

# BITS

FINANCIAL SERVICES  
R O U N D T A B L E

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August 10, 2011

Federal Trade Commission  
Office of the Secretary  
Room H-113 (Annex I)  
600 Pennsylvania Avenue, NW  
Washington, DC 20508

RE: Dot Com Disclosures, P114506

To Whom It May Concern:

BITS<sup>1</sup>, the technology policy division of the Financial Services Roundtable, appreciates the opportunity to provide comment to the Federal Trade Commission (FTC) on its “Dot Com Disclosures” Business Guidance Publication.

The original May 2000 “Dot Com Disclosures” provided necessary guidance to the business community in a nascent market. We would like to recognize the achievement of the FTC in creating this document for an emerging market. Overall, the financial services industry found the document helpful and convenient for implementing their online marketing disclosures. Despite the maturation of the market since 2000, we believe the existing guidance is very effective and still applicable.

The original guidance adequately set the stage for the continuous advancements of the online marketplace. As a result of numerous rulemakings from 1998-2002, consumers now have the ability to purchase various complex products online (e.g. insurance, securities, banking). With the ability to purchase these complex products online, there is a need for effective disclosures that are easily understood by the consumer. The 2000 “Dot Com Disclosures” Guidance provided requirements that not only allowed for succinct disclosures to view on a smaller screen, but also increased consumer readership and comprehension. For example, this document provided guidance to the industry validating the use of hyperlinks for disclosures, which is now a commonly used technique and facilitates consumer understanding.

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<sup>1</sup> BITS addresses issues at the intersection of financial services, technology and public policy, where industry cooperation serves the public good, such as critical infrastructure protection, fraud prevention, and the safety of financial services. BITS is the technology policy division of The Financial Services Roundtable, which represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Roundtable member companies provide fuel for America’s economic engine, accounting directly for \$92.7 trillion in managed assets, \$1.2 trillion in revenue, and 2.3 million jobs. For more information, go to <http://www.bits.org/>.

The May 2000 guidance has allowed innovation in the online marketplace to occur and for the successful implementation of disclosures on new devices to access the Internet. We discourage the FTC from providing specific comments on the tool used to access the Internet. The original guidance allowed the flexibility for institutions to interpret and implement as new devices for access evolved. We believe institutions should provide comparable user experiences across devices and the current rules allow for institutions to implement as appropriate.

#### *Current Rulings and Final Rules*

As mentioned above, the online marketplace has progressed and changed since the release of the “Dot Com Disclosures” guidance in 2000. Various courts and agencies have provided rulemakings and guidance that reflect the intent of the original guidance and provide boundaries to the industry.

The FTC must recognize the marketplace changes, including enforceable agreements and disclosure and the use of hyperlinks. These decisions have helped to “fill in” the legal and regulatory landscape. The following are examples of principles that have emerged from judicial review, and a few of the key cases establishing or expounding on those principles.

*Enforceable Agreements and Disclosures.* Agreements and disclosures are enforceable if clearly presented above, or to the left, of the “call to action” (usually a check box, radio button, or action button). Terms or disclosures that appear under the “call to action” or “below the fold” without any clear signal indicating their existence will not generally be enforceable. Pre-checking a box or button on behalf of a customer agreeing to terms or accepting a disclosure, rather than requiring affirmative action by the customer, may prevent the agreement or disclosure from being effective in many instances.

- A disclosure required by state law to be presented “in writing” may be delivered electronically under the UETA, where the disclosure is clearly presented to the consumer during an online application for insurance. *Barwick v. Geico*, 2001 Ark. 128, 2011 Ark. LEXIS 111.
- A click-through agreement is valid when the title provides notice that the agreement is there to be reviewed, despite the fact that only a small portion of the agreement was visible in the scroll box at any one time, and the assent requirement was satisfied because a subscriber had to click on an “Accept” button below the terms of agreement prior to entering the contract. *Forrest v. Verizon Communications, Inc.*, 805 A.2d 1007 (D.C. 2002).
- Agreement terms and disclosures that appear above, or to the left, of the “call to action” clicked by the customer are enforceable if clearly written and presented. *In Re Vistaprint*, MDL 4:08-md-1994, (Bankr. S.D. Texas 2009).
- License terms on a “submerged” or “subsequent” screen are not “reasonably conspicuous” and do not satisfy notice when plaintiff did not assent to a “browse-wrap Agreement” in which the user was not required to click on an icon expressing assent to the license, or even view its terms, before downloading software governed by the alleged agreement. *Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002).

- Terms and conditions of a software agreement were held invalid because agreement terms were accessible only by twice overriding the default choice of “I Agree” and clicking “Read Now;” twice, meaning a user who clicked “I Agree” was bound by an agreement that had never been seen. *Williams v. America Online, Inc.*, No. 00-0962, 2001 WL 135825 (Mass. Super. Ct. Feb. 8, 2001).

*Use of Hyperlinks.* Clearly labeled hyperlinks may be used to present agreement terms and conspicuous disclosures, so long as the agreements or disclosures are not “nested” behind multiple layers of links.

- Consumers using the Internet are expected to understand that hyperlinks can contain significant information about the terms of use of a given website, thus such consumers will not be permitted to argue that they did not know they were bound by unseen terms. *Hubbert v. Dell Corp.*, 835 N.E. 2d 113 (Ill. App. Ct. 2005).
- Hyperlinked terms of use are sufficiently conspicuous and thus binding if the hyperlink appears in a place on the website that must be viewed by users. It is not necessary to prove that the user actually clicked on the link or read the terms for the terms to be binding, so long as the user had notice of them. *Druyan v. Jagger*, 508 F. Supp. 2d 228 (S.D.N.Y. 2007).
- Use of nested hyperlinks to obscure information or disclosures is not permissible. *CompUSA Agrees to Discontinue Practice of Placing Disclosures Behind Several Links*, 6 ELECTRONIC COM. & L. RPT. (BNA) 562 (May 30, 2001).

We also believe that current disclosure requirements remain effective, especially when considering the previous FTC rulemakings and other laws, which influence marketing disclosures in order to avoid conflicting requirements and supplement the 2000 Guidance. These include:

- 2010 FTC Protecting Consumers Privacy in an Era of Rapid Change<sup>2</sup>
- 2010 Restore Online Shoppers’ Confidence Act<sup>3</sup>, which regulates post-transaction third party selling and necessary disclosures
- 2009 FTC Self-Regulatory Principles for Online Behavioral Advertising: Tracking, Targeting, and Technology<sup>4</sup>
- 2007 FTC Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunities Final Rule<sup>5</sup>
- 2007 Office of the Comptroller of the Currency, Federal Reserve Board, Federal Deposit Insurance Corporation, Office of Thrift Supervision and National Credit Union Administration Fair Credit Reporting Affiliate Marketing Regulations<sup>6</sup>

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<sup>2</sup> Federal Trade Commission. *Protecting Consumers Privacy in an Era of Rapid Change*. December 2010

<sup>3</sup> Restore Online Shoppers’ Confidence Act of 2010, Pub. L. no. 111-345, 124 STAT. 3618 (2010).

<sup>4</sup> Federal Trade Commission. *Self-Regulatory Principles for Online Behavioral Advertising*. February 2009

<sup>5</sup> Disclosure Requirements and Prohibitions Concerning Business Opportunities, Final Rule, 72 Fed. Reg. 15444-15575 (March 30, 2007)

- 2003 Interagency Guidance on Weblinking Activity<sup>7</sup>

*Conclusion*

In closing, we thank the FTC for addressing the issue of disclosures in an online world in 2000. We encourage the FTC to review the many rulings, recommendations, and rules, currently in existence to apply to this space that have reflected the intent of the original guidance and created boundaries for the industry.

If the FTC decides to update the “Dot Com Disclosures,” we request the FTC to identify specifically the concerns they seek to address and strongly encourage any update to be technology neutral to account for the pace and innovation of new technology.

If you have any questions or comments, please feel free to contact me at 202-589-2437 or PaulS@fsround.org, or William Henley, BITS Senior Vice President for Regulation, at 202-589-2402 or William@fsround.org.

Sincerely,

Paul Smocer  
Acting President

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<sup>6</sup> Fair Credit Reporting Affiliate Marketing Regulations, Final Rule, 72 Fed. Reg. 62910-62990 (November 7, 2007)

<sup>7</sup> Interagency Guidance. *Weblinking: Identifying Risks and Risk Management Techniques*. April 2003.