

## When Is Advertising Services As “Free” False and Deceptive? Why Honesty Alone Is Not Enough



### Executive Summary

On September 8, the Federal Trade Commission’s (FTC) Chief Administrative Law Judge (ALJ) issued an initial decision ([here](#)) that found Intuit Inc. (Intuit), the maker of the widely-used TurboTax tax filing software, to have engaged in deceptive advertising in violation of Section 5 of the FTC Act.

The challenged advertisements, many of which featured the word “free” repeated multiple times, failed to adequately disclose the limitations and eligibility criteria associated with the company’s free tax filing service. The ALJ found these advertisements misleading because the majority of taxpayers simply did not qualify for TurboTax’s free offering.

Following on the heels of Intuit’s \$141 million multi-state settlement last year regarding these same “free” campaigns, the ALJ’s ruling serves as an additional potent reminder of the importance of clear and honest advertising practices. Companies that utilize the term “free” in their marketing campaigns must ensure that their offers are truly free for all consumers and that any qualifications are clearly and conspicuously stated, or they risk facing severe legal consequences.

---

---

## Background

Since at least 2016, Intuit has offered a free version of TurboTax called “Federal Free Edition” or “TurboTax Free Edition.” The availability and qualifications for this free version have changed over time based on IRS requirements. Many taxpayers do not qualify for TurboTax Free Edition, as it is limited to individuals with “simple tax returns.”

From 2018 to 2021, Intuit ran an advertising campaign called “The Power of Free,” where the word “free” dominated the advertisements, such as “TurboTax Free is free. Free free free free.” These “free, free, free” advertisements were broadcasted over 84,000 times on numerous television networks and viewed millions of times online, primarily on YouTube.

These advertisements also briefly included, during the voice-over at the end, a screen featuring the TurboTax logo, the repeated written word “free” and small, white lettering at the bottom that read: “Free Edition product only. For simple U.S. returns. Offer subject to change. See details at [turbotax.com](https://turbotax.com).”

Intuit’s advertising practices came under scrutiny in March 2022 when the FTC announced its intention to take action against the company.

The administrative complaint filed by the FTC alleged that Intuit’s ubiquitous advertisements for “free” tax filing products and services misled consumers into believing they could file their taxes without any cost. However, a significant portion of taxpayers, including small business owners and those who received 1099 forms for work in the gig economy, were ineligible for the free service. In fact, in 2020, approximately two-thirds of tax filers, or close to 100 million people, could not use TurboTax’s free product.

As its disclosures were “virtually lost” within the context of the surrounding information, the FTC found them insufficient.

The ALJ’s decision centered on the truthfulness of Intuit’s advertisements and adequacy of their disclosures.

## When Is An Ad Deceptive? The FTC’s Legal Standard

Section 5 of the FTC Act prohibits unfair or deceptive acts or practices in commerce. Under this legal standard, advertisements must be truthful and not mislead consumers, and deceptive advertising claims are explicitly prohibited. An advertisement is deceptive if it contains a representation or omission of fact that is likely to mislead a consumer acting reasonably under the circumstances, and that representation or omission is material to a consumer’s purchasing decision.<sup>1</sup>

Thus, the determination of whether an advertisement is deceptive considers three elements: (i) the claims conveyed in the advertisement; (ii) whether those claims are false or misleading; and (iii) whether the claims are material— that is, important to consumers and likely to influence their choices.

---

<sup>1</sup> *POM Wonderful, LLC*, 155 F.T.C. 1, 10 (2013), aff’d sub nom. *POM Wonderful, LLC v. FTC*, 777 F.3d 478 (D.C. Cir. 2015).

---

---

## The Ruling

The ALJ's initial decision, which is subject to appeal to the full Commission, upheld the FTC's claims against Intuit. The ruling declared that Intuit had engaged in deceptive advertising by promoting its "free" tax products and services to consumers who were, in fact, ineligible to use them.

As the ALJ noted, it is irrefutable that a significant percentage of online taxpayers do not use "simple tax returns," rendering Intuit's claim that they could file for free false.

Further, claims related to central characteristics of a product, such as its cost, are presumptively material. The ALJ found that the representation that consumers could file their taxes for free is undeniably material, as it pertains directly to the cost of the service.

Intuit's disclosures about the conditions and qualifications for the free filing offer were often inconspicuous, unclear, or insufficient to convey the terms effectively, and they failed to modify the predominant message of "free." As the ALJ observed, the power of the word "free" in advertising necessitates clear and conspicuous limitations, which Intuit's disclosures failed to provide. Further, ambiguity was introduced through terms like "simple tax returns," and any ambiguity tends to be interpreted against the advertiser.

"The word 'free' is a lure. It is the bait. It is a powerful magnet that draws the best of us against our will 'to get something for nothing.'"<sup>2</sup> As the ALJ noted, "Given the power of 'free' messaging, the need for the advertiser to provide clear and conspicuous disclosures of any limitations or conditions is particularly strong."

Lastly, boilerplate phrases like "see details" or "see if you qualify" on the TurboTax website was considered insufficient to materially change the dominant message of "free" conveyed by the advertisements. As the ALJ found, the advertisements did not effectively communicate the limitations and conditions of the free tax filing offer and they were misleading in emphasizing the "free" aspect without clear and conspicuous qualifications.

Based on these facts, the ALJ found that Intuit engaged in deceptive advertising in violation of Section 5 of the FTC Act.

## Order

In light of his findings, the ALJ entered an order setting forth specific requirements for Intuit's future advertising practices, including:

- **Prohibition Concerning "Free" Offers:** Intuit is barred from representing that a good or service is "free" unless it is either genuinely free for all consumers or all terms, conditions, and obligations are clearly and conspicuously disclosed at the outset of the offer so as to leave no

---

<sup>2</sup> *In re Book-of-the-Month Club, Inc.*, 48 F.T.C. 1297, 1952 WL 104729, at \*14 (May 8, 1952) (also observing "[t]he astute advertiser well knows that once the average mind has received the impression conveyed by the meaning of the word 'free' it can never be completely eradicated by any other words of explanation or contradiction.")

---

reasonable probability that the terms of the offer might be misunderstood. If the goods or services are not free to a majority of U.S. taxpayers, this fact must also be disclosed in a clear and conspicuous manner at the outset of the offer.

- **Prohibited Misrepresentations:** Intuit is further prohibited from misrepresenting any material fact, including the cost of its goods or services, the necessity of using paid TurboTax products for accurate tax filing, or any other material aspects of its goods or services.

### Implications for Advertisers

This decision underscores the importance of transparency and accuracy in advertising, and that businesses must exercise heightened diligence when using the term “free” in marketing collateral.

Additional key takeaways from the decision include:

- **Robust Disclosures Are Essential:** Advertisers making “free” claims should provide clear and conspicuous disclosures that highlight any conditions affecting the offer’s availability. At a minimum, for a disclosure to be clear and conspicuous, it should be easily noticeable (or difficult to miss) and understandable by ordinary consumers, taking into account criteria such as presentation in visual or audible communication, size, contrast, location, and timing. Further, the disclosure must not be contradicted or mitigated by other elements in the communication.
- **Net Impression of Ad Controls:** The net impression created by an advertisement is crucial in determining whether a claim is deceptive. In the Intuit case, the fact that some ads technically stated that TurboTax Free Edition was free does not absolve them of deception if they falsely conveyed to a significant number of reasonable consumers that they could file their taxes for free with TurboTax. Furthermore, even true statements can be deceptive if they create a misleading overall impression.
- **Boilerplate Language May Not Suffice:** Relying on generic disclaimers like “see details” or “find out more” to alter the message conveyed in an advertisement is risky. The FTC often views such language as insufficient to meet clear and conspicuous disclosure requirements.
- **Website Disclaimers Do Not Always Cure Deception:** Advertisers should not assume that website disclaimers can rectify deceptive claims made in other mediums, such as television ads. In the Intuit case, the ALJ ruled that website disclaimers did not cure the alleged deception, especially if customers still believed the product was free after visiting the website. Further, correct information in some advertisements cannot be used to counter a deceptive claim contained elsewhere. The FTC Act is deemed violated if the first contact with the consumer is induced through deception, even if the buyer later becomes fully informed.
- **Complex Transactions Do Not Excuse Deception:** Advertisers cannot use the complexity of a product or service as an excuse for not providing clear and conspicuous disclosures. The ALJ rejected Intuit’s argument that online tax returns are complex and, therefore, consumers should

---

not expect full disclosure in ads. Moreover, to the extent it is difficult to communicate effectively all material eligibility requirements for a company’s products or services, or that doing so would constitute “information overload” that consumers cannot effectively understand or process, the solution is to avoid claims that trigger the need for such clarifying disclosures.

- **Consumer Perception Matters:** Advertisers should consider how consumers perceive their claims. If an advertisement can be interpreted as both an unqualified offer available to the consumer and a qualified offer that may not apply to her, the ambiguity is generally construed against the advertiser. The public is not expected to investigate the truth of advertising claims, so it’s crucial to avoid creating contradictory meanings.
- **Changes to Advertising May Not Be Enough:** Intuit’s argument that changes to its advertising made the case moot was rejected because the facts did not demonstrate a complete cessation of the alleged unlawful conduct. Advertisers should be aware that changes to advertising practices may not always shield them from legal consequences.

## Conclusion

The Intuit case underscores the importance of truthful and transparent advertising practices, especially when making “free” claims. Companies should be aware that using the term “free” in marketing materials must be done with great care to avoid misleading consumers and falling afoul of consumer protection laws.

The decision serves as an important reminder to all companies that when it comes to advertising, honesty, clarity, and conspicuousness truly are the best policy.

---

If you have any questions about this article, please contact:

Robert McHale, Esq.  
R | McHale Law  
9 West Broadway, Suite 422  
Boston, MA 02127  
Tel. 617.306.2183  
Email: [robert.mchale@rmchale.com](mailto:robert.mchale@rmchale.com)



*DISCLAIMER: This article is provided for informational purposes only—it does not constitute legal advice and does not create an attorney-client relationship between the firm and the reader. Readers should consult legal counsel before taking action relating to the subject matter of this article.*