P.O. Box 96503, #33850
Washington, DC 20090-6503
(800) 560-ESRA
esra@esignrecords.org

August 10, 2011

Director David Vladeck
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Dot Com Disclosures: Information About Online Advertising - File No. P114506

The Electronic Signature & Records Association ("ESRA") is a trade association with its mission to help educate the public on the use and acceptance of electronic signatures and records and to promote a legal and regulatory environment that remains friendly to electronic commerce as it grows in importance.[1] ESRA welcomes the chance to submit our views relating to the proposed revision of the Federal Trade Commission's ("FTC") *Dot Com Disclosures: Information About Online Advertising.*

At the turn of the century, rapid adoption of the Uniform Electronic Transactions Act ("UETA")[2] by the states, together with federal enactment of the ESIGN Act ("ESIGN"),[3] enabled the electronic delivery of many legally required state and federal disclosures and agreements to consumers. Electronic commerce has opened up a vast new universe of opportunities to consumers – opportunities to shop for goods and services in a low-pressure environment, to compare terms and pricing, and to select among competing options. It is not an exaggeration (and may be an understatement) to say that every day consumers make hundreds of thousands of better informed, more deliberate and economically advantageous choices as a result of the disclosure options enabled by the

---

[1] More information about ESRA can be found on the ESRA website at www.esignrecords.org.

[2] Adopted by The National Conference of Commissioners on Uniform State Laws in July 1999 and can be found at http://www.nccusl.org/.

[3] 15 U.S.C. § 7001 *et seq*.

ecommerce laws. And the FTC's guidance, *Dot Com Disclosures: Information About Online Advertising*, played a significant role in facilitating these developments.

At the time it was issued in May of 2000, the FTC's guidance was a ground-breaking document written on a virtually blank slate. There were almost no specific judicial decisions or regulations in place to assist businesses in developing online disclosures. The FTC's guidance filled a gap and offered businesses an effective set of general principles to consult and consider when creating online disclosure processes.[4]

In our view, the FTC should be mindful of a few factors as it considers revising the guidance:

- The slate is no longer blank. A number of the same principles laid out by the FTC have been endorsed, and expanded upon, by judicial decisions and later regulatory action.
- The existing FTC guidance remains relevant and useful. Any changes should be limited to adding new or revised guidance in areas that have emerged, or changed, since the original guidance was issued.
- There are specific issues, not addressed by the original guidance or related to practices that have developed since, that could benefit from additional guidance.

We will discuss each of these considerations in more detail below.

Judicial and Regulatory Activity

Over the last ten years, courts and regulators have produced a steady stream of decisions and regulations that contribute to the understanding of effective online disclosures. These decisions have generally affirmed the enforceability of online agreements and delivery of disclosures. However, courts have also set standards, similar to those suggested by the FTC guidance, for determining when presentation of information to consumers online is effective.

[4] *See* SPeRS (Standards and Procedures for Electronic Records and Signatures, www.spers.org) citing the FTC guidance.

Among the principles that courts have now firmly established are:

- Agreements and disclosures are generally enforceable if clearly presented where the consumer is asked to accept or continue the transaction (sometimes referred to as a "call to action");[5]

- As a general proposition, consumers are charged with the responsibility for choosing to read, or bypass, disclosures that are provided to them in connection with many products and services;[6] and

- 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.[7]

One of the features unique to an electronic environment is the "hyperlink" – a highlighted word or phrase that, when selected, automatically takes the reader to new information. The FTC guidance recognized the potential power of the hyperlink as an effective tool in delivering disclosures. The FTC's approach has now been validated by extensive commercial use of the hyperlink to deliver disclosures, demonstrating its utility and flexibility, and by a number of judicial decisions. Courts have affirmed that:

- It is reasonable for businesses to expect consumers using online channels to understand hyperlinks as a tool for delivering information; and

---

[5] See *Barwick v. Geico*, 2001 Ark. 128, 2011 Ark. LEXIS 111 (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); *Forrest v. Verizon Communications*, Inc., 805 A.2d 1007 (D.C. 2002) (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); *In Re Vistaprint*, MDL 4:08-md-1994, (Bankr. S.D. Texas 2009) (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).

[6] See *Druyan v. Jagger*, 508 F. Supp. 2d 228 (S.D.N.Y. 2007) (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).

[7] See *Williams v. America Online, Inc.*, No. 00-0962, 2001 WL 135825 (Mass. Super. Ct. Feb. 8, 2001). 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).

- Hyperlinks may be used to present agreement terms and conspicuous disclosures, so long as the hyperlinks themselves are sufficiently conspicuous and clearly labeled.[8]

By the same token, using hyperlinks to obscure or "bury" disclosures will render them unenforceable.[9]

In addition to the expanding common law, a variety of regulatory initiatives have also affected the legal landscape for online disclosures. These regulatory actions include:

- 2010 Restore Online Shoppers' Confidence Act , which regulates post-transaction third party selling and necessary disclosures;
- 2009 Federal Reserve Board Amendments to Regulations B, E, M, Z and DD, clarifying rules applying to electronic disclosure authorized under ESIGN;[10]
- 2007 FTC Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunities Final Rule;
- 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

---

[8] See *Hubbert v. Dell Corp*., 835 N.E. 2d 113 (Ill. App. Ct. 2005) (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); *Druyan v. Jagger*, 508 F. Supp. 2d 228 (S.D.N.Y. 2007) (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).

[9] See *CompUSA Agrees to Discontinue Practice of Placing Disclosures Behind Several Links*, 6 ELECTRONIC COM. & L. RPT. (BNA) 562 (May 30, 2001) (NY Attorney General determines that use of nested hyperlinks to obscure information or disclosures is not permissible under state UDAP law).

[10] Among other things, the Federal Reserve Board's amended regulations were significant for noting, in the Supplementary Information, that:

- Disclosures are "clear and readily understandable" if the disclosures would be clear and readily understandable when viewed on a typical home computer – this is the standard even if the consumer elects to review these disclosures on a mobile device, since the disclosing party cannot, in many instances, control the type of device the customer uses to access the disclosure.
- The consumer's right to retain disclosures is satisfied if the disclosures are provided in a "standard electronic format" and the consumer has the opportunity to either (i) download and save, or (ii) print out, the required disclosures.

- 2009 FTC Self-Regulatory Principles for Online Behavioral Advertising: Tracking, Targeting, and Technology; and

- 2003 Interagency Guidance on Weblinking Activity.

If the FTC elects to revise the guidance, it should take special care to avoid conflicting with, or contradicting, any of the established common law rules or other regulatory guidance now in place.

Preserving the Existing Guidance

We are not aware of any portion of the existing guidance that has proven either unworkable or ill-advised, or that is out-of-date. Nor are we aware of any statistics or anecdotal evidence suggesting that disclosures presented in conformity with the guidance have been difficult for customers to access, use or retain. To the contrary, the modern Internet offers myriad examples of the effective, responsible delivery of disclosures in conformity with the FTC's guidance, the requirements of ESIGN and UETA, and the emerging common law.

We encourage the FTC to bear in mind that many businesses and websites have deliberately developed their electronic process flows and page designs to conform to the guidance. This means that any significant change to the existing guidance could result in considerable re-design work, which can require a formidable allocation of resources. Accordingly, we urge that changes limiting or criticizing practices currently permitted or approved by the guidance should be adopted only in response to a demonstrated inadequacy, error or oversight in the guidance that requires correction to prevent harm to consumers.

Additional Guidance Related to Later Developments

While the existing guidance remains valid and useful, valuable additions might be made to the guidance addressing significant developments in online commerce that occurred after the guidance was issued. These might include:

- The proliferation of various handheld devices selected by consumers for engaging in electronic transactions;

- The wide variety of practices and processes for entering into transactions with auto-renewable subscriptions for information and online services; and

- Clarifications that an online agreement will not be valid, regardless of its online acceptance, if the terms of the service being agreed to are not adequately disclosed.

Handheld devices

The variety of devices that consumers can use to access electronic information now includes regular or "classic" cellphones, personal organizers (like Blackberry), smartphones, and computer tablets in a variety of sizes and configurations (including the iPod Touch and iPad). While consumers often prefer conducting their electronic commerce using these devices, the devices often to not have the ability to print or download retention copies of disclosures. It would be helpful to have the guidance from the FTC support the current practice of many businesses to provide retention copies of disclosures to the consumer either by:

- Delivering a copy to the consumer's designated email address; or
- Making a retention copy available, with notice to the consumer, at a secure site maintained by the provider of the product or service and to which the consumer has access.

Auto-renewable disclosures

There are both federal and state laws governing the use of "auto-renewal" subscriptions for services and software online. It would be helpful for the FTC to add a section to the guidance outlining best practices, consistent with those laws, for the proper handling of auto-renewal subscription offers.

Adequate disclosure

In the *Matter of Sears Holdings Management Corp.*, FTC File No. 082 3099, the settlement could be incorrectly read to require a higher standard for electronic delivery of conspicuous disclosures, as compared to written delivery. It would be helpful if the FTC could clarify that the settlement was predicated on the fact that the marketing and other content made inadequate disclosures, not that the disclosures failed because they were made electronically.

ESRA thanks the FTC for the opportunity to comment on this important guidance and welcomes further discussion on this topic. We urge the FTC, in updating the guidance, to address the issues we have set forth in a way that will promote electronic commerce and add clarity and certainty for both consumers and business.

Sincerely,

Stephen F. Bisbee
President, eOriginal, Inc.
Chairman, ESRA