinarily small print, against a poorly contrasting background and was not placed in close proximity to the claims it was intended to qualify;"[20] (2) Web site disclosures not located on same Web page, or even in close proximity, to claims of "Any airline. Any flight. Any time . . . without restrictions or limitations;"[21] (3) billboard and magazine advertisements where disclosures were too small and too distant from the same "Any flight. Any time" claims;[22] (4) restrictions on supposedly

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[17] Miller v. American Family Publishers, 84 N.J. Super. 67, 663 A.2d 643, 652 (N.J. Super. Ct. Ch. Div. 1995).

[18] See, e.g., F.T.C. v. Brown & Williamson Tobacco Corp., 778 F.2d 35, 42-43 (D.C. Cir. 1985).

National Advertising Division: In re Nabisco, Inc., NAD Case No. 3408 (closed Aug. 1, 1997) (rejecting disclosure in small white type against off-white background at bottom of television screen).

[19] In re Montgomery Ward & Co., NAD Case No. 3019 (June 1, 1993).

[20] In re Verizon, NAD Case No. 3750 (closed April 20, 2001).

[21] In re WebMiles.com Corp., NAD Case No. 3749 (closed April 20, 2001).

[22] *Id.*

"free" flights that were "buried in small, low contrast gray type amidst a litany of other terms and conditions;"[23] and (5) "mice type" disclosures at the bottom of a full page advertisement, which will not, "as a general rule, be sufficient to disclose material information."[24] Regarding this latter practice, NAD stated that, "[a]lthough many advertisers recognize their obligation to disclose material information, their efforts all too often fall far short of the 'clear and conspicuous' disclosure standard."[25]

The more material the information is to the consumer's buying decision, the more prominent the disclosure should be. In *In the Matter of Litton Industries, Inc.*, for instance, prominent headers stated that "76% of the independent microwave oven service technicians surveyed recommend Litton" and "79% of microwave service technicians surveyed say Litton is the best quality commercial microwave oven."[26] The surveys, however, covered only agencies that serviced Litton microwaves. The FTC held that a fine-print disclosure revealing this important limitation was inadequate to correct the false impression to the contrary that the headers created. A fine print disclosure of other, less important qualifications to the survey, however, was acceptable.[27]

Televised disclaimers that flash on and off-screen very quickly also are likely to be missed, particularly when a television advertisement makes spoken claims without spoken disclosures. In a commercial for Planters Mixed Nuts, for example, a super revealed: "A cholesterol free food. Sixteen grams of fat per serving." This essential information, required by the FDA, "appear[ed] in small white type, against an essentially off-white background at the very bottom of the screen." NAD recommended making the disclosure "more conspicuous," including, if necessary, "a simultaneous audio and visual disclosure."

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[23] In re Travelers Bank, NAD Case No. 3462 (closed May 1, 1998).

[24] In re Voicestream Wireless, NAD Case No. 3714 (closed Dec. 12, 2000). See also, Verizon, Long Distance Telephone Service Representative, NAD Case No. 3750 (April 20, 2001).

[25] *Id.*

[26] In the Matter of Litton Industries, Inc., 97 F.T.C. 1, 71 n.6 (1981), *aff'd as modified* 676 F.2d 364 (9th Cir. 1982).

[27] *Id.*, 97 F.T.C. at 70 n.5 (fine-print disclosure of qualification that most consumers would already understand and that was unlikely to be material (namely, that only technicians with experience with respondent's product and one competing product, not *all* independent technicians, were included in positive survey used to tout respondent's product); "[u]nder these circumstances, deception, if any, was minimal, and fine print was a reasonable medium for disclosing a qualification of only limited relevance").

NAD also recommended "larger print, a contrasting" background [and] substituting numbers for words, all designed to make the disclaimer more legible.[28]

[3]—Duration and Repetition

Disclaimers that are stated only once or twice while the underlying claim is repeated several times are ineffective. This rule is particularly applicable to lengthier advertising such as Web sites and infomercials. In one infomercial, Hair Club for Men offered "free hair" and a "free round trip" airline ticket to those who signed up for a one-year membership. The disclosure, however, that the one-year membership "is a necessary part of the offer" was not made at the same time as the offer. NAD noted that "consumers viewing only this segment of the infomercial . . . would not understand the true cost of the offer."[29]

[4]—Appropriateness to the Medium

Some regulations specifically recognize differences in media and mandate different types of disclosures for each. This is true, for instance, of advertising for warranties, for which the FTC mandates

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[28] In re Nabisco, Inc., NAD Case No. 3408 (closed Aug. 1, 1997). See also, In re Novartis Consumer Health, Inc., NAD Case No. 3449 (closed March 1, 1998) (disclaimer inadequate where "in one of the few split seconds in which it appears on the screen it consists of white print on a white background").

[29] In re Hair Club for Men, NAD Case No. 3457 (closed May 1, 1998). See also:

Second Circuit: Hearst Business Publishing Inc. v. W.G. Nichols, Inc., 76 F. Supp.2d 459, 471 (S.D.N.Y. 1999) (infrequent mention of the name of the product's true source was not sufficient to overcome false implication that the product originated from another source when the other entity's name is used far more frequently).

District of Columbia Circuit: Federal Trade Commission v. Brown & Williamson Tobacco Corp., 778 F.2d 35, 42-43 (D.C. Cir. 1985) (after twelve years of exposure to FTC cigarette ratings, consumers were "habituated" to tar and nicotine legends and would only pay attention to those portions of legend they expect to change from ad to ad, in particular the tar and nicotine numbers).

Council of Better Business Bureaus, National Advertising Division: In re Thane International, NAD Case No. 3557 (closed June 18, 1999) (visual disclosures which appear only once or twice during an infomercial were insufficient to cure false message communicated by the rest of the infomercial); In re Thane Marketing International, NAD Case No. 3222 (closed July 1, 1995) (recommending multiple disclaimers for infomercial with repeated similar claims); In re New Strategies/Tropical Beaches, Inc., NAD Case No. 3152 (closed Nov. 1, 1994) (accepting, with modifications, infomercial in which disclaimer was repeated numerous times).

See also, In re Eggland's Best Eggs, Inc., NARB Panel No. 67 (June 1993) (disclaimer, though first substantive statement in advertisement, could be lost in context of powerful presentation on nationally known health concern as to which consumers lack technical knowledge).

specific disclosures for video ads;[30] for advertising involving credit terms and leases, where the rules distinguish between print and broadcast disclosure;[31] and for prescription drug advertising.[32]

For other required disclosures, where specific regulatory guidance is lacking, FTC decisions have provided some rules of thumb. For instance, in at least one case, the FTC has defined "clear and conspicuous" in print to require that disclosures be in the same type style and print size as the representation that triggers them and audio disclosures to be made at the same volume or cadence.[33] In general, however, advertisers are allowed latitude in deciding whether a disclosure is sufficiently clear and conspicuous in the context of the medium.

Medium-specific disclosures generally must be precisely that: specific to the medium and complete in that particular context.[34] In one case, NAD reviewed advertising for eggs that claimed people with high serum cholesterol could eat "twelve Eggland's Best Eggs a week as part of a low fat diet" without raising their cholesterol levels. As substantiation, the advertiser directed NAD to its "customer service 800 #, consumer Q&A brochures, large space print advertisements with extensive Q&As, and a medical/informational public relations program," which, it claimed, gave complete nutritional information about its eggs. It also claimed its eggs were "quality-controlled" and "come from hens on a patent-pending low-fat, high vitamin E and iodine diet." Although not disputing the eggs' quality, NAD found that the television advertising did not adequately address "the complexity of the nutritional issues involved":

> "If the television commercial could ever contain all the information, disclosures and disclaimers that appear in the full-page Q&A ad, the correct message might be transmitted to consumers.

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[30] 16 C.F.R. § 239.2(a) n.1 (mandating disclosure "simultaneously with or immediately following the warranty claim" in the audio portion or "on the screen for at least five seconds" in the video portion).

[31] 12 C.F.R. § 213.7(d) (print); § 213.7(f) (broadcast). See § 4.05[4] *infra*.

[32] 21 C.F.R. § 202.1(e)(iii) (print); § 202.1(e)(1) (broadcast). See § 4.05[5][a] *infra*.

[33] In the Matter of Dean Distributors, Inc., 1996 FTC LEXIS 738 at *18 (F.T.C. April 14, 1996) (concerning disclosures in print and broadcast advertising for a weight loss program).

[34] But see: § 4.04[4][b] *infra* (radio and television advertisements for consumer leases permitted to direct consumers to complete lease terms disclosed elsewhere); § 4.04[5][a][iii] *infra* (broadcast advertisements for prescription drugs must direct consumers to package labeling).

> To rely on a total communications program to make up for any possible lack in the television commercials is unacceptable. Each piece of advertising must stand on its own."[35]

For related reasons, the United States Supreme Court noted over forty years ago that television advertising may not be an appropriate medium for certain types of commercials if all necessary information can not effectively be communicated given the inherent limitations of television advertising.[36]

In this regard, it is important to note that the major television networks have codified the FTC's "clear and conspicuous" standard into a minimum standard of clarity that such disclaimers, called supers, must meet. ABC describes the general "standard" this way:

> "When superimposed copy is required, it must be displayed clearly and conspicuously. As a general rule, supers must be presented against a contrasting background and must be displayed for sufficient duration and in large and bold enough, well-spaced letters, words, and lines of copy to be read easily."[37]

ABC also reiterates the legal standard that "[v]isual supers may not be used to materially alter a claim [and] may provide only minor clarification and must be so limited."[38] As for specifics, Fox states the following:

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[35] In re Eggland's Best Eggs, Inc., NAD Case No. 3016 (June 1, 1993). See also, In re Hawk Commission, LLC, NAD Case No. 4131 (Jan. 8, 2004) (Hawk could not direct consumers to its Web site to clarify its television and radio advertisements because "materially qualifying information should appear close in proximity to the specified claim it is intended to modify. An advertiser cannot modify a misleading representation with a disclosure that appears in an entirely different medium.").

[36] F.T.C. v. Colgate-Palmolive Co., 380 U.S. 374, 390-391, 85 S.Ct. 1035, 13 L.Ed.2d 904 (1965) ("If, however, it becomes impossible or impractical to show simulated demonstrations on television in a truthful manner, this indicates that television is not a medium that lends itself to this type of commercial, not that the commercial must survive at all costs."). See also, In re Cavalier Telephone, LLC, NAD Case No. 4184 (Feb. 24, 2004) (rejecting advertiser's claim that television ads do not allow for full disclosure the NAD stated that "[w]here time allowances do not permit for full disclosure of material terms and conditions so as to prevent price claims in long-distance telephone advertise[ments] from being misleading to customers, [] such claims should simply not be made").

[37] ABC *Advertising Standards and Guidelines*, 78 (Aug. 2009) ("ABC Standards").

[38] *Id*. at 28.

> "For purposes of reference, an ideal display of copy would have letter h[eight] of 4.5% of the vertical dimensions of the scanned area (approximately 22 video scan lines for upper case letters and 24 video scan lines for lower case). The first line of copy would be viewed for a minimum of 3 seconds, with each subsequent line at 1 additional second."[39]

In addition, the networks encourage steps to enhance legibility, such as edge-drop shadowing and a clear typeface, such as Helvetica.[40] Supers that vertically roll over the screen are specifically acceptable at ABC,[41] while horizontal crawls are generally seen by networks as unacceptable.[42]

[5]—Understandable Language

Disclaimers must be properly worded and use terms as they are commonly understood by consumers.[43] For instance, a company that offered an interest-bearing loan, describing it as an "advance," was deemed to be providing a confusing message.[44] Similarly, a disclosure that referred to "basic rates" to describe pricing was found inadequate because consumers did not understand what the term "basic rates" meant.[45] Disclaimers also are inadequate if they are too vague. For instance, a disclaimer stating that soap pads are appropriate for "many" kitchen surfaces was held insufficient because it failed to specify how "many" surfaces were appropriate for the pads at issue.[46]

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[39] *FBC Advertising Guidelines* (2008) ("Fox Standards"); *NBC Advertising Standards*, 95 (2002) ("NBC Standards") (same); *CBS Television Network Advertising Guidelines*, 53 (July 2002) ("CBS Standards") (18-24 scan lines, depending on capitalization; one line = 2 seconds, two lines = 3 seconds, 3 lines = 5 seconds).

[40] *ABC Standards*, N. 37 *supra* at 79.

[41] *Id*.

[42] *Id*. ("Supers which . . . horizontally 'crawl' across the bottom one-third of the screen are reserved exclusively for use by the News Department and may not appear in commercial announcements."); *CBS Standards*, N. 39 *supra* at 33, 45; *NBC Standards*, N. 39 *supra* at 17; but see, The CW Network Advertising Guidelines 22 (June 2007) ("The use of horizontal crawls will be reviewed on a case-by-case basis.").

[43] In re Signature Color, NAD Case No. 3174 (closed Jan. 1, 1995) (disclaimer, "Processing available from Signature Color with limited availability from other labs" failed to reveal how "limited" the "other labs" availability really was).

[44] J&H Tax, Inc. v. H&R Block Eastern Tax Services, Inc., 128 F. Supp. d 926 (E.D. Va. 2001).

[45] Illinois Bell Telephone Co. v. MCI Telecommunications Corp., 1996 WL 717466 (N.D. Ill. Dec. 9, 1996).

[46] In re 3M Company, NARB Panel No. 85 (March 1995).

Similarly, a disclaimer stating that a service may not be "available in all areas" where it was being advertised was insufficient when in fact the service was only available to 15% of the customers in the area where the service was being advertised.[47]

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[47] In re Verizon Communications Inc. FiOS Internet Service, NAD Case No. 4764 (closed Dec. 5, 2007).