DREHER TOMKIES LLP ALERT

FOR CLIENTS AND FRIENDS OF DREHER TOMKIES LLP

June 21, 2024

ARE YOU ADEQUATELY DISCLOSING – OR MISSING THE MARK?

First there was Amazon's Prime, now the Adobe "annual paid monthly" subscription plan. The Federal Trade Commission ("FTC") once again is targeting alleged burial of material terms, hidden charges and complicated cancellation procedures. *See* Complaint, *U.S. v. Adobe Inc.*, No. 5:24-cv-03630 (N.D. Cal. filed June 17, 2024).

The FTC alleges that Adobe (and its executives) hid material fees and made cancellation procedures too difficult. According to the FTC, Adobe steers consumers to the company's most lucrative "annual paid monthly" subscription plan, its most popular plan, by pre-selecting the plan as a default and displaying the "monthly" cost during enrollment. The FTC further alleges that Adobe does not clearly disclose that cancelling the plan during the first year will result in an "Early Termination Fee" (ETF) equal to 50% of the remaining first year's plan payments that can total hundreds of dollars. On the other hand, Adobe quite clearly discloses the ETF when a subscriber attempts to cancel their plan, using the ETF as a powerful retention tool but with adequate disclosure only after the customer has already committed to the plan.

The FTC asserts that Adobe buries the information on its website in "fine print" or requires potential customers to take extra steps by hovering over small icons to find material disclosures in optional text boxes. Efforts to cancel are deterred by an onerous and complicated cancellation process.

The FTC concludes that Adobe's actions violated federal consumer protection laws, including the Restore Online Shoppers' Confidence Act ("ROSCA"), constituting an unfair or deceptive act or practice under Section 5 of the Federal Trade Commission Act.

While directed at online sales, the FTC's action is another reminder for members of the financial services industry to carefully evaluate every aspect of product and program offerings and consider the experience of customers and potential customers — from marketing and promotion through servicing and account termination, especially with regard to optional consents and ancillary offerings.

Have you accurately described how your offered products, programs or sought after consents operate? Have you provided complete and timely information, including key factors that a consumer might consider to make an "informed" (valid) decision? In presenting information, have you provided adequate captions, bullets or other devices to break up blocks of text for easy identification of pertinent information or provided clear direction on where to obtain further details and information? Is information appropriately prominent or conspicuous for consumers to effectively notice and understand, *i.e.,* have you placed information in plain view or must a reader go searching? Are disclosures in close proximity to the triggering claim? Have you used clear and unambiguous language?

Regulators are clear: the person communicating will be held to a high standard and may become liable for any failure to communicate clearly and effectively, even if a particular (but not entirely unreasonable) reading clearly was not *intended*. *See, e.g.,* our ALERTS of Mar. 15, 2013, Feb. 9, 2023 and Mar. 5, 2024.

Another periodic review of your communications and creatives may be in order. Various practices can be problematic, such as:

- Putting key information in obscure locations, like the use of optional disclosure methods to convey material terms;
- Including disclosure links that are not obvious or require multiple clicks to reach the relevant disclosure
- Using small type sizes or low contrast type;
- Using lengthy, densely packed lines of type or footnotes that are distant from the text they qualify (such as footers on lengthy emails that may be viewed on screens that provide limited visibility, as compared to physical creative that can more easily be scanned from top to bottom);
- Including distracting elements that can diminish the effect of disclosures, like the use of oversized type, where relevant disclaimers may be provided in comparatively much smaller type; or
- Implementing complex cancellation or termination procedures that unduly inhibit a consumer's ability to cancel or terminate.

Context, presentation and format matters and every communication should be evaluated on its own merits — but also within the broader context of the flow of information to the recipient.

A variety of other, more specific, considerations can also apply:

- Use of the term "free";
- Use of comparatives and superlatives ("best," "highest," "low,"

Darrell L. Dreher
ddreher@dltlaw.com

Elizabeth L. Anstaett
eanstaett@dltlaw.com

Susan L. Dreher
sdreher@dltlaw.com

2750 HUNTINGTON CENTER
41 S. HIGH STREET
COLUMBUS, OHIO 43215
TELEPHONE: (614) 628-8000 FACSIMILE: (614) 628-1600
WWW.DLTLAW.COM

Michael C. Tomkies
mtomkies@dltlaw.com

Mercedes C. Ramsey
mramsey@dltlaw.com

Robin R. De Leo
robin@deher-la.com

etc.);

- Use of absolutes ("never," "always," "none," "no annual fee," etc.);
- Use of unsubstantiated claims ("top choice," "top-rated," "market leading," etc.);
- Consistency with language in corresponding contracts;
- Guarantees, puffery and gimmicks;
- Future changes (*e.g.*, *Rossman* disclosure);
- Context-appropriate promotion (*e.g.,* touting car "reservation" versus "rental" or "worldwide acceptance" for subprime accounts with large fees and very small credit limits; etc.); and
- Multi-language/multi-cultural offerings.

Numerous tips, tricks and recommendations can be followed to achieve full, fair, effective and yet economical disclosure.

Having a third party periodically evaluate your communications in light of changing regulatory standards and perspectives can be very helpful, especially as new creatives are developed and tested, which may alter the effectiveness of prior communications as a whole.

With decades of experience, we offer assistance to clients in reviewing a variety of materials and communications for issues such as these, particularly from the broad, flexible and continuously developing perspective of unfair, deceptive or abusive acts and practices. Let us help you! ❑

✧ *Mike Tomkies, Elizabeth Anstaett and Mercedes Ramsey*