
* This chart does not include licenses and permits from state and local fire, health, building and safety agencies, nor does it include all signs potentially required under Proposition 65. For further compliance assistance, contact the applicable state agencies and your environmental and safety consultants.

Are Your Advertising Disclosures “Clear and Conspicuous”?

The Federal Trade Commission (FTC) continues to monitor dealership advertising and punish dealers it deems to be offenders. It was very active in the automotive industry last year and 2018 apparently won't be any different. Last month, the FTC approved a final Consent Order settling its deceptive advertising charges against Cowboy Toyota, a dealership based in Dallas, Texas.

The settlement relates to the FTC's December 2017 complaint regarding Cowboy Toyota's Spanish-language newspaper ads. According to the FTC, the dealership (1) misrepresented the cost of purchasing or leasing cars, (2) misrepresented the qualifications or restrictions for financing or leasing cars, (3) misrepresented the availability of vehicles for sale and (4) prominently advertised low interest rates and low monthly payments in Spanish, while stating significant limitations to those terms in fine print English. The complaint alleges Cowboy Toyota violated the Federal Trade Commission Act, the Truth in Lending Act/Regulation Z, and the Consumer Leasing Act/Regulation M.

Many of the FTC's claims relate to the dealership's failure, in the FTC's opinion, to make advertising disclosures that are “clear and conspicuous.” What does this seemingly subjective standard mean? How can a dealership know whether its advertising disclosures are “clear and conspicuous”?

We reviewed the three most recent dealership settlements/consent orders (Orders) published on the FTC's website within the last year and found that they contained much of the same language regarding “clear and conspicuous” disclosures. Below is a consolidated list of the FTC's requirements for satisfying this standard, as set forth in the three Orders, along with a few comments by Auto Advisory Services:

“Clearly and conspicuously” means that a required disclosure is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways:

1. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be made visually or audibly.

[AAS often receives questions regarding Pandora Radio ads displayed on computers or mobile devices (Pandora Radio provides streaming music accompanied by text and graphics.) Should these ads be treated as audio ads or television ads? Since most consumers listen to internet radio without staring at a monitor or screen, AAS recommends treating Pandora Radio ads as audio ads. For example, if an ad audibly states a monthly finance payment, the remaining disclosures regarding APR, downpayment and the number of months should be stated audibly as well.]

2. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

[In a prior publication, the FTC explained that advertisers could test whether an ad meets this standard by asking the following questions:

- **Prominence:** *Is the fine print big enough for people to notice and read?*
- **Presentation:** *Is the wording and format easy for people to understand?*
- **Placement:** *Is the fine print where people will look?*
- **Proximity:** *Is the fine print near the claim?*

See [FTC Fact Sheet: The Devil's In the Details](#)]

3. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

[Speaking of streaming videos, dealerships should be aware that the FTC also reviews and scrutinizes YouTube ads posted by dealerships. If you upload ads to the internet, make sure they're compliant.]

4. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.

[For further information regarding the FTC's expectations for online disclosures, see [.com Disclosures, How to Make Effective Disclosures in Digital Advertising](#)]

5. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears.

[The complaint against Cowboy Toyota includes ads in which prominent representations regarding low monthly payments appeared in Spanish, while the fine print disclaimers regarding lease terms and credit qualification requirements were written only in English.]

6. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices.

[Beware - a disclosure that is easy to read on a computer monitor may not be large enough to be "easily noticed" or read from a mobile phone. When reviewing dealership advertising, FTC attorneys will actually view ads from a mobile phone to determine whether disclosures are clear and conspicuous.]

7. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

[Our ad review staff often finds errors when dealers, or the ad agencies they work with, are rushed in producing an ad and mistakenly hold over disclaimer and disclosure language that was used in a prior ad.]

8. When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, "ordinary consumers" includes reasonable members of that group.

9. When advertising financing or lease terms, an ad must "clearly and conspicuously [disclose] all qualifications or restrictions on the consumer's ability to obtain the represented financing or leasing term, including but not limited to any qualifications or restrictions that [the dealer's] lender, lessor, or any other entity may impose based on a consumer's credit score or credit history. Provided, further, that, if a majority of consumers likely will not be able to meet a stated credit score or credit history qualification or restriction, the advertisement must clearly and conspicuously disclose that fact."

We encourage you to reach out to AAS, your internal compliance department or competent counsel to make sure the ads you, or the ad agencies you work with, contain all the required disclosures and to make sure those disclosures are clear and conspicuous. The FTC shows no sign of backing down anytime soon. As any dealership opposing an FTC complaint can attest, you do not want to be on the FTC's radar. Once the FTC latches on to a dealership, they do not let go.

If you have any questions or would like further details about AAS' informal ad review service, please contact us at (800) 785-2880 or questions@autoadvisory.com.

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