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FEDERAL TRADE COMMISSION

IN SHORT: ADVERTISING AND PRIVACY DISCLOSURES IN A
DIGITAL WORLD

Wednesday, May 30, 2012

9:00a.m.

Federal Trade Commission
FTC Conference Center
601 New Jersey Avenue, N.W.
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1 PROCEEDINGS

2 (9:00 a.m.)

3 MS. KRAINSKY: Good morning, and welcome to our
4 workshop, In Short: Advertising and Privacy Disclosures
5 in a Digital World. My name is Ella Krainsky and I'm an
6 attorney with Bureau of Consumer Protection in the
7 Division of Advertising Practices.

8 We're very happy to see you all here and we're
9 looking forward to informative and lively discussion
10 today.

11 Before we begin this morning, I do have a few
12 administrative matters to mention. First, if you have
13 any questions for our panelists at any time, please write
14 them on a comment card and hold up the card for one of
15 our workshop team members to collect it. If you need a
16 comment card, just raise your hand and we'll get one to
17 you as soon as possible.

18 If you're joining us via webcast, please submit
19 questions to FTCdisclose@ftc.gov. If you're tweeting
20 about the workshop, please use the hashtag, [FTCdisclose](https://twitter.com/FTCdisclose).

21 Restrooms are located across from the entrance
22 to the conference center, past the security desk to the
23 left.

24 If you leave the building at lunch or any other
25 time, please remember to allow for some extra time as you

1 will have to go through the metal detectors again.

2 Finally, please remember to silence your mobile devices.

3 And, now, without further ado, I'd like to
4 welcome you all again and introduce Commissioner Maureen
5 Ohlhausen to open the workshop. Thank you very much.

6 (Applause.)

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1 WELCOME AND OPENING REMARKS

2 COMMISSIONER OHLHAUSEN: Good morning, and
3 welcome to the FTC's workshop on In Short: Advertising
4 and Privacy in a Digital World. I'm Maureen Ohlhausen.
5 I'm the newest commissioner, having been here just about
6 two months. But as part of my background, you should
7 know that I served for almost 12 years at the Commission
8 previously. During that time, advertising and privacy
9 were two of the most important and interesting issues
10 that I worked on.

11 This workshop promises to be an incredibly
12 informative program on a topic that is changing as
13 rapidly as any issue on which the FTC has jurisdiction.
14 I know that the discussion today will significantly add
15 to our understanding of this critical issue and thereby
16 help advance our goal of enabling consumers to make their
17 own informed choices.

18 Also, I believe the FTC should use all of its
19 tools to advance its mission and am thus a strong
20 supporter of workshops and outreach like today's event,
21 which bring together a variety of stakeholders.

22 It is hard to underestimate the importance of
23 advertising and privacy disclosures. Many of the
24 Commission's advertising rules and guides and orders
25 require clear and conspicuous disclosures and the FTC Act

1 requires that if an advertisement makes an express or an
2 implied claim that is likely to mislead without certain
3 qualifying information, that information must be
4 disclosed clearly and conspicuously.

5 Similarly, with respect to privacy,
6 transparency is a baseline principle outlined in the
7 Commission's March 2012 Privacy Report. And one of the
8 chief ways that businesses achieve transparency is
9 through meaningful and clear disclosures to consumers.

10 In Dot-Com Disclosures issued in 2000 -- and
11 later in my speech, I will refer to it as DCD, so Dot-Com
12 Disclosures (DCD) -- Commission staff took up the
13 question of how FTC consumer protection rules apply to
14 advertising and sales made via the Internet and concluded
15 that the same consumer protection laws that apply to
16 commercial activities in other media apply online as
17 well. The central topic in that discussion was how to
18 make clear and conspicuous disclosures online.

19 The advice given was practical and flexible,
20 and based on the tenor of the comments filed, has been
21 well received by online advertisers. And I certainly
22 recall that when I was in private practice, I did turn to
23 the Dot-Com Disclosures guidance to help counsel my
24 clients.

25 But what a difference a decade makes. When

1 Dot-Com Disclosures was issued, who could have imagined
2 the world we live in now? Tablet computers and
3 smartphones and apps, social media, tweets, using your
4 phone to get an instant discount, you know, on a meal at
5 your favorite restaurant in your neighborhood, walking
6 down the street and having your phone tell you that the
7 coffee shop a couple blocks away has a special offer
8 today, and then also simultaneously telling hundreds of
9 your friends that you like a particular product.

10 These technological advances have been nothing
11 short of really amazing. But as is so often the case,
12 each of these technological advances brings not only new
13 opportunities, but new challenges. As the three-inch
14 smartphone screen takes over from the 17-inch computer
15 monitor as the means of delivering advertising to
16 consumers, how do marketers ensure that the information
17 consumers need to fully evaluate the advertiser's
18 statement, you know; i.e., to prevent the ad from being
19 misleading, are clear and conspicuous? How and where
20 should that coffee shop tell you that to get a free cup
21 of coffee, you need to buy two pounds of beans? How do
22 advertisers effectively communicate this information on
23 social media platforms that have their own space or
24 content limitations? How should someone who can only use
25 140 characters tell readers that they got the product

1 they're endorsing for free?

2 Finally, as consumers increasingly utilize
3 mobile devices to perform such activities as browsing the
4 web to check out the latest headline or sports score,
5 launching an app to find a nearby gas station, pay their
6 credit card bill and possibly their rent or their
7 mortgage, how should businesses relay key information to
8 consumers about their privacy practices, including how
9 they may be collecting, using or sharing consumer data?

10 When the Commission first sought input on Dot-
11 Com Disclosures in May 2011, some commenters said the
12 matter should be left to industry self-regulation, while
13 others said that any new guidance should be sufficiently
14 flexible to account for future developments in
15 technology. As those of you who follow the Commission
16 closely know, we are strong advocates of industry self-
17 regulation. However, we also believe that self-
18 regulation usually works best when it's backed up by a
19 law enforcement presence. At the same time, we are
20 cognizant of how fast technology is evolving and we
21 understand the need for and benefits of innovation.

22 The original DCD business guidance document did
23 not expand the application of Section 5. It merely
24 explained how the long-standing principles of advertising
25 law applied to what were their relatively new online

1 media. And that is again what we are looking to do as we
2 revise DCD. On the privacy side, we will explore, later
3 this afternoon, how mobile privacy disclosures are made
4 and how these disclosures can be short, effective and
5 accessible to consumers.

6 Our discussion today will not focus on the
7 question of what information must be disclosed in
8 advertising or in practice disclosures. Nor in the case
9 of ads, will we focus on who may be liable among the
10 parties involved in the process of creating and
11 publishing the ads, and we know that there can be many
12 parties involved in a single page. Rather, we will focus
13 on how, assuming that certain information must be
14 disclosed to consumers, how can it be done effectively?

15 Although the panelists will all have their own
16 views, the collective goal of today's discussion is to
17 explore and develop best practices for advertising and
18 privacy disclosures in social media and on mobile
19 devices. Clear and conspicuous disclosures have an
20 obvious consumer benefit, but I'm sure that we all
21 recognize that it is in everyone's best interest to
22 ensure that consumers have positive experiences and are
23 making informed choices when they use today's mobile or
24 social media tools or tomorrow's exciting innovations.

25 So, today's workshop brings together all of the

1 key stakeholders in this area, consumer advocates,
2 advertisers, trade associations, social media platforms
3 and academics. These are the people who are on the front
4 line in tracking these issues. Their presentations will
5 help inform the Commission as we continue to develop our
6 expertise in this area.

7 Thank you very much for joining us today and
8 enjoy the workshop.

9 (Applause.)

10 MS. KRAINSKY: Thank you, Commissioner
11 Ohlhausen.

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1 PRESENTATION ON USABILITY RESEARCH

2 MS. KRAINSKY: We'd like to begin this morning
3 with a presentation on usability research by Jennifer
4 King, who's a Ph.D. candidate at the University of
5 California - Berkeley. This presentation will provide
6 you with some background into the challenges that
7 consumers experience finding disclosures in digital and
8 mobile media.

9 MS. KING: Good morning, everybody. I am
10 Jennifer King. I'm a Ph.D. candidate at the UC-Berkeley
11 School of Information where my research focuses on using
12 human computer interaction methods to understand people's
13 expectations of information privacy. So, thanks to the
14 FTC for asking me to speak here today.

15 I'm here to kick off today's discussion by
16 talking about methods for improving disclosures and
17 privacy policies. I realize that we'll be spending the
18 day talking about what doesn't work and my goal is to
19 highlight some of the constructive work that's been done
20 by my community, the human computer interaction field, to
21 improve disclosures and privacy policies.

22 So, the FTC uses the perspective of the
23 reasonable consumer to evaluate online disclosures and
24 privacy policies. This is likely a familiar concept to
25 many of you in the audience today. But to those who are

1 unfamiliar with it, I will quote very briefly from the
2 FTC's deception policy statement to provide a basic
3 overview, which is "When representations or sales
4 practices are targeted to a specific audience, the
5 Commission determines the effect of the practice on a
6 reasonable member of that group. The Commission will
7 evaluate the entire advertisement, transaction or course
8 of dealing in determining how a reasonable consumer are
9 likely to respond."

10 As an HCI researcher and a non-lawyer, when I
11 read this, I ask, how do we reliably measure this
12 concept? How do we approach this without an externally
13 valid reproducible method for gauging how a reasonable
14 consumer evaluates a statement.

15 The field of human computer interaction, or
16 HCI, approaches the concept from a -- approaches the
17 concept of a reasonable consumer from a different
18 perspective. But first let me describe what HCI is, and
19 I have a few definitions for you up on the screen. As an
20 academic field, HCI has existed for over 30 years. Today
21 it's a diverse field of both academics and practitioners
22 who typically have training in some combination of
23 computer science, information science, visual design and
24 cognitive science.

25 HCI practitioners work in specialties such as

1 user experience research, visual design, usability
2 testing and information design. We practice a
3 methodology called user-centered design where our
4 approach is guided by our users' needs, perceptions and
5 expectations. HCI offers design principles derived from
6 empirical research that take into account our shared
7 cognitive and perceptual limitations.

8 Disclosures and privacy policies exist to
9 communicate information to consumers and HCI
10 practitioners are experts in determining how to present
11 information to consumers in digital environments.

12 Crucially a key component of the design process
13 is user testing, putting our designs in front of our
14 users to ensure effectiveness. The benefit of using HCI-
15 based design principles is that they are suggestive and
16 not prescriptive. By drawing on them, we can start
17 creating disclosures that are user-friendly by design.
18 Because our work is guided by human cognitive
19 limitations, we may not be able to say with certainty
20 what is reasonable, but we can say what is effective.
21 The policy question is what level of success or failure
22 presents an acceptable outcome.

23 So, now, I'd like to introduce a few key
24 concepts underlying how HCI practitioners approach
25 improving disclosures using examples that are directly

1 relevant to disclosures and privacy policies. Please
2 note that these are examples and I don't necessarily
3 endorse them unreservedly as design solutions.

4 So, the first concept I'm going to talk about
5 relates to how people process information. People are
6 goal-oriented. So, whether you are seeking information
7 online or playing a computer game, you have a goal in
8 mind when you visit a website or open an application.
9 This goal-orientation narrows a person's focus to
10 concentrate on the tasks or content they need in order to
11 reach that goal, and the consequence is what researchers
12 call selective attention.

13 So, my next slide, I have a quiz for you all.
14 Nothing like starting the morning with a quiz. So, the
15 first question is, can you spot the scissors on the next
16 slide? And I'm only going to have it up for about two
17 seconds. So, ready? Okay, so, quick quiz. Did the
18 toolbox contain a hammer? Anybody want to say yes? A
19 few people? Okay. It actually did. And, so, if you
20 didn't notice, you are most likely not alone in this
21 room. Because I primed you for that task, you were
22 focusing your attention on that one activity of looking
23 for the scissors.

24 So, I hope it's not a surprise to hear that
25 people aren't visiting a website or using an app in order

1 to read a disclosure or a privacy policy. As long as
2 these elements are disconnected from a user's primary
3 activity, they will generally remain unread and
4 unnoticed. From an HCI point of view, this is reasonable
5 behavior. We would expect anything a user was required
6 to read would be part of the user's task flow. Thus,
7 when considering how to present a notice or a disclosure,
8 research suggests that timing is crucial. In order to
9 get a notice noticed, its presentation should be tied to
10 an action or to a goal with some relationship to the
11 notice itself.

12 So, here's an example of what's variously
13 called a popover or a tool tip within the browser. This
14 is a disclosure made within the context of a specific
15 goal. In this case, it's evaluating a potential
16 purchase. The disclosure is proximate to the product and
17 offered in the context of actually evaluating it.
18 Proximity and context are key principles. Disclosures
19 and notices need to be located both in the user's task
20 flow and in a context that makes sense, given the other
21 actions that the user is taking at that time.

22 So, my next example is from a mobile device and
23 many of you will recognize this as the location prompt
24 from the iPhone. Again, this is not a perfect example,
25 but it is a good example of something that's contextually

1 relevant, it's well-timed and it provides the user with
2 an actionable choice, whether to disclose to the MAP
3 application their current location or not.

4 So, the next concept I want to discuss is how
5 people read on screens. It's well understood that people
6 don't read webpages in their entirety and they scan them
7 quickly, typically reading only about a quarter of the
8 content on a page. To some extent, this is due to the
9 strain of reading on a screen, as well as to selective
10 attention. This principle suggests that we need to aid
11 users by designing for increased readability. This means
12 that pages should have a clear visual hierarchy so people
13 know where to look for information and that the writing
14 itself should be concise and reader-friendly.

15 So, this next example is one of how people
16 actually read on webpages. This image was generated
17 using eye-tracking software, which tracks where people's
18 eyes are on a screen as they actually read the page.
19 This example is taken from the work of Jacob Nielsen, who
20 has tested hundreds and hundreds of people as they read
21 all types of different websites. So, you'll see that
22 people look for clues on a page to determine where to
23 find the most relevant information. That's why you see
24 consistent patterns in eye-tracking studies. People are
25 scanning the areas where they have learned to find the

1 most useful information.

2 On webpages, that typically leads users to
3 navigation bars and menus and results in an F-shaped
4 reading pattern. And you can see from that image that
5 the red parts of the image are where people are spending
6 the most amount of time with their attention, and it gets
7 cooler and cooler. The blue are the least and the gray
8 areas are areas where people did not look at all when
9 they were looking at the page.

10 So, in contrast, so here's an example of what
11 most privacy policies look like today. This is a
12 screenshot I took of what I'd call medium-large screen,
13 my monitor at home, a 23-inch wide-screen diagonal. And
14 what you're seeing here is the policy. After I zoomed
15 out my browser display as far as possible, I still had to
16 take two screenshots to get it all to appear on one page.
17 So, you can see some of the criticisms I have on this.
18 It's extremely long. It lacks a good visual hierarchy.
19 People don't know where to look for information for this.
20 There's no call to action. There's nothing that tells
21 them what to do or what they can take away from it. And
22 the reading level is fairly sophisticated. In a lot of
23 cases, you're going to need a college degree or perhaps
24 even a law degree to interpret these things.

25 And, so, this next example is from a mobile

1 device, my own, in fact. So, this is using the mobile
2 browser and not an app, to make that clear. So, you
3 can't read this and, frankly, I couldn't, either, when I
4 took the photo of it on my phone, which is in my hand.
5 Reading full-size webpages on a mobile device is a real
6 serious challenge. And in this case, it's nearly
7 impossible without a lot of zooming, a lot of scrolling
8 and a lot of patience. But using insights about how
9 people read, designers are redesigning existing notices
10 for better readability.

11 One of the most significant flaws with existing
12 notices is the lack of a visual hierarchy. Reading on
13 screens is a difficult task. It's not natural for us.
14 The more concise text can be made on a screen with clear
15 visual cues to help people find what they need, the
16 higher probability that it will actually be read. So,
17 next I'm going to show you a few examples from academics
18 and practitioners who are working to improve the existing
19 system of notices.

20 And, so, this is an example by designer, Gregg
21 Bernstein. He took the Apple iTunes licensing agreement
22 and redesigned it. And he uses a clear visual hierarchy
23 to draw attention to the key points of the documents. He
24 uses a numeric outline, bullet points and icons to help
25 make it clear and digestible. He also parses the

1 agreement into text that is far easier to read and
2 concise and he also includes some very clear calls to
3 action for the consumer so they know what they actually
4 have to do to get through it and to accept or acknowledge
5 that they've read it.

6 My next slide is work by a Ph.D. student,
7 Patrick Kelly, and some of his colleagues at Carnegie
8 Mellon. They've tested different variations of
9 summarizing privacy policies and they've found that
10 standardizing the presentation into what they call a
11 nutrition label style approach has greatly increased both
12 readability and comprehension in their studies. And this
13 is due to both the consistency of that framework, people
14 know where to look, and the distillation of the text into
15 really concise key points. So, this example shows a
16 standardized table that they came up with, as well as a
17 much shorter version on the right.

18 And, so, my next example, this is work by
19 Travis Pinnick, he is a user experience designer at
20 TRUSTe and he's been refining a similar approach called
21 layered privacy notices. So, in this case, he's condensed
22 the notice and organized it into a clear visual
23 hierarchy. He's called out the choices and tools that
24 are available to consumers. But note that it still does
25 contain quite a bit of textual description. And one

1 thing to note about this approach is that while this
2 design makes it easier to find information that you want,
3 there's no guarantee that consumers are going to read the
4 entire thing. So, if there's information that people
5 must read prior to making a decision, a contextual
6 disclosure would be more appropriate.

7 So, let's next talk about mobile devices which
8 pose an even greater design challenge. A recent study
9 indicated that the comprehension of privacy policies on
10 mobile devices decreased from about 40 percent on the
11 desktop, which isn't great -- 40 percent's a pretty low
12 comprehensibility marker -- to only about 19 percent when
13 they're read on phones. And this finding was
14 attributable to the size of the text on the screen and
15 the need to scroll to view a lengthy document on that
16 small screen.

17 We also need to be aware that mobile users can
18 use their devices in many more contexts than desktop
19 users, which makes effective design an even greater
20 challenge.

21 So, the example on the screen right now is the
22 example of a notice actually taken from an application on
23 the phone, not the mobile browser. So, this is from
24 Twitter and they optimize this version of their privacy
25 policy from their mobile app. And you can see that it is

1 actually readable compared to the example I showed you
2 earlier. But that was just the first page.

3 (Laughter.)

4 MS. KING: So, again, this is the device I took
5 it on which is my Android phone. So, I had to scroll
6 through the entire policy -- it was 16 screens total --
7 to capture the entire thing. So, you can see that
8 substantively, this really isn't an improvement. Again,
9 there's little visual hierarchy, people don't know where
10 to look. There's no call to action. There's no takeaway
11 for people. And most people are going to navigate away
12 from this without reading the entire thing.

13 And, so, my last slide, this, again, is an
14 example from Travis Pinnick at TRUSTe where he offers a
15 notice style that's actually optimized to work within a
16 mobile form factor. This style is called the short
17 notice or progressive disclosure. And it gives users,
18 again, an easier way to find information on a very small
19 screen.

20 So, to close today, I want to emphasize that
21 despite the examples I've shown you, design and
22 improvement of disclosures and notices remains largely
23 unexplored by the HCI field. While there is a small
24 group of academics and practitioners who have been
25 working on improvements, to date, there's been little

1 investment in improving disclosures by most companies.
2 This is an area of research that would benefit from a
3 multi-disciplinary, multi-organizational group working
4 together to make these experiences as consistent and
5 user-friendly as possible.

6 The benefit of the growing ubiquity of mobile
7 devices is the recognition that we can't take what we've
8 been doing on the Internet, which we know hasn't worked,
9 and apply it to mobile without significant changes.
10 While designing for mobile is a challenge, I actually
11 think there's reason to be optimistic because there's
12 many talented designers and user-experience researchers
13 out there who have yet to even take a crack at this
14 problem. And the more participation we can get will
15 yield many more creative solutions.

16 So, in closing, I hope that the outcome of
17 today's workshop will be progress towards creating more
18 consistent, engaging and usable disclosures and privacy
19 policies for consumers. Thanks.

20 (Applause.)

21 MS. KRAINSKY: Thank you, Ms. King. I just
22 wanted to remind everyone that if you do have questions
23 for the panelists, please write them on a comment card.
24 If you need a comment card, please raise your hand and
25 we'll get one to you as soon as we can.

1 We're also getting a few more chairs in the
2 room because we have some people that need a place to
3 sit. And I actually see a few in the middle section if
4 folks need to sit down.

5 All right, so we'll now have our first panel,
6 Universal and Cross-Platform Advertising Disclosures.

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1 PANEL 1: UNIVERSAL AND CROSS-PLATFORM ADVERTISING

2 DISCLOSURES

3 MR. OSTHEIMER: Good morning, everyone. My
4 name is Michael Ostheimer. I'm an attorney in the
5 Division of Advertising Practices. And thank you for
6 coming this morning.

7 Before we start the first panel, I'd like to
8 give you a little background, mostly drawn from the 2000
9 Dot-Com Disclosure guidance document. After that, I'll
10 ask the panelists to introduce themselves briefly and
11 then I'll give a little bit more background, we'll show
12 the first example that we have, and we'll start our
13 discussion.

14 The first three panelists today will focus on
15 disclosures that are required under the laws that the FTC
16 enforces. We do not intend to address disclosures that
17 might be required by other federal and state laws. As
18 Commissioner Ohlhausen mentioned, disclosures may be
19 required to prevent an ad from being deceptive or unfair
20 under the FTC Act or they may be required under the
21 various laws and regulations that the FTC enforces.

22 When it comes to online ads, the basic
23 principles of advertising law apply. A disclosure that
24 contradicts a claim will not be sufficient to prevent an
25 ad from being deceptive. Disclosures that are required

1 must be presented clearly and conspicuously. To make a
2 particular disclosure clear and conspicuous, a marketer
3 should consider, among other things, the placement of the
4 disclosure in an ad, the prominence of the disclosure and
5 its proximity to the claim that is qualifying. Whether a
6 disclosure is clear and conspicuous is measured by its
7 real world performance; that is whether consumers
8 actually see, read and understand it within the context
9 of the ad. The key is the ad's overall net impression.

10 In reviewing their online marketing,
11 advertisers should adopt the perspective of a reasonable
12 consumer, as Ms. King previously noted. Among other
13 things, assume that consumers don't read an entire
14 website. Disclosures must be communicated effectively so
15 that consumers are likely to notice and understand them.
16 If consumers have to actively look for information
17 available on a website, it doesn't meet the clear and
18 conspicuousness standard.

19 And, now, I'd like to ask the panelists to
20 briefly introduce themselves.

21 MR. DELBIANCO: Thanks, Michael. And in
22 addition to the introduction, give a brief opening
23 statement? Is that what you want us to do?

24 MR. OSTHEIMER: Just an introduction.

25 MR. DELBIANCO: Just introductions. Steve

1 DelBianco. I'm Executive Director with NetChoice, which
2 is a coalition of leading ecommerce platforms and online
3 services.

4 MS. GOLDSTEIN: I'm Linda Goldstein
5 representing the Promotion Marketing Association.

6 MS. GREENBERG: Never ask a group of people who
7 are here to talk about advertising to only introduce
8 themselves. They always want to do an ad. But, anyway,
9 I'm Sally Greenberg. I'm Executive Director of the
10 National Consumers League.

11 MS. KING: Jennifer King, UC-Berkeley School of
12 Information.

13 MR. SINGER: Good morning, Paul Singer with the
14 Texas Attorney General's Office.

15 MS. WALKER: Good morning, I'm Svetlana Walker.
16 I'm here with the Clorox Company.

17 MR. OSTHEIMER: I'd like to start the first
18 panel out talking about hyperlinks. In 2000, FTC staff
19 said that disclosures that are an integral part of a
20 claim or inseparable from it should be placed on the same
21 webpage and immediately next to the claim without
22 referring the consumer to somewhere else. We emphasized
23 that this is particularly true for cost information and
24 for certain health and safety claims and disclosures.

25 At the same time, we said that a hyperlink

1 disclosure may be useful if a disclosure is lengthy. We
2 said that the hyperlinks label should convey the
3 importance, nature and relevance of the information to
4 which it leads and that a hyperlink simply labeled
5 disclaimer, more information, details or terms and
6 conditions does not communicate the nature or
7 significance of the information to which the disclosure
8 leads.

9 Several of the public comments staff recently
10 received as part of this process suggested that staff
11 revisit its guidance and be more lenient in terms of
12 hyperlink labeling.

13 With that background in mind, I'd like you to
14 look at a hypothetical website selling a Frost-A-Tron
15 cooler. Right below the product's price it says that
16 satisfaction is guaranteed and below that is a
17 hyperlink labeled disclosure. If a consumer clicks on
18 the hyperlink, it leads to a lengthy disclosure about
19 substantial restocking fees that apply if the item is
20 returned. Assuming that the disclosure is required to
21 qualify the guarantee, is the hyperlink's label adequate?
22 I'd like the panelists to weigh in.

23 And just to remind the panelists, if people
24 want to speak, please stand your card up on its end and
25 I'll know who is interested in speaking. Why don't we

1 start with Linda Goldstein.

2 MS. GOLDSTEIN: Thank you, Michael. Just
3 before I answer the question specifically, we wanted to
4 make some general comments just regarding the use of
5 hyperlinks and disclosures in general, which really will
6 ultimately get to the answer.

7 Because of the rapid changes in technology, the
8 fact that we're looking at this particular message on a
9 website, but it may be syndicated, it may be viewed in
10 other screens and other platforms with more limited real
11 estate, we do think there are some general principles
12 that should guide the FTC in its approach, particularly
13 to hyperlinks. And that is greater flexibility, more
14 leniency and the notion that less is more. Without that
15 flexibility, marketers will be precluded from using many
16 of the innovative formats that the technology is
17 affording.

18 The second thing is we think that the FTC needs
19 to acknowledge that space considerations often make it
20 very difficult to make lengthy disclosures and,
21 therefore, there has to be a more lenient rather than a
22 more restrictive approach to hyperlinks and disclosures
23 in general.

24 Third, we believe there has to be a fundamental
25 shift in the way the FTC views advertising and consumer

1 behavior. I think this is a good example that the FTC
2 has historically viewed advertising in a linear fashion
3 and has taken a very static approach to disclosures,
4 meaning where on the page should it be. Sometimes in
5 today's environment, there may not even be a page.
6 Consumers today have the ability to multi-task. They go
7 in and out of disclosures and they interact with content
8 differently than they did ten years ago when these
9 guidelines were first visited.

10 So, I think what this all leads to is the
11 answer to whether this disclosure is adequate is it may
12 depend. We think the use of a hyperlink as a means to
13 disclose information is appropriate and there should be
14 more, rather than less, use of hyperlinks.

15 In this particular case, it depends what it is
16 that's going to be disclosed via this hyperlink. If it's
17 information that's likely to be within the consumer's
18 expectation, things that the consumer might expect, like
19 conditions associated with the satisfaction guarantee,
20 what the consumer has to do in order to return the
21 product. And they're reasonable conditions that would fit
22 within reasonable consumer expectations, then the use of
23 a hyperlink is probably appropriate. If there's some
24 incredibly restrictive, onerous requirement that might
25 not fit within the consumer's expectation, then perhaps

1 some additional contextual disclosure might be required
2 and perhaps some additional labeling might be required.

3 The other thing we would say is I know there's
4 a concern about generic disclosures in general and there
5 may be a concern just about use of the term "disclosure"
6 and whether that's too generic to be a meaningful call to
7 action for consumers, but, again, I think given the
8 realities of limited real estate and space constraints,
9 marketers are going to be forced to bundle together more
10 disclosures, and that's going to make it difficult to
11 have individually labeled disclosures for every piece of
12 information.

13 So, as the Commission thinks about this, we
14 would encourage the Commission to think more broadly and
15 more generically and to embrace the idea of more generic
16 disclosures that meaningfully tell the consumers there's
17 important information, but don't necessarily identify
18 that specific information because there may be multiple
19 layers of information that are being disclosed through
20 that link.

21 MR. OSTHEIMER: Sally?

22 MS. GREENBERG: Linda, I can appreciate that
23 your organization and the companies that you represent or
24 industries that you represent might want more flexibility
25 and I think that that's something that we should consider

1 very seriously.

2 However, if we take an example like this where
3 it says "disclosure" and there's "satisfaction is
4 guaranteed," disclosure doesn't really tell you anything.
5 If it said "disclosure - restocking fees apply," that's
6 going to give the signal to consumers that there may be
7 some costs involved if they decide to return this
8 product. When I read "satisfaction guaranteed," that
9 says to me I'm going to get my money back. And a lot of
10 advertising will say no questions asked. Your money
11 back, no questions asked, which gives me the green light
12 as a consumer to say, I'm going to buy this thing and
13 there's really no risk involved if I end up not liking
14 it, it's not a satisfactory product.

15 So, I don't think it's that hard even in
16 different formats. And we know that the FTC has said
17 that many Commission rules and guides are not limited to
18 any particular medium used to disseminate claims or
19 advertising and, therefore, apply to online activities.
20 And I think what we learned this morning from Jen King is
21 you can do this. There's a lot of signs out there.
22 There's a lot of research going on that says we can do
23 this. And I think what I heard from her is really a call
24 to action to companies to be more creative and to be much
25 more agile in providing this information to consumers.

1 MR. OSTHEIMER: Jen?

2 MS. KING: Just focusing on this page, yeah, I
3 would say what's here isn't adequate. Again, the use of
4 the term "disclosure" may be completely meaningless to
5 consumers, especially if it keys off the idea of
6 something that relates to a legal concept. Again, I
7 apologize to the lawyers in the room, but most people
8 don't enjoy reading lengthy policies. And, so, at
9 minimum, I would say that this needs to be moved towards
10 the call of action, which is the "Order Now" button and,
11 certainly, most likely, relabeled. And this is the sort
12 of thing that if you test with a representative group of
13 users, you can certainly find out if people are noticing
14 it and if they do understand the terminology. But, yeah,
15 as this page is designed today, I would say it's
16 inadequate.

17 MR. OSTHEIMER: Let me broaden the question and
18 throw out some alternative labels. More information,
19 fine print, terms and conditions, details, limitations,
20 important info. Are any of those sufficient and under
21 what circumstances? And what about alternatives such as
22 Sally suggested, such as significant restocking fees or
23 restocking fees apply? Steve?

24 MR. DELBIANCO: Thanks, Michael. The title of
25 this first panel was cross-platform, so let me just focus

1 for a moment about the other multiple platforms that this
2 particular hyperlink would show up, right, because this
3 is a webpage for the vendor. But that same claim about
4 the cooler and the accompanying necessity of a disclaimer
5 could also show up at other platforms like an organic
6 search result, which are all textual or a search ad to
7 the right of a search result. It could show up in a
8 tweet. It could show up in a Google+ comment. And in
9 all of those cases, the platforms I spoke of, the ad
10 platform, comment platform and Twitter, those platforms
11 don't allow a label on their hyperlinks. They require
12 that the hyperlink show up explicitly http: for very
13 good reasons.

14 MR. OSTHEIMER: And that's going to be the
15 subject of our next panel.

16 MR. DELBIANCO: Next panel?

17 MR. OSTHEIMER: Yes.

18 MR. DELBIANCO: But for very good reasons. And
19 for those reasons, you can't expect that the label itself
20 is going to be able to convey the meaning. There's a
21 good chance the clever use of things like CMP.LY or other
22 areas could help make it clear to people. And, today,
23 actually ICANN is closing the window on the bids for new
24 top level domains. So, we could actually see new top
25 level domains that would be clearer, things like dot-

1 disclose, dot-disclaim or maybe even dot-read this, that
2 I hope would be able to condition people to click on a
3 hyperlink where there's no label to say what it's about.

4 MR. OSTHEIMER: Paul?

5 MR. SINGER: So, before I respond, I'll briefly
6 mention, any opinions I express are mine and not
7 necessarily those of the Texas Attorney General or any
8 State Attorney General, but, you know, we've talked a lot
9 about this. I think in terms of the label for this
10 hyperlink, states have been consistent recently in their
11 actions that it has to -- if there's a meaningful
12 material limitation on what's being represented to a
13 consumer, you need to disclose that up-front. It's
14 insufficient to put it somewhere buried on the page or
15 through hyperlinks. In this example, you know, it's not
16 just right that satisfaction is guaranteed, you have the
17 big 100% satisfaction guaranteed seal on the page. I
18 think it's conveying a significant message that -- like
19 some of the other panelists have mentioned -- you know,
20 if I'm not happy with this, I'm going to get my money
21 back.

22 The alternative labels that you ran through,
23 most of them have the same effect. I mean, they were
24 just variations on the word "disclosure." There's
25 nothing substantively meaningful about those words to

1 signify exactly what it's modifying until you start
2 talking about the restocking fee. So, a label here that
3 signals to the consumer that there are significant
4 restocking fees can be made in a very concise manner. It
5 can be made proximate, I would say, not only to Jennifer's
6 point, not only to proximate to the call to action to the
7 order now, but proximate to the actual claim that it's
8 modifying, the satisfaction is guaranteed.

9 So, I think that when you say and signal to the
10 consumer there's significant restocking fees, that gets
11 the message across.

12 The other information about maybe how much
13 those restocking fees are or other details, there may be
14 different places for those details and for that full
15 explanation, but you've at least given the consumer the
16 ability to then signal in their mind they need to go
17 read more about this if they want to find out the
18 details.

19 MR. OSTHEIMER: Svetlana?

20 MS. WALKER: Thank you. Yeah, for me I think
21 it's -- while there's definitely two issues here, the
22 proximate placement of the disclosure itself, the bigger
23 one, I think, or the much more material one for consumers
24 is the way it's actually labeled. I think that even
25 significant restocking fees wouldn't necessarily form a

1 causal relationship between reading that and the 100
2 percent satisfaction guaranteed.

3 So, as an alternative, I would suggest -- and,
4 of course, this is just my opinion -- but something that
5 really ties together the satisfaction, the potential
6 limitations to it. So maybe something along the label of
7 guarantee limitations or important guarantee information
8 or guarantee conditions, that would allow consumers to
9 click on that and understand that there is a material
10 potential investment that will be incurred if they choose
11 to return the product that limits the guarantee in and of
12 itself.

13 But, certainly, I think the other proximate
14 placement issues that the other panelists have mentioned
15 are really in play here.

16 MR. OSTHEIMER: If you're a consumer viewing
17 the original Frost-A-Tron webpage scroll down, there
18 would be a hyperlink labeled "Important Health
19 Information." Clicking on the hyperlink would reveal a
20 somewhat lengthy disclosure about bacteria build-up and
21 foodborne disease from using the product under certain
22 conditions. This raises a couple of issues, based on an
23 actual FTC case.

24 Under staff's previous Dot-Com guidance,
25 certain health and safety disclosures should not be made

1 through hyperlinks. Is this advice outdated or is it
2 still appropriate? Steve?

3 MR. DELBIANCO: Yeah, in this example, the
4 hyperlink for the health disclosure, just following your
5 basic principles on placement, proximity and prominence
6 ought to be closer to the claim, the triggering claim,
7 that it keeps these things fresh and cold. So, for
8 example, I mean, I love to look at the mock ads examples.
9 You guys have 62 pages of mock ad examples in the 2000
10 Dot-Com Disclosure and, undoubtedly, are going to add
11 some more for the new formats.

12 But it's also important to understand how FTC
13 is enforcing the guidelines as well as Section 5. And I
14 would love to know whether over the past 12 years since
15 that's been out, have there been cases where the FTC has
16 investigated and maybe taken an action because a
17 disclaimer was too far away from the triggering claim.
18 Because the notion of scrolling is -- you know, that's
19 not going to get us too far in this conversation because
20 the new device formats makes scrolling essential. So,
21 let's focus more about your basic principles, sound
22 principle of proximity, and ask whether the claim right
23 at the top that says, keep cold drinks, fried chicken
24 fresh and cold, that that's the place for which proximity
25 of the health disclaimer needs to appear.

1 MR. OSTHEIMER: Is the advice about not making
2 health and safety disclosures still valid? Linda?

3 MS. GOLDSTEIN: Again, I think as a general
4 principle, we would agree that if there are material
5 health and safety considerations, those are sufficiently
6 important. I think traditional Section 5 rules and your
7 existing Dot-Com guidance would still apply here, which
8 is, is this important material information that we need
9 to be certain the consumer will see before they make a
10 purchasing decision and what are the consequences of not
11 seeing that disclosure?

12 So, when you're talking about health and safety
13 considerations, obviously, the consequences of a consumer
14 not seeing that disclosure are going to be more
15 significant.

16 I think, in general, it goes to a principle of
17 prioritization. I know you're going to talk much more on
18 other panels about the realities of space constraints and
19 cross-platforms and which disclosures may appear
20 differently and can't all be made in the same format, and
21 I think that cries out for the need to really prioritize
22 disclosures and ensure that the most material disclosures
23 or the ones that potentially could lead to the greatest
24 consumer injury, if consumers don't see them, need to be
25 more prominent and perhaps there needs to be more

1 leniency with respect to some of the less material
2 disclosures or those that have the less potential to
3 create consumer harm. But, certainly, we would agree
4 that health and safety disclosures are important and need
5 to be disclosed in a way that consumers will see them.

6 MR. OSTHEIMER: Sally?

7 MS. GREENBERG: Well, if we take this specific
8 example -- I don't know how closely this tracks to the
9 real-life case. But we've got -- I mean, you asked the
10 question, is it still relevant to mention health
11 information. So, we take this specific --

12 MR. OSTHEIMER: Actually, the question was
13 whether it's still appropriate to say that one should
14 make health and safety disclosures through hyperlinks.

15 MS. GREENBERG: Okay, is it still important to
16 make health and safety information available through
17 hyperlinks?

18 MR. OSTHEIMER: The FTC's prior guidance was
19 that one should not make health and safety disclosure
20 through hyperlinks and is that guidance still relevant?

21 MS. GREENBERG: Right. Well, what I would
22 argue is this information here is -- has to be provided
23 in a way that is readily available to consumers because
24 the information that is offered here about this Frost-A-
25 Tron is that it's stocked with fruits, sandwiches, cold

1 drinks, fried chicken, fresh and cold, and the
2 information that is provided through the disclosure is
3 that items such as meat and mayonnaise are not going to
4 necessarily stand the test of this particular product
5 because they are, obviously, not going to be safe to
6 consume if they're used with this particular product at a
7 temperature higher than 80 degrees.

8 So, the question I would raise is it's
9 absolutely imperative that consumers have this
10 information up-front when considering purchase of this
11 item. And we have to not become more lenient or we have
12 to ensure that consumers have up-front notice of this.

13 MR. OSTHEIMER: One of the public comments that
14 we received said that scrolling is less of an issue now
15 than it was in 2000. I'd like to hear whether you agree
16 and also both in the context of full-size websites on
17 desktop devices and also mobile devices. Svetlana, would
18 you like to try to answer that question?

19 MS. WALKER: Actually, if I could, I'd just
20 like to note about the health disclosure again. I think
21 as every one of the panelists noted, the issue here is
22 really materiality. But a second issue may be -- you
23 know, I guess I should first and foremost say I do think
24 it should be appropriate to disclose this type of health
25 information through hyperlinks, simply because in the

1 space that marketers are working on today and consumers
2 are viewing, it's simply impossible, in many instances,
3 to condense this type of information onto a screen that
4 consumers are viewing.

5 Given how material this information is, I would
6 also maybe urge all of us to consider the fact that we
7 don't want to create a false sense of security by leading
8 consumers to think that by reading a health disclosure
9 online at time of purchase, they've read all the
10 important information they need to know about the
11 product.

12 What's more important here is really that
13 relevant materials regarding potential product misuse and
14 dangers stemming from that should be distributed at
15 point of purchase with the product itself. I think
16 neither the Commission nor anyone here wants to create a
17 potential scenario where consumers are sort of relying on
18 what they read online as a substitution for carefully
19 reading, say, owner's manual or instructions that contain
20 other important health and safety information for a
21 product. That's definitely something that we need to
22 consider when we think about is it sufficient to just
23 place a health and safety reminder sort of in a
24 disclosure online at time of purchase. Is that really
25 relevant to consumers within that context?

1 And I will actually defer to other panelists on
2 the scrolling question.

3 MR. OSTHEIMER: Paul?

4 MR. SINGER: I'll restrain myself from
5 answering the previous question, too. But, no, I'll try
6 to address the scrolling question. I think that those
7 comments, in particular, sort of focused on the fact that
8 consumers are more comfortable today using the Internet
9 and navigating a webpage to understand that, oh, they may
10 have to scroll and understand what a scroll bar is
11 compared to 12 years ago.

12 But I do think that with new technology and
13 certainly with mobile devices, scrolling is becoming an
14 issue yet again in sort of a new fashion and in a new
15 format. And we've certainly, in our office, handled
16 cases where we've seen people making use of, for example,
17 text messaging and inserting large amounts of spacing to
18 hide material disclosures that would otherwise be
19 communicated in that text message. And it's something
20 that, in particular with smartphones and the way that
21 text messages get read, et cetera, it's something that a
22 consumer may not understand, they need to open up this
23 message or multiple messages to see the full terms and
24 conditions that are in there.

25 So, I do think that if information is going to

1 be placed on multiple pages or there still needs to be
2 the same kind of trigger or something that draws the
3 consumer's attention to the fact that they are going to
4 need to scroll if there's other information there for
5 them to read.

6 MR. OSTHEIMER: Jen?

7 MS. KING: To echo some of what Paul said, as
8 well, monitor sizes are getting larger, but then we have
9 mobile. People are a bit more sophisticated maybe than
10 12 years ago in understanding that you scroll, you can
11 scroll. But, again, pages have a visual hierarchy, to
12 use the term I used earlier in my talk, and people
13 generally expect that the least important information is
14 placed at the bottom of the screen. So, to the extent
15 that people are putting disclosures and claims at the
16 bottom of the screen, beyond the viewable portion, below
17 the fold, it's still an issue.

18 Yes, again, as soon as we introduce mobile into
19 the equation, that changes everything. But I realize
20 that's going to be talked more about later.

21 MR. OSTHEIMER: Okay, moving forward, assuming
22 that using a hyperlink for a safety disclosure wasn't an
23 issue, is it a problem that a consumer could click the
24 "Order Now" button and leave the page without scrolling
25 to see the health disclosure? Steve?

1 MR. DELBIANCO: Thanks, Michael. I think that
2 scrolling is only part of the question, right, because we
3 heard from Jennifer that eye movements observe sort of an
4 F pattern. So, anything that's not on the pattern of the
5 F eye movements is just as least likely to be seen as
6 something to which I have to scroll. When you said
7 earlier that the key is to keep the disclaimers close to
8 the triggering claim, the question would be if they never
9 said the words "fresh" and "cold" in the claim, would the
10 disclosure still be necessary? And I'd love to know what
11 the FTC would say about that.

12 If they didn't make a claim about fresh and
13 cold meat and chicken, does the disclaimer really belong
14 somewhere below the scroll line? Does it belong on the
15 purchase page or does it really belong on the inside lid
16 of the cooler? The purchase decision is one thing, but
17 it's the use decision that carries the risk, that I could
18 get sick from food that I put in the cooler.

19 I don't know whether FTC covers that, but
20 hopefully on the inside label to this cooler it says,
21 it's 80 degrees outside, don't put meat, fish or
22 mayonnaise in here. Those kinds of user safety concerns
23 happen post purchase.

24 So, what about the claim, if the claim's not
25 there, fresh and cold, do they still require this health

1 disclosure in your opinion?

2 MR. OSTHEIMER: Does anybody else want to weigh
3 in on that?

4 MS. GREENBERG: Well, I don't think they're
5 mutually exclusive, so I would argue that consumers need
6 warning. I think important health information, given
7 what the claim is here and how the health claim
8 contradicts, in my mind, what the claim is, that
9 important health information, even through a hyperlink,
10 is not sufficient notice to consumers, and I think most
11 manufacturers would say we're going to certainly put a
12 warning inside the product itself. But as a consumer
13 advocate, I would argue I need more warning than just
14 important health information.

15 As Jen has pointed out, the visual hierarchy
16 suggests that many consumers may miss this because it's
17 at the bottom of the page.

18 MR. OSTHEIMER: Paul?

19 MR. SINGER: Yeah, two quick points. One, I
20 would say that this is still a cooler, right? So, I
21 think its function is to keep things cool. So, if
22 there's a limitation on that and I'm going to get sick, I
23 don't think it really matters whether or not it says
24 keeps things fresh in the ad.

25 But that said, in turning to the specific

1 question, I mean, I guess some of the answer may depend
2 on what the full purchase flow looks like to the
3 consumer. Because I would throw out there that this is
4 so material and the kind of information that consumers
5 really need to know that maybe it's appropriate for some
6 form of affirmative acknowledgment prior to actually
7 completing the sale. And so, if there's another
8 disclosure somewhere that makes that prominent and would
9 require the consumer to affirmatively say, I understand
10 that this may pose some health risks to me, that might be
11 a mechanism to ensure that they've read it and to ensure
12 that they've got that information.

13 MR. OSTHEIMER: That's a good transition to our
14 next hypothetical. I'd like you to look at a webpage for
15 a Dutch oven. To purchase the Dutch oven, a consumer has
16 to agree to a trial enrollment in a recipe club that
17 costs \$4.95 a month after the trial period expires. This
18 enrollment is disclosed on a product description page
19 clearly next to the "Add to Cart" button. In addition,
20 after a consumer adds the item to her cart, she has to
21 click either a "yes" or "no" box indicating whether or not
22 she agrees to the enrollment in the recipe club. She
23 can't really click away without answering yes or no that
24 she understands.

25 The Dot-Com Disclosure document says that where

1 advertising and selling are combined on a website, like
2 in this hypothetical, disclosure should be provided
3 before a consumer makes the decision to buy before
4 clicking on an "Add to Cart" button or an "Order Now"
5 button.

6 Does anyone disagree with that guidance, the
7 generic guidance about making disclosures that are
8 necessary to prevent deception or otherwise required by a
9 rule prior to clicking on an "Order Now" button or an
10 "Add to Cart" button? Linda?

11 MS. GOLDSTEIN: We certainly support the
12 general principle that material disclosures need to be
13 made before the consumer gives their affirmative consent
14 to disclosure. But we believe that that is the correct
15 general principle, that consumers must be given notice of
16 material information before they give their consent to
17 purchase, but the consent to purchase can take several
18 forms. So, I think there's two components to this
19 question.

20 One is, does the disclosure need to be made?
21 And we would certainly agree that the type of disclosure
22 that you have here, which clearly states that with the
23 purchase you will be automatically enrolled in a 30-day
24 free trial and the disclosure of the monthly fee is
25 given, is adequate and necessary disclosure of the free

1 trial offer and the continuity program. But we would
2 disagree with the principle that a check box is the only
3 mechanism through which affirmative consent could be
4 given and we would urge the FTC not to adopt that rigid
5 an approach to what constitutes affirmative consent.

6 A check box may work on a website as we see it
7 today, but there are many other platforms where it
8 wouldn't be possible to have a check box. And five years
9 from now, we don't know what mechanisms and what
10 technological innovations may be in place that would be
11 just as clear and reliable evidence of consumer assent as
12 a check box. Again, a check box is a notion that's
13 grounded in a very static form of media. We're moving to
14 a situation now where your mobile device -- tapping your
15 mobile device may constitute a mechanism for making a
16 purchase where there will be other features and
17 mechanisms in apps and on mobile devices and other
18 formats through which the consumer can evidence consent.

19 And so, to allow for that technological
20 innovation, we think it's critical that the general
21 principles of notice and consent be maintained, but that
22 the Commission recognize that affirmative consent can be
23 given in a number of ways and there should not be one
24 mandated way through which that consent has to be
25 provided.

1 MR. OSTHEIMER: Let me ask my next question,
2 then I'll give Paul a chance to answer either or both
3 questions.

4 When, as in this hypothetical, an affirmative
5 acknowledgment after a consumer clicks "Add to Cart" is in
6 addition to an earlier disclosure, does that
7 acknowledgment make it more likely that a consumer's
8 actually read the disclosure and is it -- not as a
9 requirement, but is it a best practice? Paul?

10 MR. SINGER: Well, I'm glad you asked the
11 second question, too, because some of what I was going to
12 say is that I think as a general principle, states, in
13 their actions, have been consistent with the notion that
14 these kind of material terms do need to be made prior to
15 the checkout process.

16 I think that, in addition to having some form
17 of affirmative acknowledgment, it's critical to have the
18 disclosure up-front at that first -- on that first page,
19 when you're actually adding it to the cart as well,
20 because this fact is a material limitation on what you're
21 buying. You're not really buying a \$220 Dutch oven;
22 you're buying a \$220 Dutch oven and a membership in this
23 program. So, the consumer needs to be told that and made
24 sure they understand it.

25 I do think that an affirmative acknowledgment

1 is something that states have used as a means to
2 demonstrate that the consumer has read it and understands
3 that they're making the purchase. I think that what's in
4 that acknowledgment is obviously critical and I think
5 some of what Linda's saying is very true, that I think
6 the form of that affirmative acknowledgment itself may
7 vary depending on the type of transaction that you're
8 engaged in or the type of device that the consumer's
9 using. But I think that's also very relevant to the
10 question of whether or not a consumer's going to read and
11 understand the limitation.

12 MR. OSTHEIMER: Steve?

13 MR. DELBIANCO: The prominence is one of your
14 three key legs of the stool with respect to these
15 disclaimers. Prominence is a best practice, as you say,
16 and you guys do a great job describing that in the 2000
17 Dot-Coms. But then if you look at the enforcement record,
18 I believe that the FTC has taken it further since then by
19 looking at offers for computers that were very heavily
20 discounted, but the purchaser had to sign up for two
21 years of Internet service. Maybe it was the Prodigy
22 case, but I don't remember it exactly. Those kind of
23 cases, as they evolve, they change the standard that
24 maybe prominence really wasn't strong enough a word and
25 that it actually had to be unmistakable. I think that

1 was the word used in it. It had to be so obvious that
2 you would not miss it at the point of making the
3 purchase.

4 And if that's the way that standards are
5 evolving, I think it cries out for the need to update the
6 disclosure guidelines to include not just your mock-up
7 examples, but to include a little bit of flavor of how
8 your enforcement record shows where you're attaching
9 responsibility and whether the following of guidelines
10 has a sliding scale of importance depending upon the
11 magnitude of the risks to the purchaser, the financial
12 risk or the health risk. All of this helps to paint a
13 roadmap so that advertisers, sponsors and others can try
14 to find a way to fit within the law for cases that don't
15 exactly match the examples given in the guidelines.

16 MR. OSTHEIMER: Jennifer?

17 MS. KING: So, just to add a little bit, I
18 actually think this is a pretty good example in the sense
19 that the disclosure is in the task flow. It's tied very
20 tightly to the action on each page. You're adding
21 something to the cart. It's not guaranteed that someone
22 necessarily may read all that, but when you do get to the
23 checkout page, again, it's part of the task flow. I
24 might improve it slightly by calling out the negative
25 option as an actual maybe line item for purchase on the

1 purchase page, so it's a little bit clearer that you're
2 actually going to get charged for it, at least if not
3 now, in the future.

4 I think the question of check boxes versus
5 radio buttons versus -- we might find on mobile devices
6 we're giving these consents verbally. You know, you
7 might actually say, I agree to something to your phone in
8 the future. So, I would think from a design perspective,
9 designers themselves would not want to be constrained to
10 one particular type of interaction form because you would
11 always want the flexibility to change it. But having a
12 way of actually getting some type of affirmative
13 agreement from the user is certainly important.

14 MR. OSTHEIMER: Jen, what if instead of yes and
15 no boxes, the acknowledgment only had one check box to
16 agree? Would that change your opinion?

17 MS. KING: Yeah, actually it would. I think
18 this is better. What's not clear to me, though, by
19 looking at this is if I can buy the Dutch oven without
20 the negative option. I guess if I said no and I removed
21 the item and I couldn't purchase it, that would signal to
22 me that clearly I can't do that. But that's the thing I
23 lack right now is the sense of whether or not I can make
24 the purchase at all without enrolling. But, yeah, if it
25 were just a check box that said I agree to something, no,

1 I would say that's not sufficient.

2 MR. OSTHEIMER: And why not?

3 MS. KING: Because it's -- this, at least, is
4 kind of forcing your focus on a decision point. And
5 there's an actual consequence. If I hit "no", something
6 will happen with that check box. If I just had a check
7 box and no "yes" or "no", if I left it blank, I might get an
8 error message that said, you need to check the check box,
9 which kind of forces you to agree without really
10 agreeing. So, this, I think, is a better interaction
11 because it actually has -- you have an option, per se,
12 versus just a check box that would force you to check it.
13 To agree before moving on, I think, is less clear what
14 the consequences are.

15 MR. OSTHEIMER: Svetlana?

16 MS. WALKER: Yes, thanks. I think we all agree
17 in theory that disclosures for continuity programs such
18 as this are really important and I certainly agree that I
19 don't believe we should be constrained at this time to
20 the particular mechanics of disclosure, given sort of the
21 evolving field of how these offers are presented.

22 But I think what's also important to note here
23 is the way the affirmative acknowledgment is made and the
24 way it's phrased. So, in certain instances, maybe going
25 beyond this example, I don't think it's sufficient to say

1 I agree, I disagree. Maybe it would make more sense to
2 phrase it in, I agree to be auto-enrolled in this \$4.95
3 30-day trial, right, as opposed to just a simple
4 agree/disagree which I think could lead to a lot of false
5 positives.

6 MR. OSTHEIMER: Linda?

7 MS. GOLDSTEIN: Yeah. I wanted to just make a
8 general point here that I think this is a great example
9 because there are multiple issues loaded into this. One
10 of them is, is the disclosure at the point of purchase
11 sufficient or -- I think Steve had alluded to the fact
12 that there needs to be disclosure early on. I think we
13 would all agree that disclosures have to happen early
14 enough in the order path to prevent the ad from being
15 misleading. And, certainly, if you made representations
16 throughout the entire order path that all you were
17 purchasing was a Dutch oven when, in fact, there was
18 something else associated with that, that would be
19 problematic.

20 But, again, I think in thinking about this
21 issue, I would stress flexibility again, in the sense
22 that I think it's important to look at the principles of
23 where and how the disclosures need to be made from the
24 vantage point of the consumer's entire path to purchase.
25 In other words, again, not to specifically mandate that

1 the disclosure has to be on the first page or it has to
2 be on the landing page or it has to be on the page where,
3 you know, the consumer adds the product to the cart. I
4 think you have to look at it in the context of what is
5 being said at each stage of the consumer's journey
6 through this order path and looking at that path in its
7 totality. Are we relatively certain that the consumer
8 will have seen all of the material information that they
9 need to see before they make the purchase? And, again,
10 it may not be a one size fits all. It may depend on what
11 is said on each page that may dictate where the
12 disclosure would be most -- not only most important, but
13 most meaningful to the consumer.

14 So, I'd like to see us get away from, again,
15 this static view of it should be on page one, it should
16 be on page three, it should be on page four, and look at
17 it from the vantage point of the entire journey.

18 The other thing I just feel compelled to say in
19 response to some of the comments that were made is,
20 again, we agree in principle that this kind of
21 requirement, a bundled up-sell, if you will, of a
22 continuity offer is a very important condition that needs
23 to be disclosed to consumers. But I think we're hearing
24 a bit of overkill here in the sense that if you've made
25 this disclosure and this disclosure is in a box, meaning

1 it's highlighted, it's in a standalone box, it's at
2 several points within this order path and in immediate
3 proximity to where the consumer is actually checking out,
4 it seems a bit of overkill, number one, to force the
5 consumer to necessarily have to check a box as opposed to
6 clicking "I accept the order" or taking some other
7 affirmative action.

8 And then to go beyond that and have to repeat
9 the disclosures in the mechanism, if there were a check
10 box, to have to say right after we've said with my
11 purchase, I'll be automatically enrolled, I'll be billed
12 \$4.95 each month, to have to then include that disclosure
13 as part of the, "yes, continue to check out and bill me
14 \$4.95 each month" when we have this overarching concern
15 about having limited real estate and space restrictions,
16 hopefully, again, we can think about ways to do some of
17 these things more concisely and not necessarily engage in
18 that overkill.

19 MR. OSTHEIMER: Sally?

20 MS. GREENBERG: Yeah, I don't know if underkill
21 is a word, but in response to what Linda just said, I
22 would say I feel compelled to say that these kinds of
23 negative check-offs are odious on consumers who are
24 simply trying to buy a product that has attracted their
25 attention and looks like a great Dutch oven kind of

1 cooker.

2 So, I would say we are being kind by allowing
3 companies to force you to buy a monthly membership when
4 all you want is this product which they've advertised.
5 Now, having said that, I think it's -- I'm sympathetic to
6 the point Linda's making, which is that we need to be
7 flexible in how we provide information about affirmative
8 agreement to buy the product.

9 I think one of the problems I'm having with
10 this ad is that we don't have enough information. If
11 Linda said to me, these are the three or four different
12 ways our industry would like to provide this information
13 and these are the places that we would like to provide
14 it, I think I would like to take a look at that and see
15 how effective the notice is to consumers.

16 The other thing we don't know enough about is
17 the cancellation details. So, I want to click on that
18 hyperlink and see what those cancellation details are as
19 a consumer before I'm going to buy that \$220 product.
20 And I would also join forces with Jen in saying I like
21 the box and I think it should be a "yes/no" because it
22 forces you to think through that transaction and not just
23 a check-off that you've read it.

24 MR. OSTHEIMER: Steve?

25 MR. DELBIANCO: Well, before you leave this

1 example, I just have to share one story. My brother
2 calls me from college because he's got a girl he really
3 wants to impress and he asks me how to make this great
4 stew that he's seen me make before. So, the first thing
5 I say to him is I say, well, do you have a Dutch oven?
6 He gets off the phone for a minute. He comes back and he
7 says, no, it's a GE.

8 (Laughter.)

9 MR. OSTHEIMER: One of the public commenters
10 asserted that a terms of service type agreement should be
11 considered clear and conspicuous if a consumer accepts
12 it. Another commenter asserted that consumers do not
13 read terms of service type agreements and requested that
14 the Commission identify what information from such
15 documents must be displayed on a website in clear and
16 concise language. Does anyone have views on what
17 guidance the staff should give about required disclosures
18 appearing in terms of service type agreements? Jen?

19 MS. KING: They shouldn't would be my
20 viewpoint. People don't read them, as I think I went
21 over the reasons earlier why. And just fundamentally, if
22 there's anything someone needs to see, they absolutely
23 need to see that information before they make a decision,
24 it needs to be called out and it needs to be somewhere in
25 their task flow versus burying it in a document where

1 most people are trained to simply acknowledge that, click
2 "I accept", and not read them.

3 MR. OSTHEIMER: Steve?

4 MR. DELBIANCO: I want to try to give an
5 example. If you go to the WashingtonPost.com
6 classifieds, as a user of those classifieds, there's an
7 opportunity to read the terms of service, but I usually
8 don't. I just look at the things in classifieds, whether
9 you're looking for a car, an appliance or subletting an
10 apartment, and the sellers who list their items in those
11 classifieds, they may have no clue about their
12 responsibilities to give the disclaimers and disclosures
13 that are actually required of a seller. They're on an
14 independent third-party platform, the Washington Post
15 classified marketplace.

16 So, I'm curious about where the responsibility
17 lies. It's clear from the FTC's case work that the
18 Washington Post is not liable for the disclosure. But
19 the question would be, how much do their terms of service
20 have to inform buyers and sellers in their marketplace
21 that disclaimers are required, but the disclaimers may
22 not always be given because the Post doesn't police every
23 listing that goes into the classifieds?

24 So, I'm getting to the distinction about the
25 terms of service for a platform or a third-party

1 marketplace versus the terms of service for an actual
2 website that sells an item, which I know is the focus of
3 most of what the FTC mock ads are, are its own website.
4 But so much commerce happens in marketplaces and
5 platforms where third-party users act as buyers and
6 sellers and the terms of service really just inform the
7 buyer of what they can expect and they inform the seller,
8 to some extent, of their obligations in certain areas of
9 law.

10 MR. OSTHEIMER: Okay. And for purposes of this
11 question, I'm asking about terms of service agreements
12 for the seller themselves. Linda?

13 MS. GOLDSTEIN: Yeah, I think maybe one guiding
14 principle that would be helpful here is I think there's
15 an important distinction between terms of service that
16 relate to use of the site or the seller's website, et
17 cetera, versus offer terms. We would agree that putting
18 offer terms in a terms of service, that's not where
19 consumers are going to expect to see offer terms. So,
20 offer terms should not be placed in terms of service
21 because that goes contrary to the consumer expectation.

22 However, terms of service that really relate to
23 the use of the service or the use of the website, IP
24 protections, things like that, things that consumers
25 would expect to be in those terms of service, that's

1 probably the appropriate place for it to be.

2 But what many marketers have done and I think
3 where the FTC has had issues is where marketers have put
4 terms of an offer or conditions of an offer in a terms of
5 service and that's not where consumers would likely
6 expect to find them.

7 MR. OSTHEIMER: Paul?

8 MR. SINGER: Right. Some of what I'll say
9 echoes some of what's already been said. But, I mean, I
10 do think that when we talk about terms material to the
11 offer, certainly terms of service are not the appropriate
12 place to put them. I think that the work that regulators
13 have done has clearly demonstrated a consistent pattern
14 that, no, that's not going to be an acceptable place for
15 it.

16 Now, I will say that certainly states have
17 taken actions where, you know, we've looked at sort of
18 maybe differing tiers of what kinds of disclosure needs
19 to be made depending on the materiality of those
20 disclosures and whether or not it has to be -- because,
21 at the same time, I think we recognize issues like
22 limited real estate and issues like you don't want to
23 overwhelm the consumer with everything right there next
24 to a particular trigger. But if it's material to what's
25 being offered, to the specific offer, yes, it needs to be

1 made outside of any sort of terms of service. There may
2 be other kinds of disclosures relevant to visiting that
3 website, like Linda was talking about, that could be made
4 elsewhere. I think it's just going to depend on how
5 material it is to the transaction that that consumer's
6 entering into.

7 MR. OSTHEIMER: Okay, we just talked about
8 selling combined with advertising, like on the website
9 for the Dutch oven. Let's talk about when advertising
10 and selling are not combined. For example, assume that a
11 consumer receives a location-based ad on her mobile
12 device for a discounted cup of coffee because she's near
13 a particular coffee shop. Are there any terms that do
14 not have to be disclosed until the consumer enters the
15 coffee shop or should they all be disclosed on the mobile
16 device before the consumer walks to the store? Linda?

17 MS. GOLDSTEIN: This is one that's very
18 important to PMA members because you're really now
19 getting into consumer incentives, consumer offers
20 combined with location-based marketing. Let me say just
21 at the outset that if it's a condition such as was
22 alluded to in the introductory comments where the
23 consumer has to make a purchase in order to get the
24 discounted cup of coffee, we would agree that's a
25 material term that has to be disclosed.

1 But I think when we're thinking about what
2 needs to be disclosed in the context of this kind of an
3 offer, there is a couple of important considerations to
4 keep in mind. First, the disclosure requirements really
5 have to take into account the context in which the offer
6 is being presented. Is it a mobile blast that's going to
7 a wide range of consumers? Or is it a very targeted
8 blast that's maybe going to people who are in the daily
9 coffee program and they get this blast every day, in
10 which case they already know how it works? And, so, the
11 level of disclosure that might be required in that
12 context is very different from the level of disclosure
13 that might be required if it's going to consumers who are
14 not familiar with how the program works at all.

15 And then, obviously, it also depends upon
16 what's the nature of the information that's being
17 disclosed? Again, if it's a location-based ad, you
18 probably don't need a deadline date if you're saying come
19 in now and get your free cup of coffee because you happen
20 to be a block from the nearest location. There's
21 probably an inherent sense within that offer that this is
22 a very limited time offer, whereas in other contexts
23 where you have a free offer, a deadline date might be
24 required. So, again, I think the context of that offer
25 and the target audience is important, and particularly

1 here because these messages often are so targeted and are
2 being sent to consumers that already have a very strong
3 relationship with the seller. Some disclosures that
4 might normally be required in a mass media advertisement
5 may not be necessary here.

6 And then, again, you have to look at what are
7 the nature of the limitations and how material are they.
8 Additional cost requirements are going to be important.
9 Is it only available on certain flavors of coffee? That
10 may or may not be material depending on which flavor it
11 is. If it's the most popular flavor, that's probably not
12 a material condition. If it's a flavor that, you know,
13 nobody's ever heard of and you can only get it on that
14 one flavor, maybe that is a material condition. So, I
15 think all of those factors have to be considered.

16 MR. OSTHEIMER: What if it said come to our
17 coffee shop five blocks from you and the shop wasn't open
18 yet for another hour?

19 MS. GOLDSTEIN: I think, in that context, it
20 would be not only important, but probably wise on the
21 part of the seller to disclose the opening hours because
22 I don't think you'd want to have a lot of frustrated
23 consumers standing outside your closed shop.

24 MR. OSTHEIMER: Sally?

25 MS. GREENBERG: I think you've touched on

1 something really important which is don't tick off the
2 consumers. And one example might be on your mobile phone
3 you would get a -- it's hard to say because we're not
4 talking about real examples here. So, there's nuance to
5 all of these examples that we hear or all these
6 discussions that we're having depending on what the
7 offers are and what's missing from the information.

8 But if you're suggesting to consumers that they
9 come for a free cup of coffee and when you get there it
10 says, oh, but a purchase is required, you have to buy
11 something for more than \$5, you're going to tick off
12 consumers. You don't want to do that as a company.

13 There are many other examples of things. I
14 think as we -- everyone in this room has tried to take
15 advantage of various offers. One thing that comes to
16 mind is I don't think I've ever been able effectively to
17 use a coupon for a rental car. There's always a
18 condition. There's always something that is, oh, no, no,
19 we can't use that, sorry. You know, you came the wrong
20 day, you came the wrong week. If there's a time
21 limitation, that's -- again, you're just making consumers
22 angry and we know when we've been -- had the wool pulled
23 over our eyes.

24 So, I would say when it comes to these mobile
25 offers, let the advertiser beware because there may be a

1 lot of unhappy consumers if what's promised isn't what's
2 delivered.

3 MR. OSTHEIMER: Svetlana?

4 MS. WALKER: Yeah, I would agree with Sally
5 that this is a really highly nuanced example and what's
6 material is really going to depend on the specific
7 situation in play. So, obviously, the conditional
8 purchase of something else in order to get this free cup
9 of coffee is material and should be disclosed, as should
10 probably the location hours and whether there's a limited
11 number of cups of coffee available and perhaps if there's
12 limited franchises in which this offer is available.

13 But say something else, such as the free cup of
14 coffee can only come in a small or a medium. Is it
15 material that the large size is not eligible for the free
16 discount? Is it important that perhaps premium beverages
17 are not available for this discount? So, let's say you
18 can get a free cup of coffee, but you can't get a soy
19 mocha latte that costs \$6 or something like that. It's
20 hard to say whether a reasonable consumer would think
21 that you can get sort of carte blanche for everything
22 available at the coffee shop.

23 So, I think in this particular instance, it's
24 really hard to draw a line in the sand as to what's
25 material or what's not material because so much depends

1 on what the offer is, what the product is and what a
2 consumer in that context would be expecting from the
3 marketer.

4 MR. OSTHEIMER: Paul?

5 MR. SINGER: So, following up on some of those
6 comments, I mean, I do think that some of the questions
7 might be that what's material is going to change from
8 consumer to consumer in a situation like this. We've
9 been talking generally about FTC principles of a
10 reasonable consumer, which isn't necessarily the same as
11 what state standards are under their little FTC laws.
12 But, you know, I would say that -- I mean, I think some
13 of the beauty of mobile devices is that they empower
14 consumers so that consumers have information readily
15 available to them. It seems to me like the kind of
16 details that we're talking about that may or may not be
17 material, depending on the individual consumer, are
18 things that you can still make available to a consumer.

19 And, so, I think that if there's something in
20 the ad itself that could direct consumers to where they
21 can find all of the details about the size limitations or
22 the type of coffee or anything like that, certainly that
23 helps to give them that information so that each
24 individual consumer can say for themselves, I want to
25 know what kind of coffee this is on and has the

1 flexibility and ability to look at it.

2 It sounds like everyone's in agreement, though,
3 that there are some fundamental core things that are
4 definitely material that need to be disclosed. And,
5 obviously, an additional cost is one of them. And I
6 think that's going to be universally true.

7 MR. OSTHEIMER: Steve?

8 MR. DELBIANCO: In the example, I would agree
9 with a lot of what Linda said. If it's somebody that's
10 part of a service, the Caffeine Addicts Club, and they
11 know that in that service they're going to get these pop-
12 up notifications when their location information reveals
13 a participating coffee shop, then for them, the level of
14 disclosure necessary is a lot less. They will have
15 accepted some terms of service to join the club and
16 presumably had some experience with it as they feed their
17 habit every day.

18 But with respect to the notion of a scale,
19 whether we've risen to unfair and deceptive, I think you
20 have to look at the inconvenience and the investment that
21 the consumer makes by relying upon the offer. So,
22 putting aside the Caffeine Addicts Club, if I just get a
23 text-based ad, a pop-up ad, a search-based ad on a page
24 that says come to this coffee shop for a free cup of
25 coffee, if the very ad itself has a click for the

1 disclaimer, well, then, I don't have to suffer much
2 inconvenience to learn that there are significant
3 limitations or that the shop itself isn't open except a
4 couple of days a week. If that's one click away, I don't
5 have to invest very much to learn more.

6 If, however, I don't have any extra
7 information, I literally invest the time to walk several
8 blocks, maybe stand in line and only at the register am I
9 able to learn of these limitations, I feel pretty stupid
10 about that. I might feel it's unfair, that's deceptive.
11 I might never come back to the coffee shop, but I also
12 might file a complaint with the FTC.

13 Because it's like Adlai Stevenson said once, he
14 said, there was a time when a fool and his money were
15 soon parted, but now it happens to everybody.

16 MR. OSTHEIMER: I was asked to tell all of you
17 to do something that I have not been doing which is to
18 speak directly into the mic. Apparently, there are some
19 problems with the webcast audio.

20 Let's add a nuance that Steve just mentioned.
21 That same example where a consumer gets a location-based
22 pop-up banner ad on their mobile device that says, free
23 cup of coffee, details, and a consumer could click on
24 that link that says, details, and the details are that
25 you do need to buy two pounds of coffee in order to get

1 your free or discounted cup. Do people think that that
2 would be adequate? Paul?

3 MR. SINGER: Am I the only one brave enough to
4 answer this? No, I mean, I think this circles back to
5 some of the question that we had at the outset about a
6 material limiting piece of information needing to be
7 disclosed clearly to the customer as part of that
8 advertisement. So, understanding limited real estate, et
9 cetera, I don't think that changes the fundamental
10 principle which is a simple link that just says
11 disclosure or something like that is not going to be
12 sufficient to signal to the consumer the material
13 limitation that you're talking about, which is a
14 significant purchase is required in order to take
15 advantage of the offer.

16 So, there are certainly ways, even in space
17 constrained areas, to make a material disclosure that
18 signals it to the consumer. I think it was true 12 years
19 ago that there were limitations when the original
20 guidelines were being created and, in particular, when it
21 talked about banner ads, et cetera. I mean, the same
22 issues are true today, just in new technology.

23 MR. OSTHEIMER: Linda?

24 MS. GOLDSTEIN: We do believe, given the
25 changes in technology, that we'd like to see some more

1 leniency and some more flexibility. But some of the
2 basic principles that were articulated not only in the
3 Dot-Com Disclosure guidelines, but are sort of at the
4 core of fundamental FTC principles, still apply. And one
5 of them is that when you're -- in determining whether
6 disclosures need to be made, you have the general
7 principle that if you're looking at the ad, standing on
8 its own, without those disclosures, is the ad truthful,
9 accurate and non-misleading.

10 So, if you have an offer for a free cup of
11 coffee, but there's an underlying purchase requirement to
12 obtain that free offer, general FTC principles would say
13 that that ad, standing on its own, is not truthful, and I
14 think those principles are as valid today as they were 12
15 years ago and I think those principles will continue to
16 be valid in the future.

17 The challenge will be how can we make those
18 disclosures with more limited real estate. I know those
19 are issues you'll tackle in the next two panels, but I
20 wouldn't want to leave here suggesting that we need an
21 overhaul of some of these very basic fundamental
22 principles. I think a lot of the building blocks are
23 there and they're still valid today and this is a good
24 example of a principle that works.

25 MR. OSTHEIMER: Steve?

1 MR. DELBIANCO: Since so much of the
2 effectiveness of your Dot-Com Disclosure guidelines are
3 in the examples in the mock ads, you have to attach a lot
4 of importance to the way you construct your examples.
5 For instance, in this example, what Michael led us to was
6 the word "details." That was the name of the hyperlink.
7 Of course, if it was in a text ad. You couldn't have a
8 label; it would have to say, for details, go to http://.

9 And we're assessing that on the basis of the
10 word "details." And Paul said, you know, you have to
11 disclose everything, it really wouldn't matter what the
12 label said. But in short format, it's text messages and
13 pop-ups, SMS, tweets, it isn't possible to include all of
14 the terms of the offer. So, I would just invite FTC to
15 think about phrasing the examples in a way that lead to
16 best practices.

17 For instance, if the word "details" doesn't
18 convey enough about the investment I may have to make or
19 limitations, then please use "other best practices." Use
20 words like "terms, restrictions, limitations,
21 requirements." Help to lead us to do commerce
22 responsibly by using the word that we can still fit in a
23 limited format, limited space available that conveys the
24 importance of clicking on it. Maybe "details" doesn't go
25 far enough, but I wonder how Paul would have answered the

1 question if it said "restrictions" or "limitations" or
2 "requirements" instead.

3 MR. OSTHEIMER: And before I get to the next
4 panelist, I'll throw in the possibility of, let's say,
5 "free cup with pound purchase," "with coffee purchase,"
6 "with ground purchase," "with purchase." Jennifer?

7 MS. KING: So, just to build on what Sally was
8 saying earlier as well, you don't want to present a bad
9 user experience to people because you only have a limited
10 amount of goodwill and trust that people have in your
11 product or your company. And if you -- not to limit or
12 not to dismiss the disclosure, like the disclosure is
13 important, but if you're going to present offers to
14 people that end up frustrating them or making them angry,
15 then you've really blown your goodwill.

16 So, from my perspective, you really want to
17 design for the best user experience possible. And, so,
18 if I have a customer who comes to a store and is informed
19 that their free cup of coffee has a whole bunch of other
20 things tied with it that they have to purchase, you've
21 most likely ruined your goodwill with that person. So,
22 it's a poor user experience and you really need to keep
23 that in mind as you craft these offers, that you're
24 crafting offers that don't put up so many obstacles that
25 people are frustrated by them because then the company

1 doesn't win, either.

2 MR. OSTHEIMER: Sally?

3 MS. GREENBERG: Yeah. So, I want to agree with
4 what Linda said, which is we should continue to return to
5 some basic principles here, which is, is the ad truthful,
6 accurate and not misleading? I don't think it's that
7 hard to say, in a mobile device, purchase required.
8 Little star, purchase required right underneath the free
9 cup of coffee. Restocking fees may apply. Yes, we're
10 talking about limited real estate, but Jen King and her
11 colleagues have given us a real call to action about how
12 this could be done effectively and well and I think
13 probably economically.

14 So, the question, Jen, after your presentation
15 was, you've given advertisers and companies a lot of
16 information. The question is, is there the will to take
17 that information and use it so that the consumer has the
18 best experience possible? And I hope that is the case
19 because there's a lot of great new information out there.

20 MR. OSTHEIMER: Okay. I'll call on Linda and
21 Paul in just a minute, but let me broaden the question or
22 tweak it a little bit and then you can answer either the
23 prior question that we were discussing or the new one or
24 both. What about consumer products, such as Clorox's,
25 that might be advertised online but purchased at a brick

1 or mortar supermarket or pharmacy, when, if ever, could
2 disclosures be delayed, disclosures that are necessary to
3 prevent deception as opposed to, let's say, a CPSC safety
4 disclosure? When could those disclosures that are
5 necessary to prevent deception be delayed until a
6 consumer goes to the store shelf? Linda?

7 MS. GOLDSTEIN: I'll do a little bit of both.
8 I think it's very difficult to answer that question in
9 the abstract. I mean, I think, again, it goes to very
10 fundamental principles of looking first at the ad itself
11 without those additional disclosures, is the ad standing
12 alone truthful, accurate and non-misleading, or are
13 additional disclosures necessary to create the
14 truthfulness of the ad?

15 Then, secondly, I think you have to go back to
16 the basic principles of materiality. How material are
17 those -- is that information in terms of it being likely
18 to affect the consumer's purchasing decision as opposed
19 to disclosures that may relate to the use and enjoyment
20 of the product? Because that information could more
21 likely be delayed until the consumer reaches the shelf
22 and can interact with the product versus information
23 that's more likely to affect whether the consumer would
24 elect to make the purchase in the first place.

25 The other thing I wanted to mention, as we're

1 talking about labeling of disclosures, and there's been a
2 lot of discussion, is this label appropriate, is that
3 label appropriate, that perhaps one of the things that
4 should be considered as part of this exercise is the role
5 of industry self-regulation and the possibility of
6 developing some universal disclosures or icons that
7 would, through consumer education, become more
8 recognizable to consumers as much as it's being done in
9 the behavioral advertising area.

10 So that if it's safety and health information,
11 maybe there are certain icons or labels that could be
12 used that would alert the consumer to the fact that the
13 disclosures relate to that type of information, or if
14 it's cost information, that it relates to that type of
15 information, or, you know, more generic types of
16 disclosures that relate generally to terms, conditions,
17 limitations, restrictions, et cetera. Because we have to
18 deal with these issues -- we can't deal with these issues
19 in a vacuum. We have to address the issues we're talking
20 about on this panel in the context of the issues that
21 will be addressed later today of limited real estate,
22 multiple platforms that don't support universal ways of
23 making disclosures and disclaimers.

24 So, maybe industry self-regulation can play a
25 role here in helping to develop labels, icons and other

1 mechanisms that consumers will become familiar with and
2 be better able to navigate these platforms.

3 MR. OSTHEIMER: Okay. And just to be clear,
4 the question I was asking about was about disclosures
5 that would be necessary to prevent an ad from being
6 deceptive, is it okay for those to be delayed until point
7 of purchase at a store on the shelf? Svetlana?

8 MS. WALKER: Yes, thank you. This was a really
9 interesting question, I think, for all CPG companies.
10 And just speaking from my personal experience and I think
11 anyone who works with a subset of products, the space on
12 product labels is really, really precious real estate.
13 So, it's almost hard to conceive of when you would want
14 to make a disclosure on a product as opposed to make one
15 in the context of an advertising claim online.

16 It seems much easier to -- for purposes of
17 proximate placement, to make that disclaimer at the time
18 that the product is being advertised as opposed to the
19 point of purchase because, in many contexts, it's
20 actually much simpler to include that disclosure along
21 with the advertisement as opposed to on the package
22 itself.

23 If anyone's ever worked with a marketing
24 department, believe me, they don't want to hear from
25 legal about disclosures needing to appear anywhere, on

1 the front, the back, the bottom, the whatever of the
2 product package. So, I think strictly from a CPG
3 experience, although I'm certainly open to other
4 viewpoints, it would be much more preferable to keep the
5 disclosure with the advertisement itself as opposed to
6 separate them physically in such a way that a consumer
7 would only see it once they get to shelf.

8 MR. OSTHEIMER: Paul?

9 MR. SINGER: So, I'll respond to sort of both
10 of the questions that you were talking about before.
11 First, let me sort of back up to -- back to the free cup
12 of coffee example. I mean, Steve suggested that I was
13 making the comment that all the terms should be there on
14 the mobile device. I think quite the opposite. What I
15 was suggesting is that there's a material restriction to
16 that purchase or to that free offer that's a purchase.
17 And I think that was sort of the key point, and I think
18 others have made that point well, that limited real
19 estate is not sort of a good excuse when that information
20 can be clearly communicated, even in the most limited of
21 situations. Because it fundamentally modifies what that
22 offer is, which was a free cup of coffee.

23 But I think in terms of when we're talking
24 about all of the various terms and conditions and whether
25 or not all of them need to be made prior to a consumer

1 going in the store, I think that some of the ways that
2 states have tackled it, certainly in more recent multi-
3 state actions that we've taken, has been to recognize
4 that you can't necessarily put every piece of information
5 and every part of the term in an ad directly proximate to
6 particular calls to action or trigger terms. And,
7 certainly, that's true in space-limited ads.

8 So, the approach that we've taken is to have
9 that information available to consumers, and that's some
10 of the beauty of discussing about this in the online
11 world is that while it's true you may have space
12 limitations on an ad or a particular platform, the fact
13 that consumers can access other webpages and other
14 information, there's really no reason not to have that
15 information available to them and to make it available
16 for them to read all of the information if they want to
17 have access to it, before they were to take the action of
18 going into the brick-and-mortar store.

19 MR. OSTHEIMER: And just let me note that the
20 Commission's deception policy statement says that you
21 can't correct a misleading ad through a label statement.

22 Sorry, Steve, we're running out of time and I
23 want to ask a few more questions and then leave some time
24 for questions from the audience.

25 The guides give advice regarding disclosures on

1 banner ads. Is that advice still relevant today for
2 current online space-constrained ads? Does anyone want
3 to answer that question or should we move on to another
4 question? Linda?

5 MS. GOLDSTEIN: I'm just going to make two
6 quick points. I think the general principle, which is
7 that, again, if what is stated in that "banner ad" is
8 truthful on its own, it's sufficient to make disclosures
9 elsewhere is still valid. But I think the term "banner
10 ad," quite frankly, is an outdated term. I think it
11 would be more appropriate to -- a banner ad is really --
12 it's an example of teaser advertising, and I think it
13 would be more appropriate to think about those kinds of
14 messages in terms of teaser ads. Teaser ads are really
15 just designed to create awareness of the product,
16 awareness of the offer. They're intentionally designed
17 to direct the consumer to another location at which the
18 offer is really being presented.

19 Once you think of it in that context, as simply
20 almost a traffic cop directing a consumer to a location,
21 I think you can get comfortable or, hopefully, you can
22 get comfortable with the concept that it is then
23 appropriate to make the necessary disclosures at the
24 point to which the consumer has been directed where the
25 actual offer is being presented.

1 MR. OSTHEIMER: Steve?

2 MR. DELBIANCO: I think Linda's right. The
3 word "banner ad," I think, is too limiting. It gets to
4 the notion of an ad that contains graphic elements. It
5 can even contain hyperlinks that include labels. Whereas
6 we said earlier, textual based ads, which appear far more
7 frequently than banner ads, don't permit hyperlink
8 labels, except in limited circumstances, and they're
9 often very space limited. So, I think ads would be a
10 better way to go.

11 And, Michael, if I could dovetail this with
12 your last question on Clorox, it's not just ads, it's
13 endorsements. Clorox, fabulous product, gives a lot of
14 advice online, and there's a campaign Clorox had where
15 you could get a buck-off coupon if you gave some advice
16 on your favorite uses of Clorox. And I saw some. You
17 can use it to remove mildew from siding and somebody said
18 you can use it to clean the taps for our home-based
19 brewery. That one sounds a little suspicious. And
20 they're all shown on the Clorox Facebook page, which is
21 fabulous because right on the Clorox page you know
22 exactly what's going on and you can see that Clorox has
23 more information on safe uses of their product.

24 But the thing is that since those were advice
25 given by people, they also showed up on their own wall

1 posts or pages, out of the context of the Clorox Facebook
2 page. So, one of my friends posted that advice about the
3 mildew from siding, posted the advice about cleaning my
4 home brew equipment. There's no disclaimer there.
5 That's not an ad from Clorox; it's simply advice that's
6 coming from somebody who feels good about the product.

7 In that case, Michael, you're going to have to
8 rely upon my common sense to understand when not to use
9 Clorox or read the label on the box, because Facebook
10 can't be responsible. I don't think Clorox can be
11 responsible for that. It's more of our social
12 interaction in life that the advice we get from friends
13 is not always complete and sometimes it's bad advice.
14 So, we need to be careful about the things we do.

15 MR. OSTHEIMER: Let me ask another question.

16 MS. KING: Can I just add one more quick thing
17 before you move away from that, which was death to the
18 banner ad term? Unfortunately, I don't have a good
19 recommendation, but just to note, things like sponsored
20 search and sponsored stories in a Facebook newsfeed throw
21 out all sorts of new paradigms for teaser ads.

22 MR. OSTHEIMER: The next question is related to
23 the prior one. If a space-constrained ad simply said
24 three-quarter carat diamond earrings only \$99, a consumer
25 could not take any action without clicking on that ad. A

1 banner ad or a space-constrained ad that a particular car
2 gets 50 miles per gallon could impact a consumer who
3 doesn't click on the ad and they could later have their
4 impression changed about that car. Should the analysis
5 of the adequacy of a disclosure on a click-through or in
6 the space-constrained ad itself be different when a
7 consumer has to click through in order to be impacted by
8 the ad? How and why?

9 MR. DELBIANCO: Michael, this one was in the
10 2000 Dot-Com Disclosure. There was a handful of examples
11 on the three-quarter carat diamond and you guys used
12 several pages to show how I had to disclose that three-
13 quarters of a carat in the jewelry trade could be plus or
14 minus a 16th of a carat, and devoted a lot of attention
15 to that in the FTC's 62 pages of mock ads. So, is that
16 meant to convey that there's a risk of them being fooled
17 that there's less than three-quarters of a carat? There
18 was quite a bit of attention said that whether it could
19 be an asterisk next to the three-quarters or a hyperlink
20 underneath the word "three-quarters."

21 So, I guess I'm trying to understand from that
22 example from 2000, where do you see that as putting the
23 customer at risk if they happen not to know that carats
24 are plus or minus a 16th?

25 MR. OSTHEIMER: Does anybody else want to weigh

1 in on that?

2 (No response.)

3 MR. OSTHEIMER: No? Okay. Sally?

4 MS. GREENBERG: I read all those and they were
5 meaningless to me because I had no idea -- I had no
6 experience with diamond weights. Obviously, you're
7 communicating -- this was in the 2000 guidances. It was
8 so out of context for me as a consumer who doesn't have
9 any experience at all with buying diamonds. I'm a public
10 interest lawyer through and through. And so, it was
11 repeated over and over again as an example, but maybe it
12 falls into the context of you're working with a group of
13 consumers who actually know a little bit about this and
14 can be easily -- or can be misled unless the true weight
15 of the diamond is communicated on the website.

16 MR. OSTHEIMER: Okay. Let me ask a couple of
17 questions that I believe are from the audience. The
18 first question is, don't advertisers control the number
19 of required disclosures by deciding how many
20 representations they make that require disclosures to
21 make the ad not deceptive?

22 MR. DELBIANCO: I'll start. Yes, of course
23 they do. They control it by limiting the number of
24 triggering claims they include in their ads, and I think
25 your guidance from 2000 was outstanding on that. You

1 asked the advertiser to consider disclosure
2 responsibilities when they are making a claim.

3 MR. OSTHEIMER: Anyone else?

4 MS. GREENBERG: Can you read that again,
5 Michael?

6 MR. OSTHEIMER: Sure. Don't advertisers
7 control the number of required disclosures by deciding
8 how many representations they make that require
9 disclosures to make the ad not deceptive? Svetlana?

10 MS. WALKER: Yeah, I'd like to touch base on
11 that. It's not necessarily how many representations you
12 make, but the sort of inherent complexity that may be
13 surrounding those representations. Oftentimes, imagine a
14 product launch that perhaps is centered around three
15 principal claims and, obviously, you'd like to tout all
16 three in an advertisement as opposed to stagger them or
17 choose the best one. And when you make those claims,
18 even if you make a single claim, the complexity of the
19 disclosure really is what governs where it's placed and
20 whether it's in a hyperlink and also its proximity, not
21 necessarily how many representations or how many
22 potential sort of separate advertising claims there may
23 be.

24 MR. OSTHEIMER: Anyone else want to respond to
25 this question?

1 (No response.)

2 MR. OSTHEIMER: We have another question from
3 the audience. This is a long one. What recommendations
4 can be offered on website appearance and contrast
5 noticeability of disclosures, such as bolding, boxes,
6 font color, background contrast, table of contents and
7 longer terms or the visual solutions to ensuring that
8 something is noticeable?

9 MS. KING: I'll take a stab at that. I think
10 the design community -- I'm not a designer myself, but
11 I'll just say the design community would have a lot to
12 say about that. Again, I think that you can make -- you
13 can offer up design guidelines that are suggestive and
14 not prescriptive. So, you don't need to say that all
15 disclosures need to be made in Verdana font in 10-point
16 size, blah, blah, blah, blah, blah. But there is a lot
17 of research out there that goes directly to how people
18 see what they see and how they perceive things online.

19 And so, without having to get into, I think,
20 too many specifics, I think there's a lot of good general
21 guidance that can answer a lot of those questions.

22 I know, as I've thought about these issues, I
23 wish that we could give guidance to our user testing
24 and say, you know, if you test with a representative
25 group of users -- I don't know if you could even go as

1 far as to say you earn safe harbor status or something.
2 I wish we could come up with something like that, but I'm
3 also a realist in realizing that a lot of more
4 unscrupulous people will take those type of
5 recommendations and twist them to skirt the requirements
6 as much as possible.

7 So, I think there's a balance between being
8 overly prescriptive and saying that you need to use bold
9 versus, you know, you need to do something that draws
10 emphasis and draws attention. I think it's at the point
11 now we probably should give more specific guidance, but
12 again, try not to be too prescriptive in terms of design.

13 MR. OSTHEIMER: Linda?

14 MS. GOLDSTEIN: I would certainly agree with
15 that, that it will always depend on the context of the ad
16 and other features of the ad. But there are certainly
17 certain design elements that are likely to make
18 disclosures more prominent or more readable. I would
19 leave that more to the design experts and suggest that
20 perhaps additional consumer research, like the type we
21 heard this morning, could be really helpful in that
22 regard.

23 The point I wanted to make here is I think, to
24 some extent, the FTC could be helpful here in supporting
25 the notion that sometimes less is more. One of the

1 things we do know is that the -- from enforcement action,
2 is that the FTC doesn't like long, dense disclosures in
3 long paragraphs with lots of text. That often results
4 from the fact that marketers are afraid of not disclosing
5 all of the information that the FTC might consider
6 material.

7 So, there is a real balancing act that needs to
8 happen here, and if marketers could get more comfortable
9 with the notion that less disclosure on the webpage may
10 be acceptable provided there are effective ways of
11 directing the consumer to other locations where
12 additional information can be disclosed, that would give
13 marketers the confidence to shorten the disclosures,
14 which in many respects might actually result in those
15 disclosures being more readable and understandable to
16 consumers.

17 I mean, we saw that in the case of Magnuson-
18 Moss when the FTC ultimately pulled back from the
19 requirement that all of the material terms and conditions
20 be disclosed and opted for a shorter disclosure directing
21 consumers to where they could get all of that very
22 difficult information. And I think if we could adopt
23 that as a general guiding principle, that that may be
24 helpful in reducing the text and making those disclosures
25 more readable.

1 MR. OSTHEIMER: Steve?

2 MR. DELBIANCO: Just a quick answer. The
3 question might lead FTC to conclude that it should, once
4 again, 12 years later, focus, focus, focus on websites,
5 and to focus on websites where you can do bold and
6 italics and contrast would miss the entirety of tweets,
7 SMS, wall posts, comments, search ads, as well as organic
8 search results, none of which can do contrast, italics or
9 bold.

10 So, it would be far better to stick to what you
11 said in 2000 about prominence. It's one of those three
12 pillars. And articulate prominence in the context of a
13 website where you might show an example using italics or
14 bold, but then show us some text-based ads where
15 prominence cannot be achieved through italics and bold.
16 It has to be achieved through the other placement of
17 words that are proximate and appropriately descriptive.
18 Words like purchase required to go with Paul's example
19 earlier. That's more about prominence and importance
20 than whether the word is in italics or underlined.

21 MR. OSTHEIMER: Paul?

22 MR. SINGER: So, real quickly, I would just
23 note that I think even with, as Linda was suggesting,
24 sort of clearer guidance in terms of the less is more
25 approach and what information should be disclosed, I

1 think you're always going to have the question of
2 marketers feeling like they need to put everything in an
3 ad. As long as there's still going to be class action
4 lawyers out there, there's still going to be issues that
5 they're confronted with and I'm sure that there's always
6 going to be this position and this feeling that that
7 information should be there.

8 And I think that in answer to your question,
9 given that and understanding that backdrop, that's where
10 some of these things like bold and boxes can really come
11 into play to help distinguish material information.

12 Now, I think Steve makes a really good point
13 and that's that in these differing new technologies,
14 that's not necessarily available to you as a way to do
15 it. I think that as the technologies develop and as it
16 changes over time, I think there's going to be ways to
17 call that out and to call that attention. I think the
18 other thing, though, is that in a tweet in that sort of
19 context, you're limited in space anyway. I mean, you're
20 not going to be overrun with information in that tweet
21 itself. So, the material information can be there and,
22 as I was suggesting earlier, you know, the approach that
23 states have taken is that in those space-constrained ads,
24 if the material limitations of that offer are there, you
25 can direct the user to somewhere else to get that

1 additional information and to find those additional terms
2 because there's really an impossibility element to it.

3 MR. OSTHEIMER: Sally?

4 MS. GREENBERG: I think what we heard this
5 morning in the presentation is that, yes, the formats are
6 changing and real estate is scarce in some of the new
7 formats and it's hard to use different fonts and
8 different colors. But there are some people doing some
9 very interesting research in understandability and
10 readability and things that can be seen and read much
11 more readily than some of the other models that we're
12 using.

13 And I like the term that the FTC could be
14 helpful because that's what we want our FTC to be on
15 behalf of consumers. I think the way the FTC could be
16 most helpful is to look at some of the companies and
17 advertising that is actually taking up these new modes
18 and these new designs and practices and maybe give extra
19 play to those advertisers who have really embraced ways
20 of getting information to consumers much more effectively
21 and readily and not get bogged down in, oh, do we have to
22 put everything into a terms of use just to protect
23 ourselves against liability, really look for best
24 practices, cutting edge, that it's going to provide
25 consumers with the kind of information that we know

1 consumers should have that also doesn't bog companies
2 down in the way that Linda and Svetlana and Steve had
3 talked about.

4 MR. OSTHEIMER: Thank you, panelists. This has
5 been a very interesting discussion. We're out of time
6 and we're going to take a 15-minute break. I hope you'll
7 all return for the discussion about disclosures in social
8 media. Thank you.

9 (End of Panel 1.)

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1 PANEL 2: SOCIAL MEDIA ADVERTISING DISCLOSURES

2 MS. KRAINSKY: All right, everyone, thank you
3 and welcome back. Just a few housekeeping things I
4 wanted to mention. There's some seats up here in the
5 front. All the reserved seats are free now. So, if
6 anybody needs additional seats, come on up here.

7 Another thing I wanted to mention is our
8 comments page is now open. So, if anybody has comments
9 after the workshop, we really welcome your feedback and
10 please go ahead and log on to our webpage and you'll see
11 a link to submit comments.

12 Now, it is time for our second panel, which is
13 Social Media Advertising Disclosures.

14 MR. CLELAND: Good morning, my name is Rich
15 Cleland. I work in the Division of Advertising Practices
16 at the Federal Trade Commission. And this panel is going
17 to discuss disclosures in social media.

18 To make it clear up-front, what we're talking
19 about with social media, we're talking about consumers
20 talking to consumers and not necessarily the platforms on
21 which those discussions happen. We're going to be
22 focusing on how disclosures should be made in that
23 medium, in that area, and not necessarily on whether a
24 disclosure is required or what's actually required in
25 that disclosure. That's a discussion for a different

1 time. So, we're going to assume, for the purposes of our
2 discussions this morning, that a disclosure needs to be
3 made and the question we're going to try to respond to is
4 what is the best way to make that disclosure.

5 We're going to be covering three general
6 issues. The first issue, and this is totally arbitrary,
7 but I made it up, we're going to be covering disclosures
8 in sort of non-restricted space where you've got plenty
9 of space to make disclosures and the question is, what's
10 the best way? And then we're going to talk about -- as
11 an example, blogs, your own blogs, personal blogs.

12 And then we're going to talk about disclosures
13 in restricted space media, in Twitter and things like
14 that. And then, finally, we're going to talk about how
15 disclosures should be made or can be made on social media
16 platforms that allow only for a single sign of approval
17 or check-in and there's some materiality disclosure that
18 needs to be made in that context.

19 We have a highly qualified panel here to
20 discuss these issues. We've crossed a lot of spectrums
21 from both in terms of users and sponsors of various
22 social media. I'm going to ask the panelists now to
23 introduce themselves and also I'd like to give you an
24 opportunity, at this point, when you introduce yourself,
25 if you could, briefly identify what you think is the most

1 critical issue in the area of disclosures in social
2 media.

3 We'll start with you, Susan.

4 MS. COOPER: Hi, I'm Susan Cooper. I'm
5 advertising counsel at Facebook. I think that there are
6 a few challenges with respect to social media
7 disclosures. I think social media is an umbrella term
8 and it's used to signify a number of different platforms
9 that are actually very different, that function
10 differently and that users use for different purposes and
11 in different ways. So, trying to accommodate -- and this
12 is something that came up in the last panel -- a lot of
13 different platforms where one solution doesn't
14 necessarily work on all platforms.

15 I think the other thing that we need to keep in
16 mind and that's another challenge is the way that users
17 are consuming social media is very different from the way
18 that they consume traditional media. So, that, in turn,
19 affects the way that offers are communicated and that
20 marketers and advertisers communicate with users on
21 social media platforms. So, I think generally whatever
22 solutions are arrived at just need to be flexible sort of
23 from a conceptual standpoint so that they can accommodate
24 the differences in platforms and also what's likely to
25 become future and new technologies that are different

1 from even what we're seeing today.

2 MR. DUDUKOVICH: I'm Jim Dudukovich. I may or
3 may not work for a large company, but I'm here on behalf
4 of the Word of Mouth Marketing Association, a member of
5 the Legal Affairs Committee.

6 And in terms of what I see as the biggest
7 challenge, to me, it's really understanding today's
8 consumer and trying to modernize and adapt and evolve the
9 way that we look at consumers and how they think, what
10 they know, what their expectations are. And I think
11 we're at a place where, you know, when you think about
12 it, we're still really in the infancy of the digital age.
13 And I think in 5, 10, 20 years, we're going to look back
14 and probably laugh at some of the modes of thinking that
15 we're in right now.

16 And I think -- I don't know who's responsible
17 for solving this problem and figuring out what the
18 reasonable consumer is today. But I think it needs to be
19 done because the only way to solve the problem is to
20 identify the problem. And identifying the problem, in
21 this case, to me, is identifying what consumer
22 expectations are and where there are gaps and where
23 consumers may be harmed rather than making assumptions
24 that they are being harmed.

25 MR. FAULDS: Hi, I'm Malcolm Faulds. I'm the

1 Senior Vice President of Marketing at BzzAgent. I'm also
2 affiliated with WOMMA as well. I'm on the Member Ethics
3 Advisory Panel and we work on some of the disclosure
4 guidance we give to our member companies.

5 The biggest issue that I see for us is in an
6 earned media space, which is what word of mouth marketing
7 is. It's a people-based media. You need to have
8 authenticity. It needs to be personal, it needs to be
9 relevant, it needs to be trusted between people or else
10 it doesn't work. And I think these disclosure guides,
11 when done right, support that idea of creating authentic
12 communications between people. If they're too sponsored
13 or, God forbid, if they feel like they're shill
14 conversations, they won't be effective.

15 So, we're very supportive of any initiatives to
16 give better guidance to companies on how to do this in a
17 way that supports people having authentic and transparent
18 conversations among each other.

19 MS. FERGUSON: Hi, I'm Stacey Ferguson. I am
20 here as a blogger and a cofounder of the Blogalicious
21 Community and Conferences, and I may or may not have
22 worked here for seven years prior to that.

23 From a blogger perspective, I would say the
24 biggest issue is wanting to make the proper disclosures,
25 but not wanting to detract from your message and from the

1 look and feel of your blog. Because as a blogger, your
2 primary goal is to appeal to your readers. And if that's
3 clouded with a lot of legal jargon or an unattractive
4 disclosure, that makes the message not authentic, it
5 seems forced, then you are at risk of losing your
6 readers, which is your sole purpose for being. So, I see
7 that as the major challenge for us.

8 MS. SHOOK: Hi, I'm Susan Shook. I'm an
9 Associate General Counsel-Associate Director with the
10 Proctor & Gamble Company. I lead a global privacy and
11 digital law group who's dealing with these things every
12 day.

13 I think one of our biggest challenges is
14 keeping pace with the new platforms or significant
15 changes in the platforms that affect how we go about
16 making our commercial and marketing messages, and
17 effectively, how consumers are engaging in those
18 platforms. That's part of why I think having a flexible
19 approach is important. It's not, to what Susan said
20 earlier, a one size fits all. And despite what other
21 lawyers or clients may think, we're not playing around at
22 our desks, you know, just catching up with our Facebook
23 contacts, but we're actually trying to figure out how
24 these platforms or nuances to them work and how the
25 consumers are engaging with it in a way that we can make

1 appropriate disclosures and meet our compliance
2 requirements.

3 MR. WEISSMAN: Hi, I'm Robert Weissman. I'm
4 President of Public Citizen. I do have three points to
5 offer, a little counterbalance.

6 The first point, I think, is that advertising
7 on the new platforms has to adapt to the existing law,
8 not the other way around. So, there can be flexibility,
9 but the principles underlying the law are there for sound
10 consumer protection reasons. And if advertising on a new
11 social platform can't be responsive and meet the duties
12 of those old principles, then the advertising shouldn't
13 exist or the platform has to be modified through some new
14 technology.

15 The second point is to be, from our point of view,
16 very cautious of the idea that consumers are different in
17 the new era of new social media. So, consumers may be
18 very sophisticated. Young consumers, particularly, may
19 be very sophisticated about using new technologies. It
20 does not mean that they're very sophisticated about how
21 they're being advertised to, and I don't think there's
22 any empirical data to suggest that they are, even though
23 it's sort of a common assumption that if you're really
24 comfortable with using Twitter, you know, for example,
25 when you're being marketed to.

1 The third principle is, I think, with some very
2 important exceptions, links aren't worth too much when it
3 comes to disclosures. So, it's really -- particularly in
4 the area that we're talking about where there's -- the
5 material issue at hand relates very directly to the
6 impression that the consumer is receiving at the moment
7 they're being advertised to. So, there are some really
8 significant caveats with that last point, but I think
9 that's a third piece to take forward.

10 MR. CLELAND: Okay, thank you. We're going to
11 continue the custom of the last panel. I'm going to ask
12 some questions based on some examples and then if you
13 want to respond to it first, go ahead and turn your tent
14 up here and I'll call on you. If nobody is -- this is
15 practice time.

16 (Laughter.)

17 MR. CLELAND: If nobody turns their tent up,
18 then I have a list of victims here already planned.

19 Okay, we've got two really fairly simple -- I
20 think fairly simple examples we're going to go through.
21 The first one deals with sort of the unlimited space and
22 the second one is a Twitter example. So, let's move into
23 our first example.

24 This is a blog, Katie's blog, and Katie blogs
25 about her home repairs in her home and the different

1 types of products that she uses. In this particular
2 blog, she is talking about remodeling her bathroom. And
3 in the middle of the blog here, she says that I finally
4 ended up using Paint World's Amazing Just One Coat Paint
5 in Canary Sunrise. "Paint World sent me two gallons to try
6 out and this paint is amazing."

7 Stacey, any problems with that example that you
8 see?

9 MS. FERGUSON: No problems for me.

10 MR. CLELAND: What do you think are the
11 strengths of this --

12 MS. FERGUSON: I like this, again, speaking as
13 a blogger, because it's in her own voice. It's part of
14 her message that she's already trying to communicate and
15 she's making the reader aware that she did not pay for
16 the paint. So, that should satisfy the disclosure
17 requirement. And, yet, it doesn't take away from her
18 story. So, from that perspective, I like the way that
19 she's done it here.

20 MR. CLELAND: Okay. Malcolm?

21 MR. FAULDS: Was this the example that actually
22 had the in-line disclosure? I'm sorry, the one that was
23 on top here.

24 MR. CLELAND: Yes, this is the one with the in-
25 line disclosure.

1 MR. FAULDS: Okay, good. No, I would agree
2 then. I think that's best practice when it has in-line
3 disclosure, so in the text of the post itself. Why
4 that's so important is that in social media, in so much
5 digital technology now, the content doesn't reside in one
6 place, it gets shared many places. So, someone might be
7 reading this blog on an RSS reader through a feed that
8 would be outside the design of the site. So, while she
9 has a nice disclosure and disclaimer page over to the
10 side, that wouldn't show up to someone who is reading
11 this blog on an RSS reader. So, having an in-line
12 disclosure like this is really good. And if she can get
13 some color around that, who gave it to her and in what
14 context, so much the better.

15 MR. CLELAND: Jim?

16 MR. DUDUKOVICH: I mean, I think this is
17 absolutely fine. But the question I have is, do we have
18 all the facts? And I may be skipping ahead to some of
19 the later examples. But I think it's fair for us to
20 think about this in the context of did Paint World -- did
21 they send two gallons of paint to everybody that blogs
22 about home repairs and just send them out or did they
23 send them to selected bloggers and say, hey, you got to
24 try our new paint and we'd love it if you'd blog about
25 it? I don't know. Do you think those facts are

1 material?

2 MR. CLELAND: Well, let's assume for the
3 purposes of this discussion that Paint World regularly
4 follows blogs that promote home repair products. So,
5 they've identified who the influencers are in this
6 particular space and that's who they want to reach. So,
7 they have now sent this sample paint to Katie to try out
8 wherever she wants to try it out. So, does that change
9 the analysis?

10 MR. DUDUKOVICH: Well, I mean, the question is,
11 did Katie get just a cardboard box with two gallons of
12 paint in it out of nowhere with no instructions, no
13 requests, no anything or did she get a box of paint that
14 said, hey, we know you're a blogger and you do home
15 repairs, we'd love for you to try our paint and tell your
16 readers what you think of it.

17 MR. CLELAND: Stacey, do you review products
18 and how do you get the products?

19 MS. FERGUSON: I do, both ways. So, as of
20 late, more directly targeted. Like we see you blog about
21 this, we'd like you to try X, write about it if you'd
22 like or we'll give you \$200 to write about what you
23 think. Either way, as long as a disclosure's there, I
24 don't know how much it will matter to the reader if Katie
25 was randomly selected to get the paint or if she was paid

1 to talk about the paint because you know that she didn't
2 go out and buy this paint on her own and she does have
3 some relationship with Paint World.

4 I have seen a lot of bloggers -- and, you know,
5 contrary to popular belief, most bloggers want to do the
6 right thing and want to disclose and I've seen a lot of
7 overdisclosing. So, there's a long paragraph at the end
8 and it says, Paint World contacted me, they offered me
9 \$99 to write two posts for them on these months and it
10 goes on and on and on. And I really don't like those
11 type of disclosures because then it seems forced, then it
12 seems like they are just the mouthpiece for Paint World,
13 whereas this seems more organic, more natural, and you
14 still get the point.

15 So, I don't know if it makes that much of a
16 difference how Katie was contacted as long as she makes
17 the disclosure at the end of the day.

18 MR. CLELAND: And you'll notice here -- the
19 question here is if this disclosure is here, which seems
20 to be the core disclosure in this particular example,
21 then the rest of the details could be put under
22 disclosures and disclaimers if she felt that more
23 information was necessary.

24 MS. FERGUSON: She could, but as Malcolm said,
25 almost no one is going to read that link.

1 MR. CLELAND: Well, we're going to get to that
2 issue. Okay, let's move on to our second example. In
3 this example, the disclaimer is still in the text and it
4 is at the bottom down there and it says, "Paint World gave
5 me the paint just to try out, but this paint is so
6 terrific, I'll buy it myself next time." And in the text,
7 there's a link to Paint World's website. Do you see this
8 as different than our first example? Anybody? Malcolm?

9 MR. FAULDS: No, I don't really see a material
10 difference in it. I think that she's disclosing that she
11 got the paint for free. She's giving her opinion on the
12 product efficacy. So, you know, to me, what I would look
13 for as a reader, but also as someone who organizes these
14 kinds of programs, is she offering her opinion based on
15 actual experience with the product? Is she disclosing
16 that she got the product for free? And it looks like
17 she's doing that in this case.

18 MR. CLELAND: Does anyone have a contrary view?
19 Stacey?

20 MS. FERGUSON: I was just going to say I agree.
21 If she really wanted to go the extra mile, she might have
22 put the disclosure before she linked to Paint World
23 because if I'm just looking for a great paint and I came
24 upon her blog, I might just click on it and go and buy it
25 and I'll never know that she actually got it for free,

1 and that might have influenced my decision whether or not
2 to purchase it. But I think it's fine the way it is.

3 MR. CLELAND: I think, you know, Jen had
4 mentioned earlier in her presentation about consumers not
5 reading the full page. If you focus for a second in this
6 example and compare it to the other one, the disclosure
7 sentence in the first example is right next to her
8 statement about getting the paint and the paint being
9 amazing. This one is separated out and how do we know
10 the consumer's going to read to the bottom, to the last
11 sentence on this web blog and see this disclosure?
12 Robert?

13 MR. WEISSMAN: Well, I think that's right.
14 This is not as good as the other one. And I don't think
15 you were intimating, but in case you were, the link to --
16 in some of the other materials, the link to Paint World
17 is not a disclosure, it's an ad. But this seems to me to
18 be on the margin and it's a judgment call. It's all
19 within the same paragraph. It's not that far down. This
20 does not seem to be pushing it too far in terms of the
21 disclosure to me. The other one is clearly better.

22 MR. CLELAND: Any contrary view? Jim?

23 MR. DUDUKOVICH: I'll throw it out for
24 discussion. I'm not advocating one particular viewpoint
25 on this. But going back to my comment earlier about sort

1 of starting from the finish line and working our way back
2 and looking at what the harm or the potential injury is
3 here, if Katie is a home improvement blogger, do her
4 readers think that she gets products to try out for free
5 and does that materially influence then? I mean, it's
6 just sort of a, gosh, I would -- I would have bought that
7 Canary Sunrise, but they gave it to her for free and, so,
8 I'm very suspicious of the praise that she's giving it.
9 I mean, so I know that I'm going off topic a little bit
10 because I'm getting into more of the substance of the
11 disclosure and whether it's required versus how best to
12 make it, but in this example, I can't help but wonder --
13 yeah, I think the first one is better than the second
14 one, but do I think anyone is going to get harmed by the
15 second one?

16 MR. CLELAND: But that's primarily because you
17 don't necessarily see it as material. So, you're right,
18 that's off topic.

19 MR. DUDUKOVICH: Right, that's probably not the
20 last time for me.

21 MR. CLELAND: No, no, no, no, that's fine. I
22 don't mind being off topic as long as you don't expect a
23 response.

24 (Laughter.)

25 MR. CLELAND: Okay, and our third example is

1 the disclosure, the information that's in the disclosure,
2 she's taken it out of the text. She's put it -- it's now
3 under the disclosures and disclaimers. And what it says
4 is that Katie regularly received products to review and
5 that Paint World gave her the two gallons of paint.
6 Comments on this particular form of disclosure?

7 MR. FAULDS: I would just reiterate my point
8 from before. I think this is the bare minimum for
9 someone who would be disclosing something. We wouldn't
10 consider it sufficient in our programs just because it's
11 not in-line with the review text itself, which is really
12 important. As content gets simulated out to so many
13 places these days, those kind of disclosure and
14 disclaimers pages don't always go with the content where
15 it gets displayed.

16 MR. CLELAND: Stacey, is it clear and
17 conspicuous?

18 MS. FERGUSON: Not at all. I would agree.
19 This doesn't even meet the bare minimum for me because I
20 don't treat the separate disclosure and disclaimers pages
21 as sufficient in any case. So, it would have to be where
22 the endorsement is in order for it to be sufficient.

23 MR. CLELAND: Susan?

24 MS. COOPER: I think I'd just make a point that
25 while I agree with the other commenters here, I think

1 that we're talking about a blog and a webpage, and
2 whether somebody's accessing it via a mobile device or
3 via a desktop computer, there's obviously a lot of text
4 here and there's a lot of space and, so, given perhaps a
5 lack of space constraint here, that makes this type of
6 disclosure maybe less effective. But if we were talking
7 about something else, like a Tweet, and the same type of
8 information were being communicated where space
9 constraints might be an issue, then this type of
10 disclosure might be effective. And it's really just an
11 example of how for one type of social medial platform, a
12 disclosure might not be effective, but the same type of
13 disclosure could, in fact, be effective on another
14 platform.

15 MS. FERGUSON: The only thing I would add to
16 that is there should be some clue that the reader would
17 need to click somewhere else, and there's not that clue
18 here. On Twitter, where there's less space, the clue is
19 right there because the link is right there. But here, I
20 could read her entire post and go about my day and never
21 realize that I should have read something on her
22 disclosure page. So, I think there's a little bit of a
23 difference.

24 MR. CLELAND: Okay, Robert?

25 MR. WEISSMAN: Well, I agree with everything

1 except for sort of the Twitter application, but we can
2 get to that later. I want to just add, I think one
3 thing, it's not about the materiality because we're
4 assuming that, but the first hypothetical has just two
5 gallons of paint and I think that colors the way we think
6 about it because it seems kind of de minimis. If the
7 giveaway had been, yeah, they gave me all the paint I
8 needed to paint my house, then we would have been more
9 attentive to it. So, I think just the hypotheticals tend
10 to sort of prime us, to use a pun there.

11 (Laughter.)

12 MR. WEISSMAN: Thank you.

13 (Laughter.)

14 MR. WEISSMAN: I was hanging for a minute.
15 Prime us to how we're thinking about it and I think maybe
16 that's one -- so, maybe we're a little less worked up
17 than we would be if the consideration had been larger.

18 MR. CLELAND: Okay, let's assume for this
19 example then that instead of saying disclosures and
20 disclaimers, it says something like my financial
21 relationships. Would that be an adequate disclosure?

22 MR. WEISSMAN: No.

23 MR. FAULDS: I agree it would not be. I think
24 the same technical problem still exists that that
25 disclosure wouldn't be accompanying the text wherever the

1 text goes, and I don't think that label -- even that
2 label for someone who is looking at the content on this
3 page, would be sufficient to communicate the experience
4 they had with the marketer in that instance.

5 MR. CLELAND: Let me pose this question. Let's
6 assume that we have another form of disclosure. Well,
7 let's take our first two examples since we did get some
8 positive response on the second example that, well, that
9 might be -- that might be an acceptable type of
10 disclosure. So, we have one disclosure form that's
11 clearly superior and we have one disclosure form that
12 might be acceptable. How do we treat those two in terms
13 of picking -- is it okay? Do we say, okay, it's your
14 option, both of these might be okay, just pick the one
15 that you like, the one that seems to be least offensive
16 or more consistent with your marketing message or do we
17 say the practice should be to go with a disclosure that's
18 most likely to be seen?

19 MR. FAULDS: I think provided you give
20 standards for what's required, so an in-line disclosure
21 and then it would be nice to have a disclosures and
22 disclaimers page or something along those lines, that's
23 good. But you need to give the blogger in this case
24 flexibility to put this in their own voice or else it's
25 not going to be authentic, it's not going to feel like

1 them writing. And really what we're talking about here
2 is that peer-to-peer conversation. And if we make it too
3 formulaic, give them too many guidelines, it's going to
4 lose that authenticity and people will stop doing it or
5 they'll stop paying attention to the requirements.

6 MR. CLELAND: Jim, WOMMA has self-regulatory
7 guidelines on social media. What is their advice on
8 disclosures and blogs?

9 MR. DUDUKOVICH: Well, the advice is in line
10 with what everybody's already said today which is it's
11 got to be in proximity to the message and it's got to be
12 clear. The challenge with this one to me is are we
13 focusing on Paint World or are we focusing on the blogger
14 because I think that -- I'm sorry if I keep going back to
15 my early points, but, you know, my company, as an
16 example, in our social media principles, we say that you
17 have to use the ten magic words. My name is blank and I
18 work for blank. And in a vacuum, it sounds like you're
19 supposed to do that with every post or message or
20 communication regarding the company or its products or
21 programs. And I think that that's probably too strict.

22 I think the point here is if consumers might be
23 influenced by this blogger, is it material for them to
24 know that she received this paint for free? And I think
25 we -- assuming the answer is yes, I think example one and

1 example two both are sufficient and comply with what
2 WOMMA's guidelines would say, which are -- for those of
3 you who don't know, they're under review and revision and
4 I think those have been shared with you, Rich, and those
5 will be available to the public for comment. As the
6 space evolves, I think WOMMA recognized that it's time to
7 re-look at the disclosure guides and try to modernize
8 them and update them. Not to say the old ones were
9 wrong.

10 MR. CLELAND: No, we would never say that.

11 MR. DUDUKOVICH: We would never say that. But
12 under either set of guidelines, one and two would both be
13 sufficient. I think example three would not be.

14 MR. CLELAND: Susan, I'm going to let you
15 answer this question, but I'm going to throw another
16 question in here on top of it. I know a lot of companies
17 out there have policies that govern their social media
18 marketing and many of those sort of cover when you have
19 to make a disclosure. Do they generally also cover how
20 the disclosure must be made or do those generally leave
21 that up to the individual influencer?

22 MS. SHOOK: I can speak for my company and say
23 that we generally would give some general guidelines on,
24 let's say, in-line, but we try to keep the flexibility in
25 terms of maintaining authenticity. Otherwise, if you get

1 so prescriptive, then the consumer is going to be turned
2 off and it doesn't come across as this truly was the
3 experience of the blogger with your product, which is the
4 underlying fundamental purpose or nature of going out to
5 the bloggers in the first place.

6 I was going to say, with regard to these two
7 examples, I don't think either is wrong, and at the end
8 of the day, as Robert said, it's all judgment. So, what
9 kind of claims is the blogger making? Are they making
10 extreme claims, many of them? Should they up-front more
11 or associated with the claim, the disclosure? I think
12 the nature of the underlying relationship, as someone
13 also said, did she get enough paint for the whole house
14 or did she just get a couple gallons to play around with,
15 and also, how does this information travel? So, a lot of
16 these blogger spaces have all kinds of sharing links. If
17 it's not in the context, is that disclosure going to
18 travel with the endorsement? If it's off in a link to
19 the side, that's not likely. But there may be links
20 placed within here that do a good job of disclosing,
21 within the link itself, that there's some kind of
22 relationship and that may travel with the endorsement.

23 MR. CLELAND: Okay. Stacey?

24 MS. FERGUSON: I just want to add one thing.

25 For the most part, the contracts I see, the company tells

1 you exactly what to say in the disclosure and they want
2 you to cut and paste it and make it somewhere
3 comfortable, it's been through their legal team and the
4 whole thing. And a lot of times, it's easier for the
5 blogger. All I have to do is cut and paste it.

6 What happens then, though, is that it's at the
7 very end so it's kind of more like the second example
8 where I might be talking about Paint World in my text,
9 but it's not until the very bottom where I have my
10 disclosure that was given to me by the brand to put in
11 there. So, if that's going to change, then there will
12 have to be a lot of education, both to the companies and
13 to the bloggers because we're kind of getting trained to
14 take that cut and paste language and put it at the end
15 and not necessarily in the text where the endorsement is.

16 MR. CLELAND: Let's move on to our next
17 example. This is our Twitter example. And in the first
18 -- you can all read it. It's short. Limited space, you
19 know. I'm going to start, Stacey, with you again. Would
20 you like to comment on this disclosure?

21 MS. FERGUSON: So, if I saw something like this
22 in my Twitter stream, I would just ignore it, to be 100
23 percent honest.

24 (Laughter.)

25 MS. FERGUSON: It looks like an ad. It seems

1 seedy and gross and I wouldn't know exactly where it's
2 coming from. If it's in my mother's Twitter stream --
3 who actually is on Twitter, scary -- then it could be
4 more confusing. The fact that it says "ad" at the end, I
5 don't know if that would communicate enough to the novice
6 or average Twitter user that it is, in fact, an ad. I
7 don't know if that was helpful.

8 MR. CLELAND: Yeah. Anybody have a different
9 view?

10 MR. FAULDS: I agree that it's seedy and gross.

11 (Laughter.)

12 MR. FAULDS: But when I look at this, this
13 brings up another issue that I think has caused some
14 confusion among the WOMMA membership, which is around
15 celebrity endorsements. Is Juli here a celebrity or is
16 she just an everyday person?

17 MS. FERGUSON: Right.

18 MR. FAULDS: And in the UK, they make no
19 distinction. They hold celebrities to the same
20 disclosure requirements as everyday people. And, so, I
21 think addressing that issue again or revisiting that
22 would be helpful for the FTC to do. What is that policy
23 and why would celebrities not be held to the same
24 standard on that?

25 MS. FERGUSON: I just want to jump back in. It

1 would be better if you took the plain language approach
2 and said, shooting the movie beach scene, Fat-Away gave
3 me pills to try out to make it easy. I think putting it
4 in plain English is always going to be better than adding
5 a little ad or whatever else it is at the end. She's
6 going to say that in the tweet.

7 MR. CLELAND: Just to point out, there's two
8 disclosures here. There's the typicality disclosure,
9 given that she's giving an endorsement for the product,
10 and as well as she's being paid to do it. One of the
11 questions I had after this example was drafted was
12 whether or not this would be more effective if "ad" came
13 first in the Twitter, in the feed? Robert?

14 MR. WEISSMAN: I don't think so. We're going
15 to talk about this more in the next one, but I think this
16 is a big challenge. I don't think "ad" is going to meet
17 the standard. In fact, I think the typical loss of one
18 to two pounds per week is probably a better indicator
19 that it's a paid ad than the word "ad" is.

20 MR. CLELAND: Okay, let's move to the next
21 example then. The disclosure here is hashtag spon.
22 Malcolm or Jim, how does that fair up to the disclosure
23 guidelines?

24 MR. DUDUKOVICH: Well, I was going to ask you
25 if that was okay.

1 MR. CLELAND: Well, let me ask this -- let me
2 put the question a different way. I don't think hashtag
3 spon is in the English dictionary anywhere. I'm not
4 aware that anybody has conducted any surveys of consumer
5 understanding, even among Twitter users, as to their
6 understanding of hashtag spon. Now, having set the
7 question up that way, does anybody have a reaction to
8 this disclosure?

9 MR. DUDUKOVICH: That's a great question. I
10 think that, as an industry, we would love for there to be
11 a universally adopted and understood methodology for
12 platforms with character limitations, like Twitter, and
13 hashtag spon is sort of what's been offered up and
14 adopted. Quite frankly, when I look at this, I think
15 it's clearly a paid endorsement. I don't think there's
16 any question in my mind.

17 MR. CLELAND: But we could change the example.
18 So, that's not the driving part of this example. The
19 driving part is, do consumers understand hashtag spon?
20 It's something that's become quite common. Is it common
21 enough that we can assume that enough consumers are going
22 to understand it that it's going to convey the message
23 that it was intended to convey?

24 MR. DUDUKOVICH: I don't think anybody has the
25 data to demonstrate that. I think just for kicks and

1 grins, I would go back to what I had said before, which
2 is, let's start at the end. Can we find a situation
3 where consumers were harmed because they purchased a
4 product based on a tweet that hashtag spon and they
5 didn't realize that it was a paid endorsement? I don't
6 know if we have data on that, either.

7 UNIDENTIFIED FEMALE: (Off mic) Can you just
8 say what it does mean?

9 MS. FERGUSON: Sponsored.

10 MR. CLELAND: Oh, I'm sorry. Oh, we are not
11 helping.

12 MS. FERGUSON: Sponsored.

13 MR. CLELAND: It means sponsored. It's
14 supposed to mean sponsored message, I believe.

15 MR. FAULDS: Yes. And this is actually one of
16 the hashtags that WOMMA includes in it's guidance for
17 members. This actually would be compliant with the WOMMA
18 guidelines right now.

19 MS. FERGUSON: And I would say why not just go
20 the extra mile and write "sponsored?" It's only a few
21 more characters and it would be that much more clearer.

22 MR. CLELAND: Robert?

23 MR. WEISSMAN: Yeah, even then probably not
24 enough. I mean, the harm to the -- the harm is the act
25 itself. You have been deceived if you bought -- why was

1 the ad taken out? The ad was taken out because the
2 advertiser believes that the association with this
3 celebrity is a beneficial marketing technique. And the
4 core principle of advertising is you've got a right to
5 know when you're being advertised to. If you don't know
6 you're being advertised to, you were tricked and that,
7 itself, is the harm. In some non-trivial cases,
8 people are buying because they wouldn't have otherwise
9 bought.

10 But even without that, that thing, itself, is
11 the harm. And I don't think that needs revisiting.
12 That's not a new principle for the new media. That's an
13 old principle for the old media. It goes back to before
14 TV. I mean, that's just basic stuff and it's right.

15 To go to my opening comment, I think that's why
16 Twitter is a big challenge for this kind of stuff, but we
17 don't need to -- the law doesn't need to adapt to
18 Twitter, Twitter advertising needs to adapt to the law
19 and I don't think that hashtag spon does it for a variety
20 of reasons, including your dictionary point, but not just
21 that one.

22 MR. CLELAND: Susan?

23 MS. COOPER: I remember Jennifer speaking in
24 the last panel and I guess in her introductory
25 presentation about the fact that readers don't come to

1 websites to look at disclosures and to read them and they
2 won't often see them. So, icons can be a great visual
3 cue to a reader and I just think that you're never going
4 to start off at a point where people are going to
5 understand. I mean, clearly, there are a lot of people
6 that don't understand what hashtag spon are. A lot of
7 people didn't understand what a hashtag was a couple
8 years ago. So, it definitely will take a while and a lot
9 of collaboration among the industry to get to a point
10 where there are icons that make sense.

11 I think the other thing that we need to keep in
12 mind is that we've been talking about, in both of these
13 examples, really traditional, sort of old school type of
14 offers where a marketer offers an individual a product for
15 free, try it out and promote it. And I think that we
16 have to keep in mind that advertisers are looking for new
17 ways, and not speaking from an advertiser's standpoint,
18 but my understanding is that advertisers are looking for
19 new ways to communicate and connect with their audience
20 and that means new offer types. So not just that
21 standard, here's a free product, tell us what you think
22 about it, but offering exclusive content, offering
23 coupons. So, the types of offers are not just limited to
24 what we're seeing here. And, so, there may not be one
25 icon that is going to necessarily be a universal

1 disclosure for all types of those offers.

2 MR. FAULDS: I thought that was a really good
3 point, and to put some color behind it, there's a very
4 popular interior design commerce site right now that
5 offers its members incentives to refer their friends to
6 sign up. And if you get ten friends to sign up, you get
7 \$20. If you get 30 friends to sign up, you get \$40 and
8 it kind of multiplies after that. And they give social
9 sharing tools so you can post that link to your blog or
10 you can post it as a message to Facebook or you can post
11 it to Twitter, but they don't have any kind of disclosure
12 in any of their messaging around that referral scheme.

13 So, I think to your point about different offer
14 types, it's happening today in lots of different ways.
15 And I don't think the recipients of those messages know
16 that the person who's sending that message has a material
17 connection to the ecommerce site.

18 MR. CLELAND: Stacey?

19 MS. FERGUSON: I may be jumping ahead a little
20 bit, but I see the conversation going to a place where I
21 believe the solution has to come from the platform and we
22 can't rely on the consumer to come up with their own form
23 of disclosure that they're going to hope is adequate.
24 We've seen so many different examples and none of them
25 are fantastic, especially on Twitter. So, I really agree

1 with Robert in saying that the platforms have to adapt to
2 the law.

3 So, I think that in the case of, for example,
4 that interior decorating site, they have to build in the
5 technology so that when the user shares their link, they
6 don't have to worry about it. The advertiser or the
7 brand or whoever it is that's providing that link makes
8 it clear to whoever is reading it that there is that
9 connection.

10 On Twitter, there should be an option. If I am
11 posting a sponsored tweet, I click on a certain button
12 and my tweet becomes a certain color that people will
13 come to understand meaning that there is some
14 relationship there. I don't think that you can rely on
15 the consumer to put in their own hashtag, the proper
16 disclosure in plain English. Maybe I'm taking too hard
17 of a line, but I really think that the platform providers
18 should build in technological solutions to solve these
19 disclosure issues.

20 MR. CLELAND: Susan?

21 MS. COOPER: I think it's a little bit of a
22 slippery slope to say that the platform should be
23 responsible, particularly when -- I mean, I know we're
24 not talking about whose responsibility it is here for
25 making the disclosures. But the primary people who are

1 involved in the communication here are the marketer or
2 advertiser and then the consumer or social media user.
3 And I think that there are a lot of challenges with
4 certain platforms.

5 And, so, using Facebook as an example, because
6 that's obviously what I can speak best about, if you talk
7 about a typical "like" story, if a user "likes" a page, that
8 generates a story on their profile and in their newsfeed
9 that says that Jim "liked" Coca Cola. And that is a static
10 story and Jim may have been incentivized to like Coca
11 Cola or he may not have been, but either way, that is a
12 story that says, factually speaking, he "liked" Coca Cola.
13 If he checked in to Coca Cola's headquarters, it is a
14 check-in story. Again, he may have been offered a
15 lifetime supply of Coke products for checking in, but
16 this is the story.

17 And I think that Facebook offers users a lot of
18 ways to communicate different things. Essentially
19 whatever they want to communicate, they can append a
20 comment to a check-in or to a like story. They can tag
21 photo. So, there are ways that users can add to those
22 stories. But the technology can't really detect
23 sentiment.

24 So, for example, even if there's a way,
25 technologically speaking, for an advertiser to say, okay,

1 we're offering an incentive right now, so we're going to
2 code our "like" button so that when a user clicks on it
3 during the incentive period, it shows up in a different
4 color. That doesn't necessarily solve the problem
5 because I could show up and decide I really like Coke, so
6 I'm just going to "like" their page today. I know nothing
7 about the incentive, I haven't taken advantage of the
8 incentive. But, now, suddenly, my "like" story is now
9 color-coded and I haven't, in fact, been incented to "like"
10 it.

11 And, so, that's I think just an example of
12 where some of the technology challenges exist with
13 respect to the platform actually offering a solution, not
14 to even get into sort of the whose responsibility it
15 should really be.

16 MS. FERGUSON: But what about just giving them
17 options so that if I just do like Coke, then I don't have
18 to pick that color-coded one, I can pick the regular
19 "like." But if it was incentivized, I could pick the
20 color-coded "like." I know it gets complicated, but we're
21 going down this road and we're going to have to deal with
22 it in some fashion. I don't expect anyone to disclose a
23 "like." I feel like that's going to kill Facebook. It's
24 not going to make it fun anymore if I have to go and add
25 a disclosure every single time I click the "like" button or

1 check-in somewhere.

2 But if there's something that's easy enough to
3 do, it doesn't overtake my message or my story, then that
4 should be something to be considered, I would think.
5 Maybe it's too idealistic.

6 MR. CLELAND: Robert?

7 MS. WEISSMAN: I agree with Susan's point that
8 the duty rests with the advertiser not with the platform.
9 And if the advertiser can't figure it out, then they
10 can't advertise.

11 On the other hand, if the platform wants to
12 facilitate advertising and it turns out not to be
13 possible to do it, then it may be in the platform's
14 interest to try to work out some of these kinds of
15 solutions.

16 MR. DUDUKOVICH: I was going to say the same
17 thing. I think what we're talking about here are
18 advertisers and consumers and trying to legislate any
19 responsibility on behalf of the -- on the part of the
20 platforms is difficult. But market forces may be at
21 work. If it turns out that platforms can't monetize
22 themselves because advertisers can't play on the
23 platforms, you know, there is an incentive for the
24 platforms to develop tools and technology to assist
25 advertisers. I think that's a long way off. I mean, I

1 think we're starting to see it, but I think that's
2 somewhat of a red herring for this discussion to go into
3 what the platform's responsibilities are.

4 MR. CLELAND: Okay, we have three more of these
5 Twitter examples. I want to run through them very
6 quickly in the interest of time. This next example is --
7 again, it's hashtag spon, but now it is associated with a
8 URL link. Does this raise any issues for anyone, unique
9 issues that we haven't talked about in relation to spon?

10 MR. FAULDS: I don't think this link solves
11 anything.

12 MR. CLELAND: Okay. Is it conspicuous? Is
13 spon here conspicuous?

14 MR. FAULDS: No, it's not a conspicuous
15 Disclosure. In fact, it looks like a call to action.
16 So, if I were a consumer and I saw this, I figured I
17 could click on that link and go get whatever this product
18 is and lose many pounds.

19 MR. DUDUKOVICH: The link doesn't work, I've
20 tried it.

21 (Laughter.)

22 MR. CLELAND: All right. And this one is just
23 the link. The next example is just the link, assuming
24 that all the disclosure information, including the
25 typicality disclosure and the materiality here. Does the

1 fact that the link is not labeled in any way, would it be
2 considered, under anybody's standard, to be effective?

3 MR. FAULDS: For WOMMA, the prior one would
4 have been compliant because of the hashtag spon, but this
5 one actually would not be because there is no indicating
6 the material connection.

7 MR. CLELAND: Is there -- well, that's a good
8 question. Let me back up to it just a minute there. One
9 of the questions involved in that example was, was it
10 conspicuous? Not whether it was understandable. And,
11 so, the question is, if you set it up in such a way that
12 it could be mistaken as part of the link itself, as
13 opposed to being a disclosure, is it conspicuous? If I'm
14 looking at this tweet and a bunch of Twitter things, I
15 may just see, you know, a line here that looks like a
16 link to me and not even notice at the end of this is a
17 hashtag something. It could be hashtag paid, it could be
18 something else. But I might miss that information
19 because I'm focusing on the link on the URL.

20 And then, finally, our last example is here
21 we've added some additional information, the word
22 "disclose." Earlier, we had talked about in the context
23 of the blog, the word "disclose" not really being an
24 adequate label on a link to actually convey the
25 information. Is it different in the Twitter example?

1 Stacey?

2 MS. FERGUSON: A little bit different. It
3 would give me a clue. I would never click on it, but I
4 would say, oh, okay, there's some relationship there.

5 MR. CLELAND: Would you say relationship or
6 would it be more information about the product?

7 MS. FERGUSON: This one, I would think that
8 there was information about the relationship. The
9 previous one, where there wasn't the word "disclose," I
10 would think I could go there and buy the Fat-Away pills.

11 MR. CLELAND: Mm-hmm.

12 MR. FAULDS: Agreed. I think labeling is
13 everything in these kinds of disclosure links. And there
14 are some solutions on the market and some planned ones
15 that are much more intuitive for how they communicate to
16 a reader that there's disclosure language or some kind of
17 rules or terms behind a link that would explain or give a
18 little bit more context to the tweet.

19 MR. CLELAND: Let's talk about that for a
20 second because that sort of depends on consumer
21 education, doesn't it? And who has the responsibility to
22 educate consumers what these messages are or what the
23 mechanisms for the various platforms are? Well, if
24 you're on Twitter, this is the way it's done. If you're
25 over here, this is the way it's done. Who has the

1 responsibility to do the education here?

2 MS. FERGUSON: I would say the advertiser.

3 MR. CLELAND: Jim? If we're talking about
4 icons -- let's talk about icons for a minute. We've got
5 an icon. Who educates consumers about what this icon
6 means and when do we know that it has reached a
7 sufficient level of understanding that it's okay?

8 MR. DUDUKOVICH: Great question. Don't have an
9 answer, don't have the data. I don't think anybody does.
10 So, in response, I'll throw the question back and say
11 start from the other end. Is there any evidence that
12 consumers don't understand it or are being harmed through
13 the use of icons or badges or hashtags, hashtag spon? I
14 don't know where we start. It's a chicken or egg thing.
15 Do we assume that consumers don't know, you know, guilty
16 until proven innocent? Or do we wait until consumers
17 complain and say, I've been harmed, I didn't understand
18 that this was a paid endorsement even though it said
19 hashtag spon?

20 MR. CLELAND: Susan?

21 MS. SHOOK: I was going to add if you change
22 these examples and did the hashtag paid ad even before
23 that came out as guidance, I think most consumers would
24 look at this and think, this is a paid ad, right? So, to
25 the chicken and egg, it also goes again to judgment of

1 what is a disclosure adding here? Does it suggest very
2 overtly that there's something going on here with the
3 sponsorship relationship? And you don't necessarily have
4 to have loads of consumer research to suggest that "paid
5 ad" would make the disclosure here apparent.

6 MR. CLELAND: Robert?

7 MR. WEISSMAN: I don't think it's a chicken and
8 egg question. I'm not sure if it's the chicken or the
9 egg. But, I mean, the answer is yes, we assume that
10 consumers don't know. If they're not disclosed to about
11 hidden arrangements, we assume that they don't know. And
12 we assume that because it's true. And it's a problem, I
13 think, in these kinds of conversations it's a mistake that
14 people who are super-cognizant of this stuff think, well,
15 everybody knows. Everybody does not know. If you watch
16 television, you don't know. You know there's paid
17 advertisements all the time, but you miss them all the
18 time. It's impossible to keep up with the number of paid
19 ads on TV. So, even people who are super-engaged don't
20 know.

21 So, I think a high degree of -- obviously, the
22 duty's on the advertiser. I think that the idea of an
23 icon requires at least a high degree of skepticism that
24 it can be done as opposed to using actual words that
25 describe what the thing is. I think this example is bad

1 and unsatisfactory for a variety of reasons because, I
2 mean, I looked at the disclosure and I would guess that
3 the disclosure is about the product, not the arrangement.
4 But even if it had been clearer, if you have something
5 that's sort of more generic -- or I guess this is pretty
6 generic, it's bit.ly after all.

7 This is a classic case where the disclosure
8 needs to be simultaneous with the advertisement because
9 the whole value of this kind of -- again, the example's
10 imperfect because the text is so bad. It's so blatant.
11 But this kind of association with a celebrity, it's very
12 impressionistic, it's very much about trying to get you
13 to act on the emotion. And if you don't know at that
14 moment that you're being advertised to, then you're
15 fundamentally being tricked. So, this is a classic case
16 where the disclosure has to be simultaneous, prominent,
17 easily understood, and the burden to make sure all those
18 things is true is, I think, certainly on the advertiser.

19 MR. CLELAND: Okay. I'm going to go on to --
20 in the interest of time, I'm going to move into --
21 actually, now we're going to start into the hard
22 questions. So far we've been talking about disclosures
23 that are typicality disclosures on endorsement guides or
24 materiality disclosures. And those are all disclosures
25 that can be made relatively shortly, in my view, or

1 relatively short.

2 So, let's talk about something else where
3 perhaps a longer type of disclosure is needed, more
4 information. I think Jim -- was it Jim, you came up with
5 this example. Darn. Okay. So, let's assume that
6 instead of tweeting about a weight loss product, the
7 tweeter here is talking about a fuel-saving device that
8 she was given to test and review. And the problem with
9 -- so, you have that issue, but also have an additional
10 issue here, fact, that this particular device only
11 actually saves gas when it's used with 93 octane
12 gasoline. That's obviously a lot of information for a
13 tweet. What do we do in this situation, Jim?

14 MR. DUDUKOVICH: Well, this is -- I mean, this
15 is -- we're really opening up the discussion because
16 this, as we -- I don't know why I brought this up on our
17 pre-call, but it was an accident. But this is one where,
18 okay, there is -- so, I produced this fuel-saving device
19 and I send it to a blogger and the device gets you better
20 gas mileage, but it only works with the most expensive
21 gas. So, it's sort of a -- it kind of cancels itself
22 out.

23 But if we are to assume that you cannot buy
24 this product without being told that it only works if you
25 use 93 octane gas, so it's labeled on the package, it's

1 on point of sale, it's everywhere, you can't possibly buy
2 it without knowing that, what duty does the advertiser
3 have to tell the blogger, make sure if you talk about our
4 product, you disclose that it only works with 93 octane
5 gas? I would say that it's a stretch. It's a stretch to
6 say that the blogger's got to disclose that because
7 purchasers can't actually buy the product without
8 learning about that condition.

9 MR. CLELAND: Malcolm?

10 MR. FAULDS: I think if you come back to the
11 earlier theme of authenticity in earned media, that only
12 works when people trust each other and they recognize the
13 other person is someone that they know or trust or
14 believe in certain instances. That raises the bar for
15 this kind of thing. Nielsen recently came out with their
16 trust in media study and they said that 70 percent of
17 consumers are more likely to trust a stranger on a
18 product review site than they are to trust a brand's own
19 website. And, so, the dynamics have really changed in
20 terms of where people get information and what they
21 trust.

22 So, given that there's so much trust in these
23 peer-to-peer conversations, I think it's incumbent on the
24 advertiser or the agency or whoever's organizing the
25 program, to make sure that the participants are sharing

1 all the relevant information, because if they don't, the
2 participants are going to lose credibility among their
3 social networks, which is the last thing that you want to
4 happen.

5 MR. CLELAND: Okay, Robert?

6 MR. WEISSMAN: A couple points. I mean, one
7 would be maybe a starting point way to think about it is
8 what if this was just a print ad? Because Jim makes some
9 useful and persuasive points about the context, but if it
10 were a print ad, you'd say, well, yeah, you have to
11 disclose it, this is part of what goes with it. Well, if
12 that's the case, then I think the same thing applies.
13 Actually, the disclosure wouldn't necessarily need to be
14 that burdensome. There are other hypotheticals where I
15 think it would -- where it would be. But if you said,
16 you know, needs 93 octane, you probably took care of it.
17 And if that cost you whatever number of characters that
18 is, then that's life advertising on Twitter.

19 MR. CLELAND: Stacey?

20 MS. FERGUSON: He took the words out of my
21 mouth. And, also, you know, maybe the advertiser has to
22 decide certain campaigns should not be run on Twitter.
23 Maybe for this particular example, it has to be a blog
24 post, and I've seen contracts where that comes through.
25 This, we would like a blog post for these short messages,

1 you can't put it on Twitter. But maybe that has to be a
2 call on the term of the advertiser and build that into
3 the campaign. But I think what Robert said about maybe
4 just putting that short piece in, needs 93 octane, that
5 might do it.

6 MR. CLELAND: Okay. Go ahead, Susan.

7 MS. SHOOK: We're also talking about cross-
8 platform, as well. So, Twitter may be the introduction
9 of I've got this amazing additive, and then a link that
10 says, more info here, that takes you to another platform
11 that can give you the space that you need to make the
12 claims and the disclosures.

13 And to Robert's point, if you had a link that
14 said, 93 octane only, I again think that that's -- you
15 know, for someone who's interested in this, I think
16 that's enough of a wake-up call that they probably
17 realize there's a disclosure additionally following. So,
18 I think the context of the link and the form of it can do
19 a lot to signal to the consumer that there's a disclosure
20 that's of import to the claim made.

21 MR. CLELAND: Can we assume, for the purposes
22 of discussion, that there might be some disclosures that
23 are just too darn big to put on a Twitter feed? And what
24 is the implication of that? Jim?

25 MR. DUDUKOVICH: I think -- hopefully I speak

1 for the industry when I say this -- if you cannot
2 advertise your product lawfully on a particular platform,
3 then you should not advertise your product on that
4 platform. If there are -- if you're getting into pharma
5 and areas where there are incredible amounts of
6 disclosures that absolutely have to be made, Twitter is
7 not an option for you. It's just not because those are
8 situations where there's material information that can't
9 be buried in a link. It's got to be disclosed up-front.

10 MR. CLELAND: Susan, would you agree?

11 MS. COOPER: Yeah, I think -- I guess I would
12 agree, but I would hope that those cases would be more
13 limited and be more of an exception than the rule because
14 I think that -- again, I cannot speak for the advertising
15 industry, but I would expect that they would want to be
16 in a position where they can take advantage of these
17 kinds of new media to market their products.

18 MR. CLELAND: And just quickly, one of the
19 comments raised the issue of subsequent tweets to make
20 disclosures. Malcolm, do you want to --

21 MR. FAULDS: I think it's a little bit
22 problematic because, to the point I believe Susan made
23 earlier, that tweets might -- they might start in
24 Twitter, but they might end up in different places. So,
25 a recipient of a tweet might see it on LinkedIn or they

1 might see it on Facebook. And if the disclosure happens
2 in a follow-up tweet but isn't shared to those channels,
3 well, then they've only received part of the message.
4 So, that's just one instance of how that can be
5 problematic. I think whenever possible -- well, at
6 WOMMA, we would say that it needs to be in line with the
7 tweet.

8 MS. FERGUSON: And, also, Twitter is not like a
9 blog post where you go on and you read the entire story
10 and you're done. It's a constant conversation. So, you
11 might pop in on Twitter for one minute, pop off, and
12 you'll miss the subsequent tweets. So, if there's a
13 statement or a claim being made, the disclosure has to be
14 right next to that message or it's going to get lost.

15 MR. CLELAND: I'm going to move on to the third
16 area I promised I would talk about. The issue was raised
17 in a number of our comments that there are some social
18 media platforms, such as Facebook, Facebook likes,
19 Google+ and some branded websites, allow users to endorse
20 a product or service and communicate that endorsement to
21 their social networks. Assuming that some disclosure is
22 necessary -- that was the assumption of our panel here --
23 that the consumer has been given something in exchange
24 for the like or the plus or the endorsement, what are the
25 current best options for disclosure, if any?

1 Susan, I'm going to start with you.

2 MS. COOPER: Yeah, sure. I mean, I do think
3 you have to get to the point where you've determined that
4 the like is made because of an incentive, because I think
5 that the fact that you are liking something is not
6 necessarily an endorsement. I mean, a lot of people like
7 -- we tell people, in fact, you should like the Facebook
8 site governance page so that you can get updates about
9 our terms. I don't think that people who like that
10 necessarily like the way that we govern our site. So, I
11 mean, I really do think that you have to make sure that
12 there is, in fact, an endorsement or inducement that's
13 happening there.

14 But like I said earlier, there are a lot of
15 ways that users can append comments to a like and I think
16 that's -- it's a little bit different than a subsequent
17 tweet because it would be attached directly to the like
18 there.

19 I think the other point -- and I think I maybe
20 had alluded to this earlier -- and that's the fact that,
21 you know, the fact that you -- people like things for a
22 lot of different reasons. People check in for different
23 reasons. So, to a certain extent, a check-in is, in
24 fact, an indication that I am physically at this place.
25 So, regardless of whether or not I've been given some

1 sort of incentive to be here, I am here, and I think that
2 impacts sort of the disclosure.

3 I do think that the icon example is something
4 that should be pursued because I think it could be a very
5 useful visual clue, and I'm not aware of something that
6 has emerged as sort of a leader to signal that. But it
7 could definitely be a good place to get to, I think, to
8 help with any of the gaps that exist.

9 MR. CLELAND: Other views on that?

10 MR. FAULDS: One issue that we identified at
11 WOMMA when we were revising the disclosure guides for our
12 members was these signs of approval and how they can
13 sometimes be a barrier to complete information around
14 promotions, called like-gating for lack of a better term.
15 So, if someone needs to like a Facebook page in order to
16 see the rules around a promotion, that's problematic, or
17 if they have to join a community to see the rules of a
18 membership, that's problematic because their messages for
19 these promotions might be reaching people that don't know
20 they have to like the page to see the rules or what's
21 going on, why people are acting in certain ways or saying
22 certain things.

23 So, I think that what Susan said before is
24 right around the limited space and all that, but I think
25 that sometimes people have used these in restrictive ways

1 and that's problematic.

2 MR. CLELAND: Susan?

3 MS. COOPER: Can I respond to that really
4 quickly and just raise another point I forgot to mention?
5 And that's -- there are a couple things. Facebook
6 doesn't prohibit like-gating promotional content. So, if
7 an advertiser chooses -- and obviously we require
8 advertisers to comply with all applicable law, but if an
9 advertiser chooses to require a user to like something in
10 order to enter into a sweepstakes or a contest, that
11 isn't something that's prohibited.

12 There are a couple of things to keep in mind
13 and that is that the act of liking something, whether you
14 have been provided an incentive to do so or not, does not
15 necessarily equal a published story. So, the user has
16 complete control over their settings of how their stories
17 are published. So, I can, for example, use my settings
18 to say all of my likes are only going to be directed to
19 me, and that means that I can like something because I've
20 been incentivized to do so, but no one will ever know
21 that because no one will ever be able to see that story.
22 So, we do offer some technical ways to sort of control
23 that message.

24 I think the other point that I wanted to make
25 there, too, is that the user experience is very important

1 to us and we do -- while we don't prohibit all types of
2 incentivizing, we do have a lot of policies that restrict
3 the way that incentives can be used because we want to
4 ensure that users are not going to be incentivized to
5 basically spam their friends.

6 MR. CLELAND: Malcolm?

7 MR. FAULDS: Just to close out the like-gating
8 comment, we recognize there are some valid needs for why
9 you would want to present -- some marketers would want to
10 present some information to people who have liked a
11 certain page. But whenever that creates promotions that
12 would affect people who are not necessarily members of
13 those pages, we just want to make sure that marketers
14 understand that there's an expectation that the
15 information around those promotions is available to
16 people who haven't necessarily liked those pages, that
17 there is public content that isn't behind the like-gate.

18 MR. CLELAND: Okay. I think we probably
19 already addressed the question of whether or not there
20 are technological solutions to this.

21 MS. COOPER: Yeah. The only other thing to say
22 maybe is that there may not be a dislike button, but you
23 can unlike. So, I mean, people can like -- I know that
24 it's not a perfect solution, but you can like something
25 for the purpose of obtaining content and then you can

1 subsequently -- and you can have that set so that no one
2 can see that story, and then you can unlike it to break
3 that connection.

4 MR. CLELAND: Okay. We have a couple of
5 questions here and one was -- I think this question goes
6 to how do you make disclosures on review sites where
7 you're being incentivized to go to a site to post a
8 review? Malcolm?

9 MR. FAULDS: Yeah, this is a really important
10 area. So much of commerce today is influenced by online
11 reviews. The whole -- you can take a look at Best Buy
12 for an example of how it's really transforming how people
13 are making purchases and how it's affecting major
14 companies. The best practice is to make in-line
15 disclosures when there's a material connection between
16 the reviewer and the marketer. And then when there's
17 syndicated content, we also think it's advisable to badge
18 that when possible.

19 So, if you look at Amazon Vine, for instance,
20 is a program where popular reviewers on Amazon may be
21 getting free products from Amazon. They have a program.
22 It's called Amazon Vine and those are registered people.
23 Whenever those displays are running for different product
24 pages, Amazon will badge that. There are other companies
25 like Bizarre Voice and Power Reviews -- actually, that's

1 the same company now -- but they do something similar.
2 So, that's a good practice as well you want to disclose,
3 in the same expectation you would on Twitter, to readers
4 of product reviews.

5 MR. CLELAND: Jim?

6 MR. DUDUKOVICH: I wanted to open up a can of
7 worms by asking you a question, Rich.

8 MR. CLELAND: Go ahead. Time to go fishing.

9 MR. DUDUKOVICH: Yes. And the topic is
10 Pinterest. And I've witnessed a lot of activity going on
11 on Pinterest which, you know, Pinterest is a site where
12 the fundamental premise, I think, is that if I pin
13 something to one of my boards, it means I like it. I'm
14 telling people, hey, I think this is cool, I like this.
15 Well, when retailers -- I've seen a number of different
16 incentive programs where, you know, pin it to win it
17 where if you pin things from a retailer site onto your
18 board and then send the link into them, you're entered
19 into a promotion for a chance to win a prize, or if you
20 pin something from a particular retailer and then
21 somebody viewing your board clicks through your board and
22 purchases it, you get a credit.

23 What does the FTC think about those? Are those
24 things where the person's who's pinning needs to disclose
25 that they're pinning because they're incentivized rather

1 than because they actually truly like the thing?

2 MR. CLELAND: Well, I'm going to punt, but I do
3 think that it raises -- I mean, we've talked about blogs,
4 we've talked about Twitter, we've talked about Google+,
5 but there are a lot of other platforms out there.
6 Stacey, what are some of the disclosure options on these
7 other platforms?

8 MS. FERGUSON: So, with Pinterest specifically,
9 there's a comment box right there so you can append a
10 disclosure to your pin, and you should. Pinterest is so
11 new for a lot of people that it's not being treated in
12 the same way yet as Twitter and Facebook are in terms of
13 disclosures. But if you are pinning it to win it, you
14 should put that in there. I'm pinning this so I can win
15 the whatever it is. Or you can even put in your comment,
16 this is a great pair of shoes. If you buy it, you know,
17 use my affiliate link. You can put that in the Pinterest
18 comment box. So, it's just a matter of getting users in
19 the frame of mind to know that, A, they need to do it
20 and, B, they can do it. I've seen it -- not a lot, but
21 I've seen some people disclosing on Pinterest.

22 MR. CLELAND: Okay. Any other last-minute
23 comments?

24 MR. FAULDS: I wanted to give people an update
25 on what we were doing with the new disclosure guide at

1 WOMMA. One of the most common pieces of feedback that we
2 got was that the -- while it was clear and useful, it
3 didn't provide enough guidance on how to handle
4 disclosures or how to do monitoring. So, the new guide
5 to disclosure will be available for public comment, I
6 believe, in the next month or so roughly.

7 So, one of the things that we are doing is
8 broadening the definitions of terms. So, there was the
9 term "blogger" in there to represent participating
10 consumers in social media programs. For many reasons, we
11 thought that was problematic and limiting, so we've used
12 the term "advocate" to communicate someone who has a
13 material connection to a marketer. There are two
14 different kinds of advocates, an independent advocate,
15 who might be a consumer who's taking part in a marketing
16 promotion, or an affiliated advocate, who might be an
17 employee or an affiliate or an agency. And then we've
18 defined marketer and these are the people who are selling
19 the products or service, as opposed to advertiser.

20 It might sound small, but when it comes in the
21 exercises that we go through and the examples that we go
22 through, it really starts to bring to life the real
23 dynamics that are happening and it makes the use cases
24 much more realistic to people.

25 There are some other things that we're doing

1 around specific requirements for marketers who have been
2 running these kinds of programs. We've given more
3 examples of disclosure by medium on the different
4 platforms that we've talked about, and we've also
5 identified some unique disclosure issues around contests,
6 like-gating, which we've talked about, celebrities,
7 content syndications, how content can go from Twitter, to
8 Facebook, to LinkedIn, and what reasonable monitoring
9 means because that's a big question for a lot of brands.

10 And the last thing is the last guides really
11 focused on digital and there is often a real world
12 component to social media programs, and so, we clarified
13 that this extends to offline outcomes of social media
14 programs as well.

15 MR. CLELAND: All right. Well, I want to thank
16 all the panelists. I've certainly learned a lot and,
17 again, thank you very much.

18 (Applause.)

19 MR. CLELAND: We're going to break for lunch
20 now and we're going to resume at 1:30.

21 (Panel 2 concluded.)

22

23

24

25

1 one make sure that there is clear and conspicuous
2 disclosure when you're dealing with that kind of -- those
3 kinds of issues? And I think there's going to be more.

4 And I just do want to be clear that our next
5 panel is about privacy. So, while this is a mobile
6 panel, we're not going to be talking about privacy
7 disclosure; we're going to be talking about advertising
8 disclosure with this group.

9 So, I'm going to -- we have a lot to cover and
10 I'm going to go right ahead to get to our panelists here
11 who are each going to introduce themselves to you very,
12 very briefly, introduce themselves to you and then give
13 me, in one or two sentences, what you think the top
14 challenges are for advertising disclosure in the mobile
15 space.

16 So, Anna, will you start us off?

17 MS. BAGER: Yes. So, my name is Anna Bager and
18 I'm responsible for mobile at the IAB, the Interactive
19 Advertising Bureau. And for those of you who may not
20 know it, even though we're incredibly important and a
21 fantastic organization, we are a trade association and we
22 represent the sellers or the sell side in advertising.
23 So, any company who is either serving or has inventory to
24 sell in the interactive space, so that may be websites,
25 it could be on mobile phones, et cetera.

1 And, again, I run the mobile part of it. So,
2 what we're doing is we're trying to create a better
3 environment for mobile advertising, either on mobile
4 phones or tablets or across different kinds of platforms.
5 So, then it's the media being mobile rather than just the
6 device.

7 The main obstacles or, I guess, challenges when
8 it comes to disclosure on mobile, I think, are, you know,
9 it's pretty straightforward. It's actually screen size
10 and the different operating systems that exist in the
11 mobile space. So, it's a lot harder to interact with the
12 user. It's harder and it's easier to interact with the
13 user when you're doing that on a mobile screen because
14 it's smaller. The user is probably on a different -- in
15 a different mindset than when he's accessing content via
16 the web. He may be on the go. He probably has a very
17 specific purpose with doing so and he also has a smaller
18 screen to work with.

19 So, how do you provide disclosure in an
20 effective way that is not annoying or counterproductive
21 so that the user just gets irritated and closes it down
22 before even reading it? I think that's the main
23 challenge. And, again, the different operating systems,
24 so the fact that we have Android and IOS, Windows, et
25 cetera, makes it harder from a technology point of view

1 to produce effective disclosure.

2 MS. POSS: Okay, thank you. Michelle?

3 MS. DE MOOY: Hello, my name is Michelle De
4 Mooy. I'm from Consumer Action. We're a 40-year-old
5 national nonprofit based out in San Francisco, but we
6 have offices in L.A., San Francisco and Washington, D.C.

7 So, Consumer Action advocates for
8 underrepresented consumers, particularly minority and
9 low-income communities. So, that's where I'm going to be
10 coming from today. It's a little bit of a different
11 perspective, I think. But it's important because, of
12 course, mobile users, the largest and growing population
13 of mobile users are Hispanic and African Americans, and
14 that's something that is rarely discussed or brought up
15 in the context of advertising and disclosures and what
16 that means for them. So, I'll try to focus on that a
17 little bit.

18 I think challenges are many. I think consumer
19 expectations are different on mobile phones. I think
20 it's a very personal product for most consumers and
21 they're pretty unaware of the ecosystem that surrounds
22 them, the marketing and advertising ecosystem. I think
23 they tend to think of their phones as something that is
24 not a website. For example, I think they think when they
25 go online to visit a website, that's going on the web and

1 don't necessary understand sometimes that apps are going
2 online as well and sort of the different expectations
3 that may come into play there.

4 I think, also, a challenge is getting
5 advertisers on board with this. I think there's been a
6 lot of disincentives for -- except for the FTC sort of
7 looming, for these companies to really design well for
8 consumers, to make the experience more transparent, and
9 to give consumers control over their transactions. I
10 think that's, from our perspective, some of the major
11 challenges.

12 MR. HALPERT: I'm Jim Halpert. I'm a partner
13 at DLA Piper, which is a global law firm, and I am
14 General Counsel to the Internet Commerce Coalition,
15 speaking on their behalf today. It's a trade group with
16 members that include Amazon, AT&T, Comcast, Career
17 Builder, eBay, Google, Monster.com, and Verizon.

18 The members of the organization see this
19 question of mobile disclosures as very much a win-win
20 issue for businesses and for consumers. It's very
21 important to our members that consumers not be surprised
22 about important terms and it's very important that in the
23 space-limited format, which is the major challenge -- I
24 agree completely with the way this problem's been framed
25 by Anna and then by Michelle -- that there be ways in a

1 limited space to attract the attention of consumers so
2 that important clarifications as to what offers are and
3 are not about are readily apparent to somebody who is on
4 the go and who's looking at what's often a small screen.

5 At the same time, mobile is many different
6 things. It also includes the tablet computer where it's
7 pretty easy to expand out and see things. So, I think we
8 need to be careful in our terminology, as we talk about
9 mobile, to focus on the formats that really present the
10 greatest challenge and speak empirically and practically
11 about solutions that will work.

12 MS. POSS: Mark?

13 MR. ODEGARD: Hi, I'm Mark Odegard. I'm the
14 senior attorney at Best Buy's Legal Department for
15 Advertising and Legal Marketing Matters. There's about
16 three or four of us that are charged with the
17 responsibilities for the United States. The advertising
18 runs the gamut from the traditional circulars that you
19 get in your Sunday newspaper all the way to SMS and
20 mobile advertising.

21 I won't rehash all the discussion about limited
22 real estate other than I will add that, as our offers get
23 more and more complex, it's not just about selling
24 widgets, we're going to sell subscription offers, we're
25 going to sell services, we're going to bundle other types

1 of offers together. As our offers get more and more
2 complicated, it becomes harder and harder to disclose the
3 material terms of the offers and to become, you know,
4 fully in compliance with the FTC's regulations and rules.
5 Imagine trying to also disclose, on top of all of that, a
6 finance offer, on top of all of that, let's say, a
7 sweepstakes offer. It becomes harder and harder.

8 Another challenge is that the rules require us
9 to focus on the reasonable consumer. It becomes
10 increasingly difficult to know who the reasonable
11 consumer is these days. It might be my mother who asks
12 me to look up something on "The Google" as she calls it.
13 It might be my nephews, you know, who can put everything
14 together. They don't need all the services that we might
15 have relied on selling.

16 So, it's a tougher and tougher environment that
17 we're in and the challenges are getting greater and
18 greater.

19 MR. SCHELLHASE: Hi, I'm David Schellhase. I'm
20 the general counsel at Groupon. I have my one-year
21 anniversary at Groupon, I think, on Friday. So, I'm
22 excited about that.

23 I think most of what I know about mobile
24 technology I've learned from my 15-year-old niece, so I
25 will be able to represent the high school sophomore

1 demographic up here. I think the number one challenge
2 really, and I learned this from her, is consumer
3 attention because getting people to actually pay
4 attention, even if you've got all the appropriate
5 disclosures, is very difficult.

6 You know, again, not to rehash sort of what
7 everyone said, but typically when you're using a mobile
8 device, you want something instantly, right? You want it
9 right now. You're hungry, you need to find something,
10 and you want it now. And you swiped through all of the
11 things that you're used to that are disclosures. And
12 breaking people out of that paradigm and giving them
13 important information about what they're doing is, I
14 think, the biggest challenge.

15 MR. SINGER: Hi, I'm Paul Singer. I'm an
16 Assistant Attorney General in the Consumer Protection
17 Division at the Texas Attorney General's Office. For
18 those that weren't here this morning, I will inform
19 everyone that if I express any opinions, they are not --
20 they are mine. They are not necessarily those of the
21 Texas AG or of any other State Attorney General, and
22 nothing I say should be construed as legal advice.

23 All that said, I think the sort of biggest
24 problems -- I think we've heard a lot of them, right?
25 Obviously, space limits, that's a big deal on a mobile

1 device. But I do think, you know, Michelle described it
2 as consumer expectations. I think that's a big one is
3 really understanding what do consumers know about their
4 mobile device, what do they understand about how
5 advertisements are working there and exactly what
6 information is being provided and gathered about them,
7 just understanding what consumers really know about the
8 functionality.

9 MS. YAMUDER: Hi, my name is Sheryl Ann Yamuder
10 and I am counsel for Dunkin' Brands. And I think
11 probably the biggest challenge that -- which is partly
12 what everyone's been saying, has to do with the various
13 ways that ads are accessed through various devices. I
14 think not -- it's not a one-size-fits-all situation. So,
15 to be able to provide ads in so many different formats,
16 to meet so many different needs, never being sure exactly
17 how the consumer is going to access the content becomes a
18 real challenge for advertisers.

19 MS. POSS: Great, all right, thank you. And
20 that was a great set-up for our first example here, which
21 I'll put up. So, we're going to -- we're reusing one of
22 our examples from the previous panel. So, you take a
23 look there. We have a fantastic -- example one here is a
24 Fantastique Cuisine Dutch oven adver -- website selling
25 the oven. If you look over in that far right-hand

1 corner, you might see the disclosures over there that say
2 you're going to be enrolled in a recipe club that's going
3 to be charged -- I think it's \$4.95 a month. I can't
4 quite read the disclosures from here.

5 So, now, let's take a look at this same website
6 from a mobile device. It just got shrunk. Well, then
7 let's pinch and zoom in. And where did the disclosure
8 go? I can add it to my cart, but the disclosure is gone.

9 Let's look at one of the other examples that we
10 had from this morning where you see the "Add to Cart"
11 button, the disclosure is right there. And now let's
12 shrink that one. We shrink and then we zoom in and at
13 least it's there.

14 And one more example would be what I call a
15 mobile-specific site. Let's say you've actually created
16 a separate website from your M-commerce site that when a
17 consumer is coming from a mobile device, the browser
18 directs them to this.

19 Okay, so now, I'd like to get -- and the
20 panelists, we've talked about this a little bit already,
21 this issue, which is part of the screen size issue. We
22 have browsers that are helping us. But how are companies
23 dealing with this? How are folks trying to handle this
24 problem if at all? Jim, do you want to talk about that?

25 MR. HALPERT: Sure. Now, here I can't speak to

1 the practices of the individual members of the
2 association, but I'll speak as a lawyer who counsels
3 clients on how to deal with these kinds of problems.

4 In the case of a recurring contract or negative
5 option contract, already under a variety of state laws,
6 there's a requirement to provide proximate notice. So,
7 thinking through the scenario that Patti laid out, it is
8 important to put, inside of the box, close to the point
9 where the user's going to click to accept the
10 arrangement, the disclosure because that's a material
11 term and there's significant potential class action
12 liability under state laws for failing to comply with the
13 requirements in various areas of clear and conspicuous
14 disclosures, but also proximate disclosures.

15 So, in this context, to be safe, my legal
16 advice would be to put that information about the
17 enrollment and the ongoing payment arrangement very close
18 to where the user's going to accept and not on the
19 outside.

20 MS. POSS: Mark, did you have anything you want
21 to add?

22 MR. ODEGARD: No, I would just echo what was
23 just said. You know, obviously, I tend to prefer the one
24 later in the packet where it's nearby and close and would
25 disclose the material terms of the offer.

1 When I review these kinds of things and I
2 counsel my clients, what I'm looking at is our history
3 of, let's say, litigation. Have we had any similar
4 claims of that nature? I also look at the history of
5 enforcement actions taken against our competitors or
6 similarly situated companies. All of that goes into the
7 formula for me to try to determine whether or not this is
8 a risky endeavor to go ahead and do something like that.
9 Some things become of greater concern to me. This kind
10 of an offer with an obligation on the part of the
11 consumer for regular recurring payments does cause me
12 greater concern and I have a heightened sensitivity to
13 that.

14 MS. POSS: David, did you have anything you
15 want to add?

16 MR. SCHELLHASE: Well, I'll violently agree
17 with what Mark and Jim said. I mean, I think, you know,
18 the key thing is to figure out what the key things are.
19 So, when you're talking about some kind of an offer on a
20 mobile device, you've got to decide what the salient
21 features of that offer are, price availability, refund
22 availability, things like that and they may change,
23 depending upon what goods or services are being offered.
24 But you've definitely got to be up-front with everything
25 or you're going to mis-set a consumer expectation, and

1 over the life of your brand, that's the worst thing you
2 can do.

3 MS. POSS: All right. Hopefully, that's our
4 only violence on the panel here.

5 Okay, so how likely is a consumer to scroll to
6 that right or to the left to find a disclosure, even if
7 it's something different than that? Will they scroll
8 down? We talked a little bit about this in the first
9 panel this morning. Does having the disclosure in the
10 same column as the product or near the "Add to Cart"
11 button increase the likelihood that a consumer will read
12 it?

13 Michelle, do you want to talk about that?

14 MS. DE MOOY: Sure. I think it's absolutely
15 crucial that it's right by the cart, right as they're
16 about to buy, not just so that they can see it, but
17 because, you know, if you have a phone that's not that
18 fast, scrolling can actually be a really big hindrance to
19 being able to read this. And, you know, again, just
20 coming from that sort of underserved community
21 perspective, that is the case. That's what we hear from
22 people. You know, it can be difficult to download, which
23 is what sometimes happen when you move on a mobile phone
24 over. So, I think it has to be there.

25 I think the other thing I would add that was

1 talked about earlier today would be a line item. I think
2 that would strengthen this even more, showing that
3 there's a financial transaction that's about to happen.
4 It's not just you're agreeing -- you know, with privacy
5 policies, you know, for example, people see those a lot
6 and assume it means they're being protected. I think
7 it's similar in this context that they think they're
8 agreeing to some sort of disclosure. They may not really
9 get that there's a financial transaction being involved.
10 But when you put a line item into the shopping cart, that
11 is pretty clear.

12 MS. POSS: And, Paul, did you want to add to
13 that?

14 MR. SINGER: Sure. So, I touched on this this
15 morning on the first panel. But, I mean, in terms of --
16 certainly in terms of where states have gone in
17 enforcement actions, you know, a core concept is when
18 something materially modifies an offer, it needs to be
19 made -- that disclosure needs to be made right there next
20 to it. I mean, this transaction is not really an offer
21 just to buy this \$200 Dutch oven. It's an offer to buy
22 the oven and this enrollment in this membership program.
23 So, I think at each step of the process,
24 certainly that's what needs to be clearly communicated to
25 the consumer. And, you know, we talked in the first

1 panel some about how that can be done at the actual
2 check-out process with sort of, you know, an additional
3 affirmative acknowledgment that they're doing it, but
4 certainly when the offer is made and presented, it needs
5 to be in direct proximity to that offer.

6 And I think when that's done, as sort of
7 demonstrated in these hypotheticals, you know, the issue
8 of looking at it on a mobile device versus looking at it
9 on a computer becomes somewhat less of an issue because
10 now, even on a smaller screen, you've got that material
11 information right there presented to you.

12 MS. POSS: Great. Anybody else want to comment
13 on that or on the examples?

14 MS. DE MOOY: I just want to add one thing. I
15 think a key principle that would come out of that would
16 be that the transaction has to pause, you know, that
17 there has to be some pause between the consumer putting
18 something in their cart and moving to buy it.

19 MS. POSS: Would you -- earlier this morning,
20 we had a panel where they had a box to check it.

21 MS. DE MOOY: I think people made valid points
22 about that being obsolete or somehow becoming less
23 attractive as technology moves forward and maybe there's
24 voice command or something like that. But there's a big
25 part of me that feels like, well, you know, just because

1 technology gets advanced, I mean, it's still going to be
2 pretty easy to check a box. So, especially on a mobile
3 phone where there is limited real estate, I think there's
4 something to be said for just -- you know, from a design
5 standpoint, it's easy to see. I think there's an
6 understanding that you agree, especially if there's a
7 negative option, too.

8 So, I think that's a good option. I think that
9 would strengthen this.

10 MS. POSS: Great. Okay, let's talk for a
11 moment about responsive design. Anna, do you want to
12 talk about that and describe how it compares to a mobile-
13 specific site?

14 MS. BAGER: Yeah. So, responsive design is
15 somewhat of a buzzword in at least our industry right now
16 and I just want to kind of explain what it is, first of
17 all. It's basically an evolved -- it's the evolution of
18 HTML 5, which is the programming language for the web.
19 The difference, though, with responsive design is that it
20 creates -- if you think about a website, it creates a
21 grid or it sorts the pieces of information into small
22 boxes. And then, depending on what -- and that is the
23 content. And when you want to enter the content with
24 your phone or with a tablet or through your PC, it would
25 feel that you're coming from that kind of device and it

1 will shuffle those boxes around so that they -- they end
2 up in a place where you can read, but where it also makes
3 sense on the screen. That's kind of what it is really.

4 And it's very practical for that purpose
5 because it's -- in comparison to other types of creation
6 of mobile web, it works on any device. So, you only have
7 to do it once for all of your different screens that you
8 want to reach.

9 What it also does that is different than the
10 traditional HTML is that it considers mobile first. So,
11 whatever kind of content you try to produce, you have the
12 mobile device in mind and then it will adjust to the
13 other devices rather than the other way around, which
14 makes it more practical from many perspectives,
15 especially, again, coming back to the point that I made
16 before in the beginning when we talked about the
17 challenges. There are so many different screen sizes. A
18 mobile phone is not just one 600-by-800. It could be
19 anything. It's not really clear what is a tablet because
20 there are mobile phones now that you have to hold with
21 two hands and there are tablets that you can only hold
22 with one.

23 So -- and depending on which -- what kind of
24 device you have as a user, you will be in a different
25 state of mind, in a different mode and you will be

1 differently interested in the content that is upon it.
2 So, responsive design is a very effective way of solving
3 a problem across different platforms.

4 MS. POSS: Great. Do you want to just mention
5 -- I know you weren't going to talk about the costs, but
6 are there ways around using responsive design or more
7 inexpensive ways in which a company might be able to
8 design their site?

9 MS. BAGER: So, I don't think that it's more
10 expensive to use responsive design necessarily than any
11 other technology, depending on how you budget, of course,
12 or how you define cost. But responsive design has been
13 around for a long time. The reason everybody's so
14 interested in it right now is that Steve Jobs' mentioned
15 it, I think, in 2009 or '10 in a speech saying that
16 responsive design was something that -- or that's the
17 future, when Flash is dying and other kinds of
18 technologies that have been existing before. And as with
19 everything else he said, people picked up on it, and that
20 was kind of the claim to fame for responsive design.

21 So, it's not a new technology. It's commonly
22 known. It's also in evolution, so there will be
23 something -- there will be an HTML 6 eventually. This is
24 HTML 5 for the most of it. So, I don't think that it's
25 more expensive to produce responsive design. It may also

1 be more cost effective because, again, you can have one
2 web strategy for mobile, as well as for display. And if
3 you think about, again, the fact of what kind of content
4 you're producing, it may be effective to do it across
5 devices and not have a separate strategy for one device
6 as opposed to another.

7 From a user perspective, it will also make them
8 feel more at home. So, if they have access to your site
9 on the web and then they access it on the mobile, they
10 will recognize it.

11 The problem with other types of web designs and
12 above all the pinch and pull, so when you have a website
13 that is accessible from a mobile phone, but it's just
14 your traditional website and you have to enlarge it and
15 make it smaller, is that you can -- while doing so, you
16 can press hyperlinks, you can check boxes, you can be
17 transported to other places where you don't really want
18 to be. It's not in total control. If you have children
19 using it, you don't really know where they will end up.

20 So, responsive design really is a good way of
21 solving it. And I think from an economical perspective,
22 it doesn't have to be more expensive than anything else.

23 MS. POSS: And should all commercial websites
24 be designed to ensure that their disclosures are clear
25 and conspicuous when they're viewed from a mobile device?

1 Should we have -- expect that everybody's websites should
2 be able to be viewed from a mobile device? Jim, you want
3 to take that? Or Paul?

4 MR. HALPERT: Paul, why don't you start from a
5 regulator perspective?

6 MR. SINGER: Yes, that's the answer. I mean,
7 look, certainly, all of this discussion about, you know,
8 how consumers are using their devices, I think, comes
9 into play with this, because I think one of the questions
10 would have to be, you know, understanding consumers and
11 their usage of the device and whether or not they're
12 using the commercial website, you know, as they would
13 when they're just sitting at their desktop.
14 But I think in terms of, you know, basic disclosure
15 principles, what I was saying before, I think, rings very
16 true. If there is some material disclosure that needs to
17 be made and it's made in direct proximity to whatever
18 that trigger is, where the call to action is, you know, I
19 think that that's, in some ways, answering this question
20 because, now, you're presenting it in a format that
21 whether you're designing a mobile-specific page or
22 whether it's a standard page that someone's viewing and
23 has to actually locate that call to action, that
24 disclosure is still there.

25 And, so, the placement of it may solve a lot of

1 these issues.

2 MR. HALPERT: Again, violent agreement on this.
3 It's so interesting. But I think it's also important to
4 think about the function of websites and not all websites
5 are going to be the sites of huge amounts of consumer
6 activity that would suddenly trigger material events.
7 So, saying all websites need to do X or Y, at this point
8 in the evolution of the commercial web, is probably
9 moving ahead faster, particularly than one should. If
10 there is a site, though, that's specifically designed for
11 mobile users, it's very important to take these kinds of
12 considerations into account.

13 And then, as Paul explained, for general
14 purpose sites, some of the best practices in the non-
15 mobile context will work very well in the mobile context
16 as well.

17 MS. POSS: Anybody else want to comment on
18 that?

19 MR. ODEGARD: I would just like to add that if,
20 you know, as viewership through mobile phones and
21 smartphones and tablets increases and it's rapidly, if
22 not already, outpacing, you know, desktop viewing, you'd
23 be foolish from a retailer's or business perspective, not
24 to take that into consideration and not to craft your
25 marketing message, your offer information and the

1 associated disclosures and catches so that's all properly
2 disclosed there.

3 Because, you know, from Best Buy's perspective,
4 we're certainly not in the business to try to disappoint
5 consumers. You want to maximize sales, and as a side
6 benefit, a wonderful benefit, is FTC compliance. So, it
7 goes without saying that that's a very, very important
8 thing. Because at the end of the day, what I'm around to
9 do is to help support the business, to drive sales.

10 MS. DE MOOY: I just want to echo that and say
11 -- I was going to say something similar, but more in
12 terms of businesses today would be wise to start with
13 mobile and then move to the web. I think that's pretty
14 much where everything is headed and I think it makes a
15 lot of sense to design that way. I think the problem is
16 that -- it's not so much the screen size is the problem
17 when you're doing that, but, again, like you said, Paul,
18 the location. And I think there are different
19 expectations as far as how people receive information on
20 a phone versus the web. And it's partly size, but I
21 think it's also partly the way the space is played out.

22 You know, pop-ups are something that are sort
23 of viewed negatively more on the web because they're pop-
24 up ads. And while that occurs on phones, it's mostly, I
25 think, agreements, right? I mean, we're sort of used to

1 that on iPhones and other phones. So, I think that's
2 something to take into consideration.

3 MS. POSS: Okay. Well, let's talk about that,
4 some more about the differences between mobile use and
5 desktop use. We've heard kind of -- I've heard both
6 sides. There are differences, there are similarities.
7 You know, we certainly have heard about the consumer
8 who's in a hurry, just wants to get a task done, may
9 actually be tapping "buy" as they're walking down the
10 street. Do consumers use mobile devices differently than
11 desktops, and if so, how does this impact the ability to
12 provide clear and conspicuous disclosure?

13 Anna, you want to talk about that?

14 MS. BAGER: Yeah. Well, yes, I think we
15 probably can just go to ourselves and just say that, yes,
16 they do. Consumers use mobile phones for a lot more and
17 it's a much more -- it's a device, as well as a tablet,
18 that is much more integrated in their lives, personal
19 lives in a way than the PC ever was or will be. It's
20 kind of the remote control to our lives.

21 Consumers use their mobile device when they're
22 shopping. They use it to find their way. They use it to
23 find out information about things in a much more engaged
24 way than we ever have used the PC for. We also use it
25 together with a PC and together with TV and together with

1 other types of mobile devices, as a kind of navigation
2 for those as well. So, I think you have to take that
3 into consideration a lot.

4 I mean, just from a shopping perspective, we
5 just released some research about a week ago looking at
6 consumers' shopping behaviors on mobile phones. And
7 first of all, we have close to 60 percent smartphone
8 penetration in the U.S. in all customer groups, not just
9 affluent users. All of us have them. And over 60
10 percent of the people that we researched in the survey
11 showed that they have been buying something over a two-
12 week period on their phone and 53 percent said that they
13 had stopped a purchase in-store because of information
14 that they found on their mobile phone, at the counter.

15 So, of course, it's very important that --
16 because it's such an important and integral device in our
17 lives, that you can provide effective disclosure. But
18 also that you then think about that it's not just about
19 the phone, it's about the cross media usage, several
20 devices included in this.

21 MS. POSS: Michelle, do you want to talk a
22 little bit -- you've talked a little bit about different
23 use, but do you want to address that, also?

24 MS. DE MOOY: The only thing I think -- just a
25 minor comment because I think the context is so crucial

1 when it comes to mobile phones, the context of how it's
2 being used. But I was just going to say that was
3 interesting to me that consumers stopped a transaction
4 and, again, I think that's a disincentive to provide
5 adequate disclosure for businesses.

6 So, I think that's something -- I'm not exactly
7 sure how you'd solve that issue, but I think that's just
8 another way that it's making it harder for advertisers to
9 actually want to inform their customers.

10 MR. HALPERT: I'm not entirely sure that that
11 follows. We have these data points that are pretty
12 general and if somebody does some price research or
13 something while they're at the check-out, that may not
14 mean that there's any greater incentive or disincentive,
15 but it does mean that there's more information. We then
16 have to go one step further and look on a case-by-case
17 basis if there was some misleading representation as to
18 that offer. And given that most websites aren't tailored
19 specifically to a mobile audience, I'm not sure that all
20 that really, at this point, comes into play.

21 But that's it. It's obviously very important
22 that disclosures be adequate and that consumers be fully
23 informed.

24 MS. POSS: Mark, do you want to talk about what
25 you're seeing in terms of consumer mobile use?

1 MR. ODEGARD: Yeah, I wish I had some of the
2 certainty that a lot of folks express about consumers and
3 their wants and desires and how they're using equipment
4 and devices to go ahead and shop and to do research
5 before they decide to buy something or participate in
6 some kind of an offering.

7 On the one hand, I've been in meetings,
8 marketing meetings, and folks have told me about how the
9 consumer today is so speedy quicky to judge, not
10 deliberative. On the other hand, we've experienced
11 first-hand that consumers today -- some of this is my
12 personal opinion -- have never been so well informed in
13 that they use their devices to both enhance the shopping
14 experience and the bricks and mortar store, comparison
15 shop, price match right in our stores, things like that
16 are happening. So, it's very difficult for me to
17 generalize because I've seen the data go both ways.

18 But I guess I will just come back to the point
19 that you've got to do the best you can, take the data
20 that makes the most sense to you and meet with your
21 business folks to go ahead and align on a strategy that's
22 going to drive the business, in my particular instance.
23 But it is quite difficult to formulate opinions regarding
24 that and I see the opinions are changing, too. You know,
25 the opinions that I might have held or been told a couple

1 years ago regarding consumer behavior. I think a lot of
2 that's already becoming outmoded and I'm seeing a
3 continual change in that area.

4 MS. POSS: Anybody else want to add to that,
5 the impact on being able to provide clear and conspicuous
6 disclosure based on the use of mobile?

7 (No response.)

8 MS. POSS: Okay. Well, let's move on to
9 proximity. We heard a lot of discussion about proximity
10 earlier today, and the current guidance says that
11 disclosure is more effective if it is near the claim that
12 it qualifies and that proximity increases the likelihood
13 that consumers will see the disclosure and relate it to
14 the relevant claim or product. Now, is this principle
15 still true for mobile and is it important for mobile
16 advertising given how consumers are using their devices,
17 even though we've heard a little bit back and forth of
18 how they're using them? Is it still important for mobile
19 advertising?

20 Paul?

21 MR. SINGER: Absolutely. I mean, I -- and
22 we've certainly -- we talked about it earlier today, we
23 talked about it on this panel. But, you know, certainly
24 states and other regulators out there have been following
25 the same general principles, and proximity is most

1 definitely still a very key concept to making sure
2 consumers see and understand, you know, a disclosure.
3 And, so, you know, when it is something that is material
4 that needs to be made because it relates directly to the
5 offer, then it needs to be made directly proximate.

6 With mobile devices, I mean, I think this first
7 example -- you know, we talked about it before, this
8 first example, still provides a means to make that
9 disclosure in proximity. The question of sort of use and
10 consumers' use, I think, is a much harder one. I think
11 it's whether a consumer is going to read a disclosure,
12 even if it's proximate, just because they're on the go
13 and want to hit "buy" right away is certainly a question.

14 But I would almost sort of throw that back out
15 to the folks advertising, you know, through that
16 mechanism and say, you know, it's in some ways up to you
17 all to be keeping track of, you know, what consumers
18 really understand and how they're processing the
19 disclosures that you're making and how they're using your
20 mobile sites.

21 I mean, if you're seeing that users, you know,
22 are just quickly on a page and hitting "buy" on a mobile
23 device, you know, maybe you need to rethink sort of the
24 mechanism and explore ways to make sure that they're
25 getting the relevant information.

1 MS. POSS: Michelle, would you like to add to
2 that?

3 MS. DE MOOY: I think he answered it very well.
4 I would just add that, yes, I think proximity is huge and
5 it can still be accomplished on mobile phones, but I also
6 think, again, maybe to amend the principle to somehow
7 include context on mobile phones, which would mean sort
8 of -- and also timing. So, the moment in which there is
9 a transaction happening so that the consumer's really
10 given more than just location which, you know, sort of
11 could vary based on the merchant, but that they're also
12 giving it in realtime and at a crucial moment as a
13 transaction's taking place.

14 And the other thing I might add is that they
15 have sort of like the yes/no example earlier, more
16 ability to control, whether or not they go forward with
17 that. So, I'm not sure if that would be the principle
18 where you would add that, but I think adding something
19 about context and timing would be important.

20 MS. POSS: Okay, let's talk about hyperlinks.
21 We also heard about those this morning. Hyperlinks in
22 the mobile space, though. So, the first panel spoke
23 about hyperlinks and when to use them. The original
24 guidance states that disclosures, which are an integral
25 part of the claim or inseparable from it, should be

1 placed on the same page and immediately next to the claim
2 so that the claim and the disclosure are read at the same
3 time without referring the consumer to somewhere else.

4 Let's take a look at our next example here.
5 Okay, so we have a fictitious DEAL-ON! example and the
6 disclosure of the restrictions on the offer, they're
7 available, but they're through a hyperlink labeled "More
8 Info." Let's see what they are. And there they are. If
9 for those of you who are not from the D.C. area, if you
10 look real closely at that, you will see that there are
11 some restriction that this deal is only valid at the
12 Germantown location which is way up in north Montgomery
13 County, which is in Maryland, and I believe it's also
14 only available during lunch, if I have that right. So, a
15 couple of restrictions there that are in the hyperlink.

16 So, what does the panel think about that? Is
17 this sufficient -- is this disclosure sufficient for a
18 mobile user? Why or why not? And how could it have been
19 done better?

20 David, do you want to take a crack at that?

21 MR. SCHELLHASE: Sure. This would be targeted
22 at our competitor, LivingSocial, so speaking of D.C.

23 (Laughter).

24 MR. SCHELLHASE: You know, I do think we've
25 kind of touched on one thing, but we haven't met the

1 issue head on. And I'll answer the question, I don't
2 want to duck the question, but I also want to bring up
3 one other point, which is I think proximity in the
4 disclosures is critical, but also prioritizing the
5 disclosures is very, very important, right? And I'll use
6 an analogy to another medium which also has limited sort
7 of screen space and limited duration and that's
8 television advertising.

9 So, I watched New Girl last night because Zooey
10 Deschanel is "adorkable" and there was an ad for an Acura
11 TL, and the Acura TL had, I think, five different
12 disclaimers or disclosures running across the -- well,
13 three of them ran across the bottom and then there were
14 two screens at the end of the advertisement that had
15 about 100 words per screen of disclosure. It all
16 happened in 15 seconds. And there's no way any human
17 being can assimilate all of those and understand the
18 disclosures in those 15 seconds. It's just not
19 physically possible.

20 So, to me, that suggests a couple things. One,
21 proximity is very important. Prioritization of what are
22 the important disclosures about whatever is being offered
23 or advertised is also critical. The other thing it
24 suggests to me is that one size definitely does not fit
25 all in the sense that there are some things that, you

1 know, are difficult to advertise over a mobile phone.
2 There are some things that are challenging to advertise
3 over television, and I'm not suggesting that there needs
4 to be regulation about it. I think most of the brands
5 and companies that are represented sort of understand
6 what those are and put measures in place to try to
7 prevent people from doing harm to themselves if that's
8 what's going to happen, you know, on the happy upside, to
9 create an environment where their brand is not going to
10 be harmed if the customer's expectation isn't met.

11 So, these disclosures that are here on the
12 second page are obviously better disclosures, right? And
13 I think we can all agree on that.

14 In a food and drink deal, there probably aren't
15 as many important salient pieces of information you want
16 to know. You do want to know, you know, do I have to buy
17 anything else in order to take advantage of the offer?
18 The fact that, for example, please tip on the full cost
19 of the meal. Well, that's important to your server at
20 the restaurant. It's probably less important to a
21 consumer deciding on whether to buy the deal because I
22 think there's an assumption, in this country anyway, that
23 you're going to tip and, you know, how much you tip is
24 based on the service and all that.

25 So, I definitely feel as though context is

1 important, but also content is important. And, so, you
2 know, the prioritization of the disclosures changes
3 depending upon what's on offer or what's been advertised,
4 and you've really got to think about what are the most
5 important things because you have such a limited
6 opportunity to say anything.

7 MS. POSS: Sheryl Ann?

8 MS. YAMUDER: I was going to say that I think
9 one thing that --

10 MS. POSS: Pull that mic right up to you.

11 MS. YAMUDER: I completely agree with
12 everything that was just said. I think one thing that
13 would help in a situation like this is how the link is
14 used. So, I think it is hard to fit everything in and
15 you do need to prioritize what's up front and what comes
16 next. But to make it more likely that the consumer is
17 going to go the next step in getting all the information
18 they need, something like more info may make it sound
19 like they're simply going to get more information about
20 the restaurant where we found that if you put something
21 like terms and conditions or restrictions that may apply,
22 you're more likely to get someone to take the next step
23 to see what's behind that.

24 So, I think that there are ways that, despite
25 the space restrictions, you can incentivize people to

1 look farther and to have more of a sense of what's behind
2 the link even if a link is what you need to use.

3 Another point I was going to make is that I do
4 think that, you know, whether you're acting on a mobile
5 phone or, you know, you're using a browser on a computer
6 is going to affect what room you have to put things in
7 and also I think consumer expectations about what will be
8 there is definitely not the same. And I think how you
9 prioritize based on whether it's on a phone or whether
10 you're using a browser on your computer is going to be
11 different.

12 So, it's hard to say that you can do a one-
13 size-fits-all. And while I think you can start with
14 mobile to try and tailor your ads, I don't think that you
15 can take one way of designing it and fit it into every
16 single media.

17 MS. POSS: Jim, do you want to comment on this?

18 MR. HALPERT: Yeah, I do agree and I also think
19 it's important to think about this in the context of the
20 particular space limitations that are faced. If, for
21 example, a tweet goes out promoting a particular product
22 and there are important restrictions on the offer, it's
23 important either to have a very prominent hyperlink that
24 will go to and then prioritize on the -- if somebody
25 clicks on the hyperlink, to the most important

1 disclosures, or to send a follow-on tweet, if the
2 information can't be included in the 140 characters. To
3 follow up with a second disclosure, which is perhaps
4 foreshadowed at the end of the first tweet, that then
5 goes into the additional terms.

6 But it's important as an advertiser to think
7 through practically how you're going to convey this
8 information to consumers in a way that they will
9 understand the restrictions. You do not want people
10 showing up at your restaurants, even if they're
11 franchisee restaurants, furious because they saw some ad
12 and the restriction, in fact, was incredibly narrow in
13 terms of the places that consumers could go to take
14 advantage of that.

15 So, it's really worth planning, as you do these
16 kinds of campaigns, to figure out how you're going to
17 inform consumers and they're not going to be disappointed
18 and angry at your brand because they didn't see the
19 restrictions on an offer. And being creative and
20 thinking about these parameters we've been discussing is
21 a good way to start to avoid that kind of trouble.

22 MS. POSS: Michelle, you have something?

23 MS. DE MOOY: Yeah, I think just in terms of my
24 comments about context, I was looking at Groupon and it's
25 -- you know, I think they do disclosures pretty well. I

1 think, you know, they have sort of a fine print tab. I
2 don't know if everybody's used it, which is really great
3 and it helps you understand what some of the restrictions
4 are. But what I noticed is if you go under the
5 discussion tab, a lot of consumers are confused about
6 what the disclosures are. So, Groupon has a nice way of
7 allowing them to interact with the merchant to ask
8 questions. But I think that's a little bit tricky
9 because it's sort of putting the onus on the user to find
10 that out.

11 So, then again, I think when you talk about
12 context, because you say, well, how can Groupon, you
13 know, provide disclosures for so many different types of
14 things? But I think that's an important way to sort of
15 categorize some of this, when you're talking about the
16 principles, that, you know, there's certain information
17 that's more important for certain types of transactions.

18 For example, there are subscriptions that, you
19 know, start and never end. That would be something you
20 need to know, whereas you get offered for a health
21 membership that lasts for three months and there's a
22 specific end time versus that's how long you have to use
23 it. I think that's something that needs to be considered
24 whether it's that somebody clicks on it and there are
25 specific prompts that the advertiser has disclosed that

1 would then allow Groupon to customize each offer that
2 way. I think that might be one solution to it.

3 MR. SCHELLHASE: So, maybe I should take the
4 praise and go home, but I'll just add to that that I
5 think creating the brand perception that you want, you
6 know -- Patti, you asked us to give our advice to start-
7 ups at the end, but I'll give a little advice in the
8 middle, I guess, which is I think you do want to think
9 very hard about what brand perception you want to create
10 if you're a company and how you want to be perceived.

11 And, so, you know, one of the things that we've
12 thought -- we think a lot about that, and one of the ways
13 that we've addressed it is with our truly mobile product,
14 which is a now product, which enables you to sort of
15 click on a button, and if you enable geo location, you
16 get to see restaurant deals, for example, that are within
17 walking distance.

18 If you buy that restaurant deal, it's
19 evanescent. In other words, it's good only for a certain
20 period of time. And if you don't show up at the
21 restaurant by that period of time, the deal is over.
22 And, so, when we first started thinking about that, we
23 thought, you know, how can we make this risk-free for the
24 customer because the customer, if they show up at 4:01
25 and the deal is over at 4:00, they're going to have a

1 very bad experience.

2 So, we made a decision, and it's not for
3 everybody, but it was right for us as we sort of roll
4 this new product out, that if you don't get to the
5 restaurant by 4:00, you get an automatic refund. So,
6 even though you bought it and you bought it through your
7 credit card, your credit card will then be refunded
8 instantly -- or not instantly, but within a day or so if
9 you don't go to the restaurant and take advantage of the
10 deal. And that, I think, creates a lot of kind of
11 chocolatey goodness around your brand and a good customer
12 feeling. It's not necessarily -- and you can see it in
13 our disclosures, right, it's right below the "buy" button
14 on the now product and it says you're going to get an
15 automatic refund if you don't use the deal.

16 And I think that's something that's very
17 important for everybody. You've really got to think
18 about your brand and think about what customer perception
19 you're creating. So, it's not just about -- I mean, so
20 much of our conversation is about the lowest common
21 denominator, right? What's the minimum we can say to get
22 a good piece of disclosure that's going to pass muster
23 with the FTC that's going to not outrage plaintiff's
24 lawyers too much and so on and so forth, or AGs. And we
25 think that that's important. But it's also important not

1 just to say what the lowest common denominator is, but to
2 also think about sort of more aspirational things.

3 MS. POSS: And I promised Paul I'd give him a
4 chance to change his answer from this morning on
5 hyperlinks.

6 MR. SINGER: I just appreciate the fact that
7 David acknowledged that you should be scared of AGs in
8 addition to the FTC.

9 (Laughter).

10 MR. SINGER: I think that this discussion has
11 sort of hit on a couple of different issues, but, I mean,
12 one is the actual labeling of the hyperlink and whether
13 more info effectively communicates what's behind that
14 link. And I think, you know, we talked a lot about that
15 on the first panel today, and it seemed like the
16 consensus answer was no. So, you know, that the link
17 itself would need to be clear and conspicuous and explain
18 what's behind it. And I think that's consistent with
19 certainly actions that regulators have taken when they're
20 looking at how a hyperlink would need to be disclosed.

21 But I think more to the point of this example
22 and this offer, you know, back to what we've been talking
23 about all along, the material limitations on your ability
24 to get \$15 for \$30 worth of this Italian food should be
25 displayed right there proximate to the offer. And this

1 isn't a space limit issue. They can be. When you click
2 on more info, I mean, they are. It's on a nice screen
3 that's right next to the "buy" button and is proximate
4 right there. You don't have the pretty picture of the
5 pasta anymore, but, you know, the disclosures can be
6 made.

7 And, certainly, I know from my personal use of
8 Groupon that there's some of these facts that get
9 disclosed in different ways. I mean, the location, for
10 example, the location limitation would probably be right
11 here in the title of it. You know, I've certainly seen
12 plenty of those come across, you know, on my phone, that
13 it will say Germantown location only or something like
14 that.

15 So, my point of all this is that I think that
16 there are ways, even within the space constrained
17 mechanism here, to get that information across without
18 necessarily having to use a hyperlink.

19 MS. POSS: Great. All right, I do want to get
20 a chance to talk about location-based ads to drive
21 traffic, they talked about that also at the panel, but
22 since it's very mobile and that seems to be one of the
23 hot marketing areas in mobile, let's talk about that.
24 Let's say if a consumer receives a location-based ad for
25 a discounted sandwich, what if when they get to a

1 restaurant -- you know, for a restaurant that's just a
2 few blocks away. So, they go to the restaurant, but when
3 they get there, they find that there's -- they actually
4 have to buy two sandwiches to be able to get the
5 discount.

6 What do we think about that? Should there be
7 -- should there have been -- you know, what all should
8 need to be in the banner ad itself or in the push
9 notification or in the text, whatever method in which
10 that ad was displayed. What needs to be in there if
11 there's some kind of restriction like that?

12 Sheryl Ann, you want to talk about that?

13 MS. YAMUDER: Sure. So, I think it is
14 important to make it clear on the banner ad, even though,
15 you know, it is a use of a very small amount of space.
16 If you had to buy a second sandwich in order to get the
17 deal that you were looking for, obviously, it's to
18 everyone's benefit that the consumer knows, not just from
19 a disclosure perspective, but also from a consumer
20 satisfaction perspective, which is something everyone has
21 spoken to here.

22 I think, you know, the interests are very much
23 aligned in these areas because it's important that the
24 consumer has a positive feeling about the brand that they
25 appreciate the experience and they want to go back. And

1 since that's a goal, if they show up and find out that
2 the offer isn't what they thought it was and they're
3 unhappy, then clearly they are not going to go back and
4 they are going to be dissatisfied and nobody wants that.

5 MS. POSS: Jim, you want to talk about that?

6 MR. HALPERT: I just agree completely. Your
7 brand is on the line when you do this kind of high
8 profile advertising. If you're sending an ad on a mobile
9 phone, people are very likely to see it. Probably more
10 likely to see it than if you have an ad on a website
11 where there's a lot more content than in the -- the
12 viewer won't necessarily -- the Internet user won't
13 necessarily focus. And, you know, your brand is on the
14 line. Do this carefully. In the end, an ad that --
15 particularly some of those geo limited ads that people go
16 out of their way to try to take advantage of a deal, if
17 the deal's illusory, it's the classic kind of annoying
18 consumer experience. I agree completely.

19 MS. POSS: Anybody else want to comment on that
20 before I move on?

21 MS. BAGER: Well, I just -- I agree fully, but
22 then there is a little bit of a problem with, again, the
23 banner ad and how much -- how do you actually disclose
24 that extra piece of information if it's -- you know, how
25 do you not annoy the customer then and there with that

1 much information?

2 You could write next to the buy the sandwich
3 message, "for more information, click here and go to our
4 mobile landing page," and have more information there. I
5 mean, it's hard to --

6 MR. HALPERT: Well, I think you could say, for
7 example, "buy two" in small writing and people can see
8 that or you can have a link saying, you know, "see
9 restrictions," if there's more.

10 MS. BAGER: Yeah, "see restriction," if there's
11 more, yeah, yeah, it's hard.

12 MR. HALPERT: And, obviously, it's a space
13 limitation. So, you can only use a few words. But,
14 ultimately, within the constraint, we have to be
15 practical about what's possible and what's going to be
16 clear and not expect perfection. But within the
17 constraint, it's important to make the effort to make
18 sure that consumers are likely to be aware of the
19 restrictions.

20 MS. DE MOOY: And, conversely, you could just
21 say, "two for one."

22 MS. BAGER: Yeah, that's probably the best.

23 MR. HALPERT: I'm sorry, that's it.

24 MS. POSS: Okay, let's move on to this
25 discussion about reading every word. So, the current

1 guide asserts that advertisers should assume that
2 consumers don't read the entire website -- should assume
3 that consumers don't read the entire website just as they
4 don't read every word on a printed page. Does this
5 assertion also raise specific issues for mobile
6 advertising? Do consumers read more or less of the
7 content on a mobile screen?

8 We heard a little bit this morning from Jen
9 King about this. Michelle, do you want to address this
10 question?

11 MS. DE MOOY: Sure. I'm definitely no expert,
12 but I can tell you that we get a lot of -- we have a
13 national hotline and we get some complaints about this
14 where when you go through a website whether it's mobile
15 or on a typical website, they were notified in the fine
16 print. So, I just think in general this really ticks
17 people off when there's sort of a legalese and I think
18 consumers typically really don't read any of -- you know,
19 as they don't read privacy policies, they don't read
20 these.

21 And I think one of the problems is what they're
22 named. In the same way that privacy policies are sort of
23 this misnomer and convey a certain inference to consumers
24 that isn't true. I think these disclaimer -- even some
25 of the words that we've been talking about today, I think

1 the average consumer is slightly less savvy. Not that
2 people are stupid. I think that they understand the way
3 advertising works for the most part. But I think on, you
4 know, the mobile phone, you say "disclosure" and I don't
5 think that's clear at all.

6 So, I think it's not just that they don't read
7 it and the onus is on them, you know, they're not reading
8 it, but it's to get them to understand the financial
9 ramifications in an engaging way. And I think that is on
10 the advertisers to do that.

11 MS. POSS: Okay. Anybody else want to comment
12 on that, about consumers reading?

13 MR. SCHELLHASE: Yeah, just briefly. I mean, I
14 will say that the fine print section of our mobile device
15 that you raised was actually a riff on the notion that
16 people never read the fine print, right?

17 MS. DE MOOY: Right.

18 MR. SCHELLHASE: You know, it's kind of meant
19 to draw your eyes -- it's a little bit of a joke. The
20 joke predated me. No one laughed at the joke here,
21 that's good. But, you know, that is -- so, labeling, I
22 guess, does count in some way. But you do have to be
23 sort of clever. If you've got things to say, people are
24 in a hurry and you've got to find a way to get their
25 attention and that was our effort. It's three years old

1 now. Maybe we need a new riff.

2 MS. POSS: Okay. Let's talk about some of the
3 other differences for mobile. Beyond the screen size and
4 the nature of the use, which we've talked about. We had
5 a few other issues raised in our opening statements here,
6 if you want to comment on those constraints or
7 challenges. Are there other differences or constraints
8 that the commission should consider in providing
9 disclosure guidance for mobile? Are there other
10 limitations that impact the ability to provide disclosure
11 that should be considered or other techniques that offer
12 solutions?

13 David, do you want to talk about this?

14 MR. SCHELLHASE: I'm probably focused more on
15 techniques because I think we've kind of beaten the dead
16 horse of some of the limitations and so forth. And, so,
17 you know -- and I will also sound a little bit like a
18 dead horse to say that brand is very important and how
19 you present yourself to customers and what image you want
20 to create is very important.

21 There are some obvious choices that we could
22 talk about here. We could talk about industry standards
23 as one technique, right? We can get an industry to agree
24 on a common set of standards and disclosures. That
25 probably won't work except at a very, very generic high

1 level, in my opinion, and probably won't provide much
2 meaningful protection or disclosure to consumers.

3 You know, the one thing that we've found that's
4 been very effective, and I think it was said at the panel
5 right before lunch, is that third party reviews from
6 strangers carry a ton of weight. Third party reviews
7 from your friends and acquaintances, obviously, carry a
8 lot of weight, too. But I think increasingly in the
9 mobile world, you're seeing things like third party
10 reviews either linked to or a certain number of stars
11 being given to a product or a service, and I think Google
12 announced yesterday that they were going to use Zagat
13 which, you know, everyone has thought of as a review
14 service until now, as sort of their entryway. So, Google
15 purchased Zagat, I guess about six months ago, and
16 they're going to use that as their entryway or gateway
17 for local search.

18 And I think the thinking there, I haven't
19 talked to anybody at Google about this, but I'm guessing
20 that the thinking is people will trust Zagat reviews and,
21 therefore, be more likely to patronize the businesses
22 that are highly reviewed on that site. And if you are
23 using the Google Zagat review site, you then trust the
24 businesses that pop up with good reviews.

25 So, I think, you know, in terms of kind of

1 techniques for getting people to pay attention to what
2 best practices are or the disclosures that are out there,
3 I think reviews are actually sort of an untapped source
4 for that.

5 MS. POSS: Okay. Paul, do you want to address
6 this question, also?

7 MR. SINGER: Sure. I mean, responding to your
8 first question about what are some of the other
9 differences with a mobile device, you know, I think that
10 -- and this does go back to some of what we talked about
11 at the outset. But understanding what consumers
12 understand about the technology, and certainly as it
13 changes, is very important. And I think that, you know,
14 with a mobile device, there's so many different, for
15 example, payment methods that could potentially come into
16 play.

17 So, you know, is there some sort of offer that
18 may carry with it some sort of subscription service
19 that's going to be billed directly to my cell phone bill?
20 Is there -- you know, can I use my device and swipe it in
21 front of a reader and be paying for things that way and,
22 you know, what payment method is associated with it?

23 And the point of all that is just that, you
24 know, knowing what consumers' expectations are with that
25 device is very important and relevant to what kind of

1 disclosure needs to be made to them before they're in
2 that situation. So, I think the evolving technology
3 really sort of complicates that issue and is going to
4 have to create some -- you know, it's something that
5 needs to be factored in when considering what disclosures
6 are relevant.

7 MS. POSS: And that's a good bridge. Let's
8 talk about some of the other emerging technologies
9 associated with mobile and who knows what else is coming
10 down the road. So, mobile technology continues to evolve
11 and provide creative marketing opportunities such as the
12 use of augmented reality games that promote products, the
13 integration of video, the growth of tablets and cross-
14 platform or device campaigns. Do these present new and
15 unique disclosure issues or simply the application of the
16 same principles we've been discussing already today?

17 Sheryl Ann, you want to take that question?

18 MS. YAMUDER: Sure. Well, if we're going to
19 address sort of brand-integrated content, reality games,
20 things like that, I think that there are so many
21 different ways that content is being used and brands are
22 being integrated into content, that it is definitely not
23 clear-cut. It depends on the circumstances. So, a
24 reality game may be an opportunity to have your brand
25 incorporated into the game, but if the game is such that

1 it's about everything that appears on a city street, if,
2 you know, your brand is there, then, you know, the game
3 company wants it there, you want it there and it's really
4 more of a functional presentation of something, whereas
5 if you're sponsoring brand-integrated content for a web
6 series, it's a completely different scenario as to
7 sponsorship, as to disclosure that your products are
8 being shown in that content for purposes of your benefit
9 based on your buying, advertising or funding the content.

10 So, I think that as all of these different
11 types of content evolve, I think, the way that brands are
12 placed and the way that we would view it would be
13 different.

14 As far as looking at more of the, you know,
15 cross-platform issue, which I know has been discussed a
16 lot today, I mean, with respect to cross platform,
17 whether you're looking at a promotion or some kind of a
18 sweepstakes, it's very difficult to assume that you can,
19 as I mentioned before, make the exact same disclosure or
20 start with mobile or end up in the same place. If you're
21 running a promotion that's going to be on Facebook and is
22 going to be on Twitter and is going to be in various
23 locations, without even getting into how you're assessing
24 it, then way you're going to be able to provide the
25 information is not going to be the same.

1 And, so, you're doing your best to come up with
2 a way that you can provide as much information as
3 possible or get the consumer to the information you want
4 to share, but you're definitely dealing with completely
5 diverse environment. And I think the device you're using
6 will also affect that because you can't control how the
7 consumer is going to access that information. And, so,
8 while it might make more sense for a consumer to access
9 the ad or the content on a mobile phone through an app,
10 they may choose to click an email and go through their
11 browser and you really aren't in control of that.

12 So, you're doing your best to, you know, I
13 think, sort of shape ads that will address various
14 methods of accessing them through various devices and
15 various platforms and I think it becomes very complicated
16 to ensure that you're anticipating every different way
17 the consumer is going to access those ads.

18 MS. POSS: Michelle, do you want to talk about
19 some of the new technology issues?

20 MS. DE MOOY: Sure. I think from a consumer
21 perspective, one tricky thing that comes up when you have
22 cross-platform and all these different products living
23 all over the place and where you purchase, you know, you
24 could go through Facebook and you can go through all
25 these different platforms, is the complaint and grievance

1 process. I think that's really unclear for consumers,
2 you know, who do I call if I feel deceived? You know,
3 the FTC is great, but that's just one resource. I think
4 that's really something that is unfairly confusing for
5 people. And, certainly, when you have a mobile phone and
6 then you add a cell carrier into that equation, you know,
7 a lot of times you hear people say, you know, they called
8 AT&T to complain about this ad and so they may not
9 understand the liability.

10 And I've also heard of consumers being caught
11 in between a merchant and, say, a Groupon -- not
12 specifically, but so that they -- they really don't know.
13 So, I think that that's something that, you know, just on
14 a basic level really needs to be resolved, and the FTC
15 could probably offer some guidance on who and how that
16 liability should flow.

17 And then the other thing I would say, I think
18 when you talk about rich content type stuff, I think that
19 there's two ways to look at it. One is that there's an
20 opportunity for consumers to be better educated, perhaps
21 if they're not going to read certain disclosures, there
22 would be a way to provide them within the context of a
23 game or a video. The danger, I think, would be that
24 those don't imply, again, financial ramifications a lot
25 of times. You know, if you're in a game, it's about fun.

1 You may not really understand, depending on how the
2 disclosure is offered to you. Again, the financial
3 ramifications are that you are accepting sort of a
4 financial ramification if you agree to something.

5 MS. POSS: Great. So, we have one question
6 from the audience that I'll read here. So, what about
7 the use of disclosures on multiple cart pages after the
8 "add to cart" button is checked and on the final page
9 where their payment info fields are populated, must
10 disclosures be repeated there? Repetition is one of the
11 items that's listed in our guidance documents, too.

12 What does the panel think about this question?
13 Anyone want to take a crack at it? Jim, you're starting
14 to move.

15 MR. HALPERT: No one prepared on this one. I
16 think -- again, all these are contextual. And if there's
17 a very clear and prominent disclosure in the first page
18 before the user clicks "I accept," it may not be
19 necessary to provide repetitious notice.

20 On the other hand, if you have a term that is
21 an extraordinary term and something that would create
22 huge potential liability for a consumer, for example, it
23 would be important to disclose that perhaps a second
24 time, depending on the context. But the beauty of the
25 dot-com disclosures guidance document, which the FTC had

1 enormous foresight in putting out in 2000, it's really
2 stood the test of time and it's quite striking when one
3 considers, for example, how the COPPA rule, which was
4 issued two years earlier, has been the subject of all
5 this back and forth.

6 This document is a terrific document and one of
7 its greatest strengths is that it is flexible and that it
8 anticipates that they're different contexts. And, so, I
9 think as we think about these different factors, it's
10 important to consider the overall principles of, for
11 example, proximity, prioritization, et cetera. But there
12 isn't a particular format or a particular approach that
13 will always apply, even in somewhat similar
14 circumstances. And it's that flexibility, recognizing
15 that the mobile medium is really quite young and it's
16 exploding and it's going to change that, I think, will
17 ultimately lead us to an approach that really
18 communicates in a way that's most effective with
19 consumers and adapts over time.

20 So, as this really good document and farsighted
21 document is modified, it's important to build in the
22 sense that there isn't a right answer today that will be
23 the right answer tomorrow or the day afterwards and that
24 we need to look contextually in different circumstances
25 and look at how technology's going to evolve over time to

1 keep up with this important task of making sure that
2 consumers are very aware of key terms when they agree to
3 do something online.

4 MS. POSS: Excellent. That's a great lead into
5 my last question, which we're going to ask each of the
6 panelists, this probably could have been the subject of a
7 whole other panel, but each of the panelists to give
8 their best advice for a start-up who's creating new ad
9 content, to provide clear and conspicuous disclosure and
10 any definite no-nos when they're trying to provide this
11 disclosure. We'll mix it up a little and start with
12 Sheryl Ann on the other end this time.

13 MS. YAMUDER: I think -- I mean, I think the
14 biggest piece of advice is looking at, you know, where
15 you're going to be advertising, who you're looking to
16 reach and how you're looking to reach them, because you
17 really do have to think through everyone you're going to
18 reach out to and how they're going to be accessing the
19 information you're providing them. I think most of the
20 discussion here is about how to make information readily
21 accessible and I think it's so complicated that if you're
22 not thinking through, okay, well, this may show up here
23 and it may be accessed this way, then you're going to
24 miss something.

25 MS. POSS: Paul?

1 MR. SINGER: So, I'll echo a little bit of what
2 Jim was just saying, but I think that the basic
3 principles and really the content, the core substance of,
4 you know, the 2000 dot-com guidelines is still very true,
5 you know, and I think that the basic principles that
6 apply are going to apply as there's future technology as
7 well. And, so, I mean, I think in terms of getting into
8 the space, you know, I think it's wrong to assume that
9 just because it's a new technology or just because, you
10 know, it's something new to you or new to users means
11 that the principle should change, right?

12 So, you know, the core concepts and the core
13 fundamental consumer protection values are still going to
14 be true regardless of the platform. And I think that's
15 just important to remember.

16 MS. POSS: And, David?

17 MR. SCHELLHASE: I will third that with respect
18 to the dot-com guidelines. I mean, I think -- and I keep
19 coming back over and over again to context being very
20 important and content. And, so, you know, there is
21 really no one-size-fits-all approach and it's a little
22 bit cliched to say that, but I think it's very true. You
23 know, you have to kind of look at what you're selling,
24 what you're advertising, what you're trying to market and
25 who your audience is because that's something that I

1 think we sort of touched on very, very early on in this
2 panel, but then we didn't come back to, which is
3 different cultures, different age groups, different
4 demographics react to advertising in different ways. You
5 know, we're in 48 countries around the world and, so, we
6 know that, right? We know it sort of first-hand. But
7 even within this country, obviously, there are a lot of
8 differences that don't always get acknowledged. But if
9 you're interested in being a start-up and you want to,
10 you know, appeal to as many people as possible, you've
11 got to find ways to address that.

12 MS. POSS: And Mark?

13 MR. ODEGARD: One thing I'd add is that the old
14 rules do apply, as it's been stated over and over again,
15 not all of my business clients know that. The other
16 thing, I think it's worth mentioning, we've been talking
17 about the complexity and engaging in the spaces. This is
18 a wonderful problem to have from a marketing and a
19 business perspective. Compare the static printed page
20 and the limited options that you have in conveying a
21 message.

22 All our consumers want is to be playing in this
23 space and with a mobile device and with some of the
24 techniques and functionalities we've been talking about.
25 You have so many layers, so many options to go ahead to

1 get to the consumer, yet still in a compliant fashion
2 with FTC regulations and associated laws to get there.
3 So, truly a wonderful problem to have. It might keep us
4 up late sometimes, but it's better than the alternative.

5 MS. POSS: And Jim?

6 MR. HALPERT: I think I already concluded with
7 my last answer. Thanks.

8 MS. POSS: It's pretty close. Okay, Michelle?

9 MS. DE MOOY: What I would say, my advice to a
10 mobile start-up would be -- and I think people have
11 mentioned, but, you know, the context should be what
12 prioritizes the disclosures and I think the merchant
13 should conform to consumer expectation, not the other way
14 around. I think that's a good principle -- a good
15 business principle, a good consumer protection principle.

16 I think -- in terms of what should be updated,
17 I think the FTC should look at context really closely and
18 timing because I think those are different on mobile
19 phones, in terms of not just the deal you get that
20 expires that you need to get to, but also, you know, the
21 kinds of offers that consumers are getting.

22 And I think there needs to be a frame of
23 transparency somehow written into the disclosures. I
24 think it's really crucial that advertisers take this into
25 account, not just in terms of giving information, but

1 what consumers are expecting from the advertising, when
2 they're expecting to be advertised to.

3 And then somebody brought it up, and I kept
4 meaning to bring this up today, but also the idea of
5 multiple languages. You know, I think that's an issue
6 that if you don't -- if English is not your first
7 language, these disclosures are pretty meaningless to
8 you. And as that being the largest users of mobile
9 phones, as I said before, are Hispanic and African
10 American communities. Hispanic, in particular, that
11 becomes a huge issue. So, it's not one that you don't --
12 you don't really hear people talk about, but it's a big
13 issue.

14 MS. POSS: And, Anna, do you have any -- you're
15 going to get the final word here?

16 MS. BAGER: Oh, great. No, I mean, I can only
17 end where I started in saying that responsive design is
18 probably -- especially if you're a start-up and you have
19 the luxury to start from scratch. Think mobile first.
20 Think about the fact that a lot of people are accessing
21 content via the mobile today and more will do so in the
22 future. Eventually, everything will be mobile, at least
23 from a networking perspective. So, mobile first. Think
24 about responsive design and how you can, from that
25 context, design your site.

1 And then, above all, be tentative and check
2 what's going on. One of the beauties with this is that
3 you can actually kind of figure out what works and what
4 doesn't by tracking the usage of your site. So, if
5 something doesn't seem to work, rework it and do it in a
6 different way.

7 MS. POSS: And now you've led into our next
8 panel, into the privacy issues. We're going to take a
9 break for a few minutes, but please join me in thanking
10 our panel.

11 (Applause.)

12 (End of Panel 3.)

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1 PANEL 4: MOBILE PRIVACY DISCLOSURES

2 MS. KRAINSKY: Welcome back, everyone. We'll
3 begin our final panel, Mobile Privacy Disclosures, with a
4 presentation about downloading apps with Manas Mohapatra
5 and Andrew Schlossberg from the Mobile Technology Unit of
6 FTC's Division of Financial Practices.

7 MR. MOHAPATRA: Good afternoon, everyone.
8 Before we get to our last panel of the day, we wanted to
9 start off the conversation by presenting some information
10 about the process of downloading an app. Our next
11 panel's going to discuss the opportunities for privacy
12 disclosures in the mobile space. But prior to delving
13 into that topic, we want to make sure that everyone here
14 has an understanding of some aspects of what a typical
15 user sees when they download an app.

16 We're going to walk through the app download
17 process on both the Apple and Android platforms. And we
18 hope that you'll keep some of the upcoming screen shots
19 in mind during the next panel.

20 We're going to start by walking through the app
21 download process on an Apple device. Here we start with
22 a screen shot of an iPhone home screen. That's the first
23 screen that you would see when you turn on your iPhone or
24 iTouch. For the purposes of this presentation, let's
25 assume you want to download an app that's useful for

1 space exploration and stargazing. The first thing that
2 you'd need to do would be to access the App Store, which
3 can be reached by clicking on the blue App Store button
4 seen here circled in red.

5 This would take you to the App Store home
6 screen where you could search for different stargazing
7 apps and click on the app that appeals to you in the
8 results.

9 Now, let's say that the stargazing app that
10 you're most interested in is called Fake App. When you
11 click on the app from the search results, you'll be taken
12 to a description of the app and what you see here is the
13 description page for Fake App. From here, you could
14 install the app by clicking on the blue "install" button
15 or you could scroll down to find the description and
16 screen shots of the app, ratings other users have left,
17 the date of the last update of the app and sometimes a
18 link to the app license agreement.

19 If you scroll down from the first screen of the
20 app description, you can find more information about the
21 company that created the app, including the address of
22 the company's website, which is not hyperlinked, along
23 with a button called "app support." If you click on the
24 "app support" button, you'll likely be taken to a webpage
25 on the app developer's website that contains more

1 information about the app, likely in a FAQ forum.

2 If you decide that you do want to install Fake
3 App, you can scroll back up to the top of the description
4 page and click the "install" button. After you click
5 "install" and enter your password, this pop-up box would
6 come up and you'd have to click "okay" for the app to
7 download.

8 Now, after the app is completely downloaded to
9 your phone, the icon for Fake App would appear on your
10 iPhone's home screen. To use the app you've downloaded,
11 you just click on the app's icon from the home screen.
12 Now, what you see here is what you'd see after clicking
13 on the Fake App icon and launching it.

14 And one of the features of Fake App is to find
15 your location for purposes of determining what
16 constellations are nearby, as well as to show your
17 location in relation to space-related events, like
18 shuttle launches.

19 Once you attempt to use one of the app's
20 features that actually requires the use of location
21 information, you'll see a pop-up button like the one seen
22 here on the left side of the screen. You can allow Fake
23 App to use your location by clicking "okay". Now, any
24 application that wants to use your current location would
25 ask you for permission with a similar prompt. If you

1 want to see a list of all the applications installed on
2 your phone that do use location services, you can go to
3 the iPhone's settings and look for location services.
4 From there, you can also turn location services on or off
5 globally by using the setting that's at the top of this
6 page on the right-hand side. Or you could turn location
7 on or off on an app-by-app basis.

8 MR. SCHLOSSBERG: So, let's now look at the
9 Android platform. From the Android home screen, look for
10 the pre-installed Play Store circled in red on the slide.
11 You'll be taken to the Google Play Store and will need to
12 type in the search term "Fake App" at the top of the next
13 screen.

14 After finding Fake App from the search results,
15 you click on it to arrive at this screen, the app
16 description. You can click the blue "install" button
17 right away, but if you want to scroll down, you will see
18 the app's number of downloads, ratings and reviews, day
19 of its last update, its size, app screen shots and a
20 description of what Fake App does.

21 If you scroll down a little further, you'll get
22 to this screen. You can visit the developer webpage,
23 which will open a mobile browser if you click on the
24 link, or you can send an email directly to the developer
25 if you have any questions. This is unlike the iPhone

1 which does not list an email address for the developer
2 and does not hyperlink the developer's webpage. In
3 addition, you can also see Google's suggestions for
4 similar apps that users have downloaded.

5 After reviewing the Fake App description and
6 clicking on the blue "install" button, you arrive at the
7 permissions screen. Permissions essentially let the user
8 know, pre-download, what information the app will access
9 while running. This feature is unique to Android
10 devices. You can click "accept" and download without
11 looking at any of these permissions, but if you'd like,
12 you can read them before accepting.

13 Here is one example for permission. If you
14 click on your location seen at the bottom of the
15 previous slide, you are taken to this screen, which
16 further explains what it means for Fake App to access
17 location and what happens if malicious apps obtain it
18 somehow. Note that you can't opt out of any particular
19 one of these permissions, but you can learn what the app
20 can access before the app actually starts to download.

21 Also, the permission disclosure is just a
22 notice, as it does not tell the user why the app wants
23 the information or what it does with it.

24 After reading or not reading through the
25 permissions, you can now download Fake App. After the

1 app downloads, this screen pops up and you are given the
2 option of either opening the app or uninstalling the app.

3 Let's say you decide to open the app and not to
4 uninstall it. Before you can access the app homepage,
5 you must either accept or refuse the app end user license
6 agreement, the EULA. You have the ability to scroll
7 through the entire agreement or you can just click
8 "accept" right away. If you click "refuse," you are
9 taken back to the Fake App open/uninstall screen and the
10 app does not run.

11 Assuming you click "accept," you are now taken
12 to the Fake App homepage, seen here. On this page, you
13 can access a number of functionalities related to
14 stargazing and space exploration in this particular
15 instance.

16 Now, as Manas stated earlier, one of the
17 features of the Fake App is to use your location to
18 stargaze as well as to study location in relation to
19 shuttle launch schedules. For the Android platform, the
20 app already has access to information through
21 permissions. But you do have the ability to turn off
22 location globally for the entire phone seen here on the
23 left side. Like the iPhone, you can turn location off
24 globally, but unlike the iPhone, you cannot turn off
25 location on an app-by-app basis.

1 As a result, for Android, if you don't want
2 Fake App to access your location, you also wouldn't be
3 able to use location for, say, the maps app or any other
4 app on your device that uses location.

5 So, that sums it up for the Apple and Google
6 app download process. Obviously, there are other
7 platforms that we could have shown you, but since our
8 time is limited, we wanted to take a look at the top two
9 platforms. We hope this presentation will stimulate
10 discussion about privacy disclosures on the panel to
11 follow. Thank you very much.

12 (Applause.)

13 MR. MEHM: Thank you, Manas, and thank you,
14 Andrew.

15 Good afternoon, my name is Ryan Mehm, and I'm
16 an attorney with the FTC's Division of Privacy and
17 Identity Protection. I will be serving as the moderator
18 for this panel addressing mobile privacy disclosures.
19 The purpose of this panel, as Commissioner Ohlhausen
20 mentioned this morning in her opening remarks, is to
21 examine privacy disclosures on mobile devices and
22 consider how they can be short, effective and accessible
23 to consumers on small screens. We also tend to explore
24 what steps businesses in the mobile space can take to
25 communicate with consumers in a clear and consistent way

1 about their privacy practices.

2 Today, you'll hear from six people who've spent
3 a great deal of time thinking about and/or developing
4 solutions about how to convey critical information about
5 privacy to consumers on mobile devices, including what
6 information is being collected, with whom is data being
7 shared, and does an app collect or share location data.

8 We are extremely fortunate to have with us here
9 today Jim Brock of PrivacyChoice; Professor Lorrie Faith
10 Cranor of Carnegie Mellon University; Pam Dixon of the
11 World Privacy Forum; Sara Kloeck of the Association for
12 Competitive Technology, or ACT; Kevin Trilli of TRUSTe;
13 and Ilana Westerman of Create with Context.

14 In terms of the format for this panel, Ilana is
15 going to kick things off with a foundational presentation
16 covering research she has conducted about what consumers
17 know about privacy and care about privacy, general
18 principles she has developed that are intended to
19 increase transparency and trust, and a new disclosure
20 concept for mobile devices that she's in the process of
21 testing.

22 After Ilana, Sara, Jim and Kevin will give
23 brief presentations, and then we'll have a facilitated
24 discussion exploring some of the issues raised in the
25 presentations, as well as other issues.

1 Before I turn the mic over to Ilana, I wanted
2 to mention a few administrative details about questions.
3 For those here in person, if you have a question you'd
4 like to ask of the panelists, you can write it on one of
5 the cards available in the registration area or from one
6 of the staff here in the room. If you have a question,
7 please write it on that card, raise your hand and FTC
8 staff will be moving around the room, collecting the cards,
9 and submitting them to me.

10 If you're following on the webcast and would
11 like to submit a question, you can email FTCdisclose@
12 ftc.gov. Someone here is monitoring that email address
13 and will be reviewing questions submitted via email and
14 will ensure that those questions get passed on to me as
15 well.

16 We likely won't be able to get to everyone's
17 questions, but we'll do our best to incorporate as many
18 as we can into the discussion. And, now, I will turn
19 things over to Ilana. Thank you.

20 MS. WESTERMAN: Thank you, Ryan. Okay, so,
21 before I get started with the presentation, just a little
22 bit of background on the Digital Trust Initiative. We
23 are funded by a series of sponsors, Yahoo, AOL, the
24 Future of Privacy Forum, Verizon and Visa, but this is an
25 unbiased, independent effort, and the results of the

1 research and of the design are not something that's
2 directed by our sponsors. But we do want to thank them.

3 And, also, just a little bit of background
4 before I get started on some of our findings. As a
5 design firm, before we even get started creating
6 anything, any kind of pictures, any kind of drawings, the
7 first thing we want to do is really deeply understand who
8 we're creating them for. So, we really want to
9 understand the context of use. And, so, how we do that
10 is we really go out and try to understand consumers, what
11 are their behaviors, what are their expectations, what do
12 they know, what do they care about, what don't they care
13 about. And then based on that, what we do is we create a
14 foundation, a foundation that guides the design of
15 guiding principles and best practices.

16 So, once we have these two foundational pieces
17 in place, then we can start innovating and we start
18 creating designs, but we're never right the first time.
19 So, it's a process of iterative test and design where we
20 create, test, refine, create, test, refine.

21 So, today, what I'm going to do is take you
22 through a little bit of the context and the guiding
23 principles piece, but spend the most part talking about
24 the innovation piece and kind of where we're at with
25 trying to create transparency and control on mobile

1 devices.

2 So, the first thing, for the context piece, one
3 of the things that we found in the research was that
4 consumers' expectations are that maybe companies have
5 access to their data and -- potentially. They have much
6 lower expectations that companies actually are using or
7 storing their data for any reason. And they happen to
8 have a really low expectation that companies are sharing
9 that data for any reason.

10 So, what happens is because consumers have such
11 low expectations, they're not actually going out to check
12 to see, oh, am I right, you know, is my data being
13 shared? They don't expect it to be there, so why would
14 they expect to have a control?

15 But that doesn't necessarily mean they don't
16 care. They really do care about transparency and choice,
17 and it doesn't mean that they always want to act on it,
18 but they want to feel that they know what's going on and
19 they want to feel that they have options.

20 So, then we said, okay, well, people have
21 expectations that aren't necessarily correct but they
22 really do care, so, you know, how do we solve for this?
23 Well, the privacy policy is definitely one way to solve for
24 this. They can go read about it. What we found in the
25 research is consumers just really weren't going to read
26 the privacy policy. I think this has been brought up in

1 the past. And especially on mobile devices what we found
2 is they really didn't want to read them on the small
3 screen. They would prefer, if they were going to read
4 them, to go to the web.

5 Now, with that said, when they saw privacy
6 policies that were not designed well, felt like you had
7 to scroll left to right, up to down, lots of pinching,
8 they felt that the company didn't care about them. So,
9 it could erode trust. So, we're not saying that you
10 shouldn't do well-designed privacy policies, but it's
11 probably not the vehicle that's going to really make
12 people aware at the end of the day.

13 So, how did we find out what they care about?
14 Well, one thing we did was a series of eye tracking
15 studies. And, again, consumers aren't going to privacy
16 policies, but as part of the research, we asked them to
17 go read privacy polices. And this one right here, you
18 see the red, that's a heat map, and what that red shows
19 you is either more consumers look there or more consumers
20 spent more time there. And it's about choice. So, this
21 is what they wanted to focus on on the page.

22 Also what we found is if consumers aren't going
23 to check their expectations, what happens when their
24 expectations are violated? And usually this happens when

1 something happens in their world, something they don't
2 expect or, more frequently, maybe they read something.
3 So, as part of this research activity, we had them go
4 ahead and read a blog post about how some of their data
5 was being used, and this was common reaction that we
6 heard.

7 (Video segment played.)

8 UNIDENTIFIED FEMALE: The only thing I do is go on
9 the search engine and search up images and stuff like that
10 and, you know, just whatever, general stuff. But they
11 wouldn't be telling me that they're tracking what I'm doing
12 on Google. I wouldn't know that unless I read this article.

13 Yeah, I use Google a lot to look up images
14 and stuff because I do a lot of crafts. And I don't
15 really feel like I need to have people putting together
16 data to pitch relevant ads and searches. I can search on my
17 own, I don't need them searching my stuff and tracking it to
18 put together some kind of theme for me. I didn't ask for
19 that, so...

20 MS. WESTERMAN: See, the other thing is that
21 when people are aware, you get a different reaction.
22 When they have an expectation for how their data's being
23 used, they feel like they've had a choice. So, I'm going
24 to play you this same article we had someone go read and

1 this is the opposite reaction.

2 (Video segment played.)

3 UNIDENTIFIED MALE: It's not surprising. I
4 think that the trade-off from the start has been that for
5 us to have access to these services where -- like search,
6 like Facebook, like mail, like all of these things, I think
7 they basically have been either free or very low cost, you
8 know. And I see the -- what I would call the trade-off and
9 I see that as a legitimate thing and also a fair deal in my
10 case because a similar thing would be reading a newspaper
11 and, you know, you open it up and there's an article, but
12 there's also all these ads.

13 MS. WESTERMAN: So, from a brand perspective,
14 you know, if there's transparency and people have
15 expectations, it's okay. But when they don't, it's not.
16 So, what we find is design can really create that and it
17 can either create or erode trust. So, if you're a
18 trusted brand and you have transparency and control, what
19 we find is consumers -- you know, you have a stronger
20 bond with your consumers.

21 Likewise, if you're a trusted brand and you do
22 something that maybe isn't transparent, doesn't provide
23 control, consumers do give you the benefit of the doubt,
24 once, twice, a couple times, but eventually you start
25 moving to an untrusted brand. But, similarly, if you are

1 an untrusted brand, you have the opportunity here to
2 really move to a trusted brand by continually showing
3 consumers that you have transparency and you have
4 control. And, so, design can really help make that
5 happen.

6 So, moving forward from the context piece,
7 getting into, okay, so now that we understand about
8 consumers, what do we do? What's our foundation for
9 design? So, these six guiding principles are what we use
10 to really design, as you can see, the trust icon. And,
11 so, first, we've talked about context, but the second one
12 here is awareness, which is really important, especially
13 when people aren't actively going out to seek
14 information. How can we make them aware?

15 But if they are going to go out to look for
16 information, discoverability, can they find it, is it
17 easy to find? And then if they find it, do they
18 understand it? Do they comprehend it and do they
19 remember it? And, finally, can they interact with it if
20 they want to make changes? And, lastly, what do they
21 want to do, when do they want to do it and how can we
22 provide it to them in a way that doesn't get in the way,
23 that supports them?

24 So, we took those design principles, in
25 combination with the research, and came up with 13

1 actions to help designers and developers create designs
2 that build trust. So, I'm not going to go through all of
3 them. They are out on the website if anybody wants to
4 check them out. But I'm going to go through the ones
5 that are in bold.

6 And the first one, timing is something that
7 we've talked a lot about here. And, so, when we first
8 began the research, it really seemed like the Android
9 platform would be really a great way to kind of provide
10 consumers with what's going to happen with their data
11 because right when you download, as we just saw, an app
12 tells you. However, what we found is, at that point in
13 time, people weren't really ready to consume that
14 information. They were either trying to just evaluate
15 the app, not even sure if they were going to keep it on
16 their phone, they were just going to see what is it like,
17 or they were just really excited about getting a new app
18 and they wanted to play with it and then they weren't
19 ready, at that point in time, to actually make a decision
20 or read this.

21 However, the app to the right there is an
22 restaurant app. When someone is looking at a menu and
23 wanting to order something, they do pay attention. Of
24 course they want their location to be used. I don't want
25 to go to a restaurant in San Francisco if I'm in D.C., so

1 I want to hit okay.

2 So, I'm going to play a video here of a
3 consumer, this was consistent across the whole study, of
4 reactions to -- we asked them to download apps on Android
5 and this is what happened.

6 (Video segment played.)

7 UNIDENTIFIED FEMALE: That downloaded. Do you
8 remember what they were asking permission for?

9 UNIDENTIFIED FEMALE: I didn't, I don't read it. I
10 just, I read it like the first couple of apps I downloaded...

11 MS. WESTERMAN: So, very, very consistent
12 across all the studies.

13 So, next, surface, and so, this is something
14 that is going to be different for every app and different
15 for every site. But it's the feeling consumers have if
16 they have to take too many steps to find information,
17 then they feel like it hasn't been surfaced. There's no
18 golden rule here, two steps, five steps, seven steps.
19 It's just a feeling of, and the only way you understand
20 that is through research to determine if your app really
21 feels like you're surfacing the information.

22 This was interesting here, too. We never would
23 have expected it unless we actually tested it. But here
24 at the bottom is a social network who allows you to turn

1 on and off whether you want to share your data with other
2 apps and services. But at the very bottom, if you read
3 it it says -- and I always have to look at it, hang on.
4 Every -- all your information sent to everyone is
5 available to friends application unless you turn off
6 platform applications and networks. So, but there's no
7 link there, and so, there's no way to know where to go.
8 So, just a simple, simple thing like a link to help you
9 go find where to make that can really help.

10 The other thing is associating actions and
11 outcomes. People really like this design construct. It
12 feels really easy to be able to turn things on and off.
13 But you don't know what your benefits are and you don't
14 know what you're losing when you do this. You're just
15 making a change, which dives into this, is really giving
16 people a value proposition and letting them know kind of,
17 you know, what they get and what they lose if they make a
18 decision. So, here to your left, it's telling you you're
19 going to get near me services if you say okay, but to the
20 right is an example of a flashlight app that just doesn't
21 tell you. It says, I want to use your location. It
22 doesn't give any information on why.

23 So, now I'm going to play a video of Dan kind
24 of talking about this.

25 (Video segment played.)

1 MS. WESTERMAN:

2 UNIDENTIFIED MALE: Right. So, even from what
3 this is telling me, I still have no idea of how they're
4 going to use it, like let's say it says hardware control to
5 take pictures. What does that mean? Is it going to take a
6 picture of my screen and then send it to them? Is it going
7 to go through -- it says it can modify/delete SD card
8 content. Does that mean it's going to put stuff into my SD
9 card? Is it going to take stuff off? Is it, I mean,
10 I don't know. This is extremely vague and it's not like
11 they're going to tell me more if I asked for it because it
12 doesn't -- it's not given.

13 MS. WESTERMAN: So, now we have kind of our
14 design constructs. We have our guiding principles, we
15 have the actions to take, and now really what we want to
16 do is take those and let's see how can we move forward.
17 How can we actually create this transparency? How can we
18 create innovations? How can we make it so that consumers
19 are aware but we're not getting in the way? How can we
20 make it so it's flexible for many different types of apps
21 and services?

22 So, this is just a concept, and I'm not saying
23 that -- we're in the middle of testing and there's
24 definitely some things that are working well with it and
25 some things that aren't. But the process that we're

1 going through of iterative test and design to refine, we
2 hope to get to something. So, I'm going to go ahead and
3 play the video here. And you'll see where the arrow is
4 pointing in the upper left-hand corner. If you go to a
5 site that is gathering your personal information, there's
6 an icon that appears. It bursts three times and then it
7 goes to a slow glow.

8 Then if you're interested in knowing more about
9 this site, you're able to pull down the shelf and there
10 is personal data being sent, and if it happens to be a
11 site you care about, you can go look at it and you can
12 see what's being accessed. So, just to let you know, we
13 prototyped this on the Android platform, it could be
14 something that would be on iOS and in the other platforms,
15 too. This is just an example to see if the concept even
16 works.

17 So, here is a consistent set of headers. They
18 would be consistent across all apps and websites. And
19 I'm not saying these are the right ones, but this is an
20 example. But then there's a lot of ability for each
21 developer to program what makes the most sense for their
22 app or service. So, they have two choices. Do you
23 collect that information or not? If you don't, you'll
24 see it's grayed out. And then if you do collect the
25 information, the app developed has two choices, whether

1 they're going to give control or not to the consumer.

2 So, let's say for location for this particular
3 app, you really have to know a location for it to work.
4 It would not be -- you would not have the option to opt
5 out, but let's say you could of web history and
6 bookmarks.

7 Finally, underneath each of these areas, it
8 would actually give the value proposition and allow the
9 developer to write in why it needs that information and
10 even a link to get more if a person wanted it.

11 So, where are we with this? Well, our first
12 concern was, are people even going to notice this icon
13 exists? Are they going to even see it? And, so, we were
14 surprised and heavily surprised that more people saw it
15 in our first iteration than we thought. So, we still
16 think it might be a good direction to take. But this
17 might not be the only solution. There may be many other
18 innovations that might solve this.

19 One thing we're doing quite well with this is
20 motivation. We heard from consumers that they don't
21 really care about certain sites and they care more about
22 others, so their ability to go in and make changes about
23 the things they care about and not get in the way was
24 something that was very positive. But we are still
25 having some issues with discoverability and

1 comprehension.

2 And, so, here I'm going to show you how we
3 found out that people were aware. We asked them to spend
4 five minutes just browsing. They had no idea what the
5 study was about, and this is an eye tracking study. So,
6 what happens is it shows your eyes and the red dot gets
7 bigger the longer you look at something. So, you'll see
8 she's reading about Johnny Depp. This is just something
9 she wanted to read about. And Ellen DeGeneres -- I guess
10 it was a good show. You saw, she went up and looked.

11 Now, whether someone looks and whether someone
12 remembers is different. So, after that five minutes, we
13 gave them a blank piece of paper and we asked them to
14 draw what they saw on the screen. And a surprising
15 number of people actually said that there was something
16 up there flashing, so they had noticed it.

17 However, our first attempt wasn't the best at
18 awareness. Our first attempt, we call it the glow only.
19 We didn't really want to get in the way of the consumer.
20 We didn't want to be irritating, something flashing in
21 their eyes. So, we just had this soft glow in the upper
22 left. We had pretty low awareness with this round of
23 testing.

24 So, second round of testing, we had this flash,
25 this burst, and we were concerned that would be

1 irritating, so it would only flash three times. And
2 consumers said, no, that's fine, but we still did not get
3 the awareness that we want. So, now, we're looking into
4 other techniques like vibration, like different colors
5 and other ways to kind of gain awareness.

6 Also, with comprehension, what does the icon
7 convey? The goal really here is to have it convey my
8 personal data and transmission. So, some of our icons
9 are doing quite well on conveying transmission and other
10 on personal data, but we really aren't getting good both
11 together. So, we have more work to be done to actually
12 create an icon that conveys it properly.

13 And, finally, this is the area we're most
14 concerned about, which is attention and retention. So, after
15 people became aware that, hey, this is available, that,
16 you know, my personal data is being accessed, and they
17 could go in and change it, we gave them 30 more minutes
18 to surf. And after that, we asked them which sites that
19 you went to were tracking your information? And people
20 did not tie the icon to the sites. So, while they
21 recognized it was there and it was kind of ambient in the
22 background, we don't have enough of a link between it yet
23 and the actual different sites and services.

24 So, our next concept we're looking at is
25 bringing it down from the top shelf right there into the

1 bar for a browser where you would actually see it next to
2 the URL, and this will go into testing in the next month
3 or so. So, I don't know how it will do.

4 So, just in closing, I'm required to put this
5 up for all of you. But it is an independent effort and
6 we do really want to thank our sponsors, Yahoo, AOL,
7 Future of Privacy Forum, Visa and Verizon for supporting it.
8 But this is an unbiased look at how can we create
9 innovation in a space, not just what's wrong, but how we
10 can actually move forward.

11 MR. MEHM: Thank you.

12 (Appause.)

13 MR. MEHM: Thank you, Ilana. Before we have
14 presentations from Sara, Jim and Kevin, I just wanted to
15 ask a few questions based on Ilana's presentation. And
16 the first is for Professor Cranor and it's -- you
17 recently studied the permissions models on Android
18 smartphones. So, I have a two-part question for you.
19 Number one, what did that research reveal? And, number
20 two, what are your thoughts on Android's permission model
21 compared to Apple's model?

22 PROFESSOR CRANOR: Yeah, we did some work at
23 Carnegie Mellon interviewing people about the app
24 permissions. My student, Patrick Kelley, did this work.
25 What we found was that for the most part, people had very

1 little understanding of the Android permissions. They
2 didn't understand the whole how the Android market
3 worked. They had a lot of faith that somebody was
4 protecting them from bad apps somehow in the App Store
5 and that they had all of these permission options on the
6 screen that were kind of gobbledygook for them.

7 We actually went through them one at a time and
8 asked them to, you know, explain what they thought each
9 of these permissions meant and they had very little idea.
10 And even things like location, which you might think is
11 relatively straightforward compared with some of the
12 other permissions, people still weren't entirely sure
13 where the phone was getting their location, at what
14 granularity, what it was doing with it or why. So,
15 really not a whole lot of understanding.

16 We didn't look specifically at the Apple Store,
17 so, you know, a lot of this is kind of speculation from
18 our experience, but, you know, the difference that you
19 have here is that on the Android, you are actually
20 presenting this whole list of permissions, which you
21 don't have in the Apple experience. But on the other
22 hand, you do have some fine-grain controls over location
23 on the Apple side, which you don't have on the Android
24 side. And I think that fine-grain control is something
25 which is a good thing, but it would be good to have it

1 not just for location.

2 MR. MEHM: Thank you. Let me ask Pam a
3 question here. One of the things that Ilana's research
4 has elucidated and that Jen King hit on earlier today is
5 the relevance of the timing of a disclosure. And by
6 that, I mean the notion that a disclosure might have
7 little meaning for a consumer in one context, yet that
8 same exact disclosure may be highly relevant if made at
9 another point in time. So, again, a two-part question,
10 do you agree with this notion of timing? And what are
11 some other potential methods that businesses can use
12 beyond a privacy policy to provide consumers with
13 appropriately timed notice about their privacy practices?

14 MS. DIXON: Thank you. Well, I'm just -- I'm
15 actually looking at these 13 design things. I want to
16 get to your question. I like the idea of timing. I
17 think timing is an issue that's very important in
18 privacy. And it's a front-end design issue. I don't
19 want to focus just on design. I like your principles a
20 lot. I think they're really interesting. I'd actually
21 add a few for privacy.

22 But timing, I think that there's a design issue
23 of timing. I like the idea of something popping up when
24 it's necessary or when there's about to be a potential
25 issue where a consumer needs to take a pathway, yes or

1 no, opt in or opt out, or even being told that they're
2 not being offered the option. So, I think that these are
3 all very good things and I think timing is everything.

4 I would say this, though, in looking at the 13
5 design principles, you know, when I think about the 2000
6 report, you know, they used, of course, different words.
7 Some of the things I came up with is is the notice
8 sufficient? Obviously, is it prominent? And when I
9 think of sufficient, I think of -- in the 2000 report
10 they said something interesting. They said, "don't be
11 coy." I really agree with that. Don't be coy. So,
12 sometimes improving notice just means be honest,
13 communicate what you're really intending to or your
14 attorneys have told you to and I think that that makes a
15 big difference.

16 Is it prominent? I think that this is
17 something that's overlooked tremendously. So, we heard a
18 little bit in earlier panels about cross media. I think
19 this is enormously important. Okay, so I do believe in
20 privacy policies. They have an important function. They
21 need to be there and disclosures need to be in a privacy
22 policy. But why not also put disclosures in an app that
23 people can download that's associated with the ad? I'll
24 talk more about this in the Q&A period. Why not have
25 disclosures that you can email as reminders once a month

1 to your favored or customers that are signed up in some
2 kind of rewards program? There's no reason not to use
3 every medium that's available to you.

4 If you have a Facebook page, which I think
5 every brand does now, or a Twitter stream, why not place
6 information there as well? I say be robust and be
7 creative with that robustness.

8 MR. MEHM: Do you want to respond, Ilana?
9 Ilana, do you want to respond to anything that Pam has
10 raised?

11 MS. WESTERMAN: Sure. I think the key thing is
12 that if we're trying to create the transparency, we have
13 to put it in a place where people are actually going to
14 consume it. So, just because we put it somewhere doesn't
15 mean that they're going to actually look at it. So, I
16 think that's where timing comes into place and placement
17 comes into place. But I definitely agree with you. Kind
18 of our guiding principles around making sure we're making
19 people aware, making sure people comprehend and remember.
20 So, six kind of guiding foundational principles is where
21 we're going towards. But I think the key thing is we
22 can't control consumers and what they want to pay
23 attention to. So, as much as possible, telling them when
24 they care and giving them easy access.

25 MS. DIXON: Yeah, I think that's a really good

1 point and I agree with it completely. I also think that
2 it's incredibly important to provide a more permanent
3 place of notice so that a consumer can have the stumbled-
4 upon effect and they can find a notice after the fact if
5 there's a problem. Maybe they see a news story or maybe
6 they've heard a rumor. It's all very helpful to have
7 something permanent that they can also find.

8 So, I think timing is important when you're
9 installing and working with a product the first few
10 times. I think what's interesting about your research --
11 and something that our research is also showing is that
12 after a notice is read the first time, it's just toast.
13 You can just put an expiration date on it and call it
14 done. So, we're really interested in seeing how other
15 methods like emails and, you know, reminders are useful.

16 MR. MEHM: Let me go back to Professor Cranor.
17 You've done research on icons before. Based on that,
18 what challenges exist regarding consumer awareness and
19 understanding of the trust icon that Ilana and Create
20 With Context has proposed?

21 PROFESSOR CRANOR: Right. So, we did a study
22 on the advertising options icon, which is now on a large
23 fraction of ads that we see online. And we put ads in
24 front of about 1,500 people, which had this icon, and the
25 vast majority of them didn't recognize having ever seen

1 it before, although surely they had. We also probed them
2 to try to see what they understood about it and whether
3 they would be willing to click on it to actually interact
4 with their ad choices. And what we found is that a lot
5 of them really had no idea what it meant or they had some
6 ideas of what they thought it meant that were actually
7 contrary to its actual meaning and counterproductive.

8 So, you know, the idea is that you should click
9 on it if you want to opt out or find out about your
10 options. People thought if they clicked on it, they
11 would get more ads. And, so, they were afraid to click
12 on it. It was actually the opposite effect.

13 So, I think that this is really problematic.
14 We actually tested it with the various taglines that have
15 been proposed for it, as well as some others, and the
16 taglines, the ad choices tag line actually didn't help,
17 it probably hurt things, which was really problematic as
18 well.

19 We've done some other testing with other icons,
20 including some which I think are reasonably good icons.
21 But privacy is not a concept that lends itself to little
22 pictograms very well. And, so, even very well designed
23 icons, they're not intuitive to people. And, so, I think
24 the concepts that Ilana is talking about are really
25 fantastic, but I am skeptical that they will stand alone.

1 I think that as part of a larger campaign where there's
2 actually some educational component to teach people about
3 these things through various channels, there, I think,
4 they stand a chance of actually being useful.

5 MR. MEHM: All right, thanks. Let me give
6 Ilana a chance to respond and then we'll turn things over
7 to Sara.

8 MS. WESTERMAN: Thank you. So, the advertising
9 icon, we haven't done any testing on that. So, I really
10 can't comment too much on that. But I can't imagine that
11 that's a much more difficult space than what we're trying
12 to do, because, first of all, you get attention on the ad
13 and we know that that's not 100 percent attention there.
14 And then after you got attention on the ad, then you have
15 to get attention on the icon. So, that's a huge
16 challenge. So, whoever's working on that, good luck.

17 But, yeah, we were concerned with the icon as
18 well, and I don't think it's necessarily the only answer.
19 I mean, this is an innovation process and it's an
20 iterative test and design process. We actually were
21 really kind of pleased how many people did identify the
22 icon as being maybe human or maybe transmission. We
23 thought we were going to have to go through many more
24 rounds of revision to get there. We were also really
25 pleased, you know, that people kind of got a sense that

1 it might be transmitting something. But I don't think
2 it's going to be the only way and the only way we're
3 going to find out is to really test and continue to
4 refine.

5 But with that said, having done lots and lots
6 of icon work and design work, I definitely think we can
7 create things in that size to communicate things to
8 people. So, I don't think that's an undoable thing; it's
9 just a little bit hard.

10 MR. MEHM: So, next up is Sara Kloek of ACT.
11 Sara will address disclosure issues and challenges from
12 the app developer vantage point as well as the mobile
13 badge developed by Moms with Apps, an affiliate group of
14 ACT. This badge has been designed to be featured on app
15 developer websites and in app marketplaces in order to
16 provide parents with information about kids' apps. And
17 it looks like there's a bit of a color issue unless my
18 eyesight has gone bad. But I think we're trying to find
19 a tech person.

20 (Brief pause in the proceedings.)

21 MR. MEHM: Thank you, Morgan.

22 MS. KLOEK: I appreciate efficiency, so I'm
23 going to time myself and make sure I stay within the time
24 limits.

25 My name is Sara Kloek and I am the Director of

1 Outreach at ACT. We are the trade association that
2 represents all of those mobile app developers around the
3 world. Today, I get to do the best part of my job, which
4 makes it the best job in the world. I get to brag about
5 the cool stuff that our developers are doing,
6 specifically focusing on mobile apps privacy and kids and
7 the -- an innovative privacy solution that they came up
8 with.

9 So, again, best part of my job bragging about
10 what they do. They make really cool technology. They're
11 changing the way that we work, changing the way that we
12 play and changing the way that we interact with people,
13 and I hope that they get to continue to do just that.
14 They're moms and dads and grandmas and grandpas and they're
15 making those apps that you use every day.

16 One of the shining stars of the mobile apps
17 industry is Moms with Apps. This is an online, informal
18 collaborative group formed by four moms looking for new
19 ways to cross market their apps. It actually changed
20 pretty quickly and has grown now to over 1,000 members on
21 their online forum talking every day, sometimes late into
22 the night, about best practices for mobile apps. They're
23 talking about how best to increase sales in the App
24 Store, what are some of the best languages to translate
25 your app to so you can increase sales, and they do talk

1 about privacy disclosures.

2 ACT has worked with them since the beginning of
3 2011 on educating family-friendly developers on how best
4 to include privacy in their mobile apps, incorporating
5 COPPA, figuring out how to get parental consent and where
6 to put your privacy policy when you have one, and
7 encouraging them to have privacy policies.

8 So, when the FTC released their mobile apps for
9 kids privacy -- mobile apps for kids report, they -- Moms
10 with Apps was ready to react and they got together over
11 one weekend on the Internet, on their online forums, and
12 started discussing what they can do. And over one
13 weekend, some of the developers came up with a privacy
14 disclosure icon. They wanted to do what the FTC was
15 encouraging them to do, to disclose what information they
16 collect, if they collect anything, and what sort of stuff
17 they do within their app.

18 So, this is the first iteration and there are
19 other privacy icons, privacy disclosures, there's privacy
20 certifications. This isn't a certification. There's
21 other things out there. This was come up with from
22 industry, from developers. These are not -- some of them
23 are professional graphical designers, but not all of them
24 are. They've been working on this for many months,
25 discussing it in webinars, discussing it in meet-ups,

1 discussing it on their online forum and even on Facebook,
2 presenting it to parents for feedback. What they want,
3 what they want to know when they're downloading apps.

4 And this is one of the latest iterations that
5 they've come up with. Obviously, they've changed the
6 colors, they've changed what they've included. There are
7 other iterations and they're working -- the developers
8 are working together to figure out what they want to
9 present to consumers and what consumers want to hear.
10 Obviously, it's really hard to get over 1,000 people to
11 agree on something. We know that better than anyone here
12 in D.C. And they are continuing to work and continuing
13 to put it in their screen shots on the App Store. This
14 is one of the earlier iterations. They put it on their
15 website. Here's another one. And this is another one
16 that is on the website. Even within those three icons
17 you can see the changes.

18 So, they have the icon, but it's not -- it's
19 clearly not done yet. There are a few things that people
20 are wanting to know. The developers are wanting to know,
21 parents are wanting to know, but they -- one of the
22 biggest ones is how do we know what to include in an
23 icon, what do people -- what do parents want to see, what
24 does the FTC want to see us disclose? And you can't put
25 50 things in an icon. You can only put a set number of

1 things that parents will see when they -- end users will
2 see when they download.

3 Where do we put this icon? Obviously, probably
4 the most convenient place would be in the App Store, and
5 the platforms are working on places where we can put this
6 and the developers are really happy about that. App
7 developers, how can we encourage them to adopt an icon
8 like this? And the second question after this follows
9 that: How can we make this a positive icon instead of
10 something like a scarlet letter. We want this to be
11 something that would be adopted far and wide, not just on
12 kids' apps, not just on games. We want it to be adopted
13 far and wide.

14 And then how do we get it so app customers know
15 when they see this that, oh, good, the developer really
16 cares about what my privacy is and trusts me and wants me
17 to trust them? And we can discuss this more in the
18 panel, but thank you and I look forward to your questions
19 and comments about the icon.

20 MR. MEHM: Thank you so much, Sara.

21 (Applause.)

22 MR. MEHM: Next up is Jim Brock of
23 PrivacyChoice, who will discuss PrivacyChoice's mobile
24 policy maker.

25 MR. BROCK: Thanks, Ryan. So, PrivacyChoice's

1 mission is to make privacy easier for people who publish,
2 develop content and apps and for people who use those
3 apps. Part of what we do is we keep and curate a very
4 large database of information about the privacy economy,
5 which is to say companies that track users and collect
6 data across sites. We make that available both for our
7 own apps and for companies who want to license that data
8 to make apps.

9 In terms of mobile developers, we've been
10 focused on this for about a year now. We developed a
11 resource center for mobile app developers to try to
12 collect together different tools and resources, code,
13 language, advice, excerpts from the App Store agreements,
14 leading articles about techniques for anonymization,
15 things like that that we put into one resource center,
16 and including, as you can see from this, an entire set of
17 privacy policy language that we've made available under
18 Creative Commons.

19 To understand where we've gone, you have to
20 understand how this was developed. As part of our core
21 business, we've examined about 4,000 privacy policies and
22 put them into a taxonomy based upon about 13 different
23 categories and found that we could, for a very large
24 percentage of those, put them into a taxonomy where there
25 was one of four or five different short statements you

1 could make about location, about social networks, about
2 how personal data may be collected, about advertising.

3 This ended up culminating in the development of
4 Policymaker, which is a wizard. It's a 20-minute tool
5 that a developer can go through. And the emphasis here
6 is as much on the developer's education and understanding
7 as it is on the end user's consumption of the privacy
8 policy. Because we know not a lot of end users take the
9 time to read the privacy policy, but developers can do a
10 better job of privacy if, in the course of making that
11 policy, they become educated about what it means. Do we
12 retain IP addresses? How do we use cookies? What do we
13 do with UDIDs? These kinds of questions are things we
14 try to handle in the tutorial and provide deeper
15 information for the developer.

16 This is what it looks like, and I picked this
17 particular page from the wizard because it also showcases
18 part of what we do on ad tracking, which is really one of
19 the biggest challenges for a developer in providing
20 privacy disclosure. Because any number of third parties
21 may be collecting data for analytics or advertising from
22 within their app or their web app. We collect all the
23 information about those companies and allow the
24 individual developer to simply pick the ones who are
25 applicable and we provide the disclosure, we provide the

1 proper links, we provide the summary of the company, we
2 provide opt-outs, in some cases, when they are available,
3 on the web app. So, in that case, it becomes a more
4 complete experience for users because their choices are
5 automatically embedded into the policy.

6 Now, those choices are still limited. They
7 still don't work very well for apps as opposed to
8 webpages. But it's a start. And we'll integrate with
9 whatever tracking options may emerge from the industry.

10 We also have a version of the wonderful icon.
11 We put this at the beginning of our privacy policy
12 creation process so you can't miss it. And it's very
13 simple to set up and make selections and end up with the
14 information.

15 The last thing that didn't make the deck
16 because we just launched it today is we've now launched
17 an API for the privacy policy. You create one with
18 Policymaker -- what that really means is that your policy
19 is available just as data. It's data that you can style
20 to look however you want it to look within your app.
21 It's data that anyone can look at. An App Store could
22 look at the last date you revised your policy. You can
23 take, in an atomized sort of privacy disclosure where
24 you want to present location disclosure here and social
25 network disclosure here in context, those parts of the

1 policy can be pulled out of the API and presented. But
2 the policy remains the single documented indication of
3 the promises that the developer has made to the end user.

4 So, we think API is a very exciting way to
5 start stimulating people developing new interesting
6 privacy interfaces and also allowing them to atomize
7 their disclosure and say, you know, location goes here,
8 we're going to provide that in context, but it's still
9 part of my policy. I'm still responsible for it.

10 MR. MEHM: Jim, thank you so much.

11 (Applause.)

12 MR. MEHM: Next up is Kevin Trilli of TRUSTe,
13 who will discuss creating a privacy policy and TRUSTe's
14 short notice privacy policy for mobile websites and apps.

15 MR. TRILLI: Thanks, Ryan. Good afternoon,
16 everybody. So, I just wanted to start with a quick
17 showcase about some of the things that we've been
18 thinking about. As you know, TRUSTe has been a
19 certification company and a trusted third party for a
20 long time and went private in 2008. And as such, at that
21 point, we started looking at this more from a product and
22 technology focus than we had done as a nonprofit
23 historically. And the way we look at products is that we
24 have traditional development, but we also have full-time
25 user experience professionals that look at this interface

1 with consumers, because it's very separate than the
2 business side of the product.

3 So, an example here that I'll show is something
4 we built several years back which was really a tool that
5 helped small businesses build policies, but really
6 started to take a lot of flexibility with the way the
7 output of that policy was created. What we're showing
8 here is really a layer on top of the full policy and this
9 layer, based on what we did for research, really contains
10 the key elements that a consumer may want. So, different
11 than a regulator, different than a class action lawyer,
12 but something that a consumer can look at and can be
13 actionable. So, really trying to distill down the
14 elements that a consumer can take one look at and do
15 something about that's practical.

16 This concept is what we refer to as layered.
17 We actually just updated the TRUSTe.com privacy policy
18 last week and have a presentation of it there if you'd
19 like to see it sometime.

20 The outputs really are the full policy, as we
21 mentioned, this layered construct, which really just sort
22 of sits on top of the text, but also some machine
23 readable language that can be used in different ways.
24 And what we're showing here is really a concept -- in the
25 upper left corner there -- is a browser add-on that we

1 built that really looks at these policies and does a
2 little pop-up for three seconds and presents the states
3 of those layered icons for the user so they can see it
4 immediately and then it just disappears very briefly.
5 The concept there was how do you get a consumer to read a
6 policy in three seconds, and that was really the thought
7 process that we put into that would really distill down
8 what was contained in that output.

9 The one on the bottom is a similar presentation
10 that we have for our European customers, but it's, again,
11 presenting these key elements on ways that a consumer can
12 look at them quickly and do something about.

13 As we shifted to mobile, we looked at this in a
14 similar fashion. There were things that were different,
15 obviously, with the form factor and some of the
16 disclosures, obviously, with location were different.
17 But it's the same concept where it was really trying to
18 get a user, who decided to interact with us, some
19 information very quickly. The goal was not to have them
20 spend a lot of time there, to feel a warm and fuzzy trust
21 feeling that, at least, the app developer was doing their
22 best to present these elements in a trustful way. You
23 know, and they can go -- of course, click down further to
24 read more about it. But as we know, most consumers don't
25 do that.

1 When you start thinking more about it, you kind
2 of combine these two concepts together with a layering
3 concept and this mobile app concept and this is the
4 current work that we have going on right now, which
5 really just starts to combine the two and bring this
6 information to consumers such that they can do something
7 about it.

8 And I think the principles that we used when
9 deciding what were these elements, there were two really
10 important ones and I might cover these in the last slide.
11 But first was really thinking about the things that are
12 not obvious to a consumer, that are hidden, that they
13 can't see, that happen sort of after the data has been
14 submitted. That's a very important concept. And really
15 minimizing the number of disclosures you have. Consumers
16 don't have time to read more than three things, frankly,
17 maybe even just one in that blink moment of deciding on
18 trust.

19 So, really we thought through what are those
20 absolute minimum things we can use to allow consumers to
21 understand what's going on and then decide if they really
22 want to learn more, they can go further into it.

23 So, the other thing, I think, is also the
24 annoyance factor. My previous life background with me, I
25 had, in the late '90s, worked in the SSL padlock market

1 for a long time, for five years, and really understood
2 that concept of that blink moment of trust that consumers
3 really relied on to submit their credit card through
4 ecommerce. And I think the goal there was, if you
5 remember the early days, there were a lot of pop-up
6 messages that would happen about certificates being
7 invalid and all that good stuff. And that was corrected
8 later. But really this obtrusiveness or annoyance
9 factor, if we go too far into disclosing too much,
10 consumers will tune out even further in the other
11 direction.

12 So, it's really finding that minimum set and
13 not just the timing, but the frequency of timing of the
14 presentation of that, the length of which that appears,
15 et cetera. That's all part of that kind of unique
16 experience design that needs to come in when building
17 these types of disclosures.

18 And, you know, I think the key part is how do
19 we know what's relevant to consumers. The final point
20 there is, from our research, consumers don't know. They
21 are looking to experts, they are looking to government to
22 tell them what's important, and then rely on that in a
23 trusted way. That could be the brand of the app, that
24 could be trusted third party brands. There's different
25 mechanisms that have existed, but they really don't know

1 from our research and they're relying on someone to
2 trust. And that's really the key part that I'll leave
3 with. Thank you.

4 (Applause.)

5 MR. MEHM: Great. Thank you, Kevin. My first
6 question is actually, Kevin, for you. In her
7 presentation this morning, Jen King referred to the
8 layered privacy notice and I think showed a slide -- a
9 TRUSTe slide. Jen noted that the layered notice makes it
10 easier for consumers to find information, but doesn't
11 guarantee consumers will read it. What are your
12 thoughts, reactions to Jen's point?

13 MR. TRILLI: Well, you know, you can lead a
14 horse, but you can't really take that next step. And I
15 think the key is if they do go there, you know, make it
16 so that it's written for them. They're just not --
17 regular policies are not written for consumers. I mean,
18 I think that's the first problem that layering is trying
19 to solve is speak in a language that they can actually
20 understand.

21 I agree that, you know, in the layer there's
22 multiple things that need to exist, not just icons.
23 There needs to be some text that explains them. There's
24 also the concept of good and bad, what's a good state
25 versus a bad state? You know, I think like the security

1 thing I was just talking about, there was kind of a
2 common enemy with security where with privacy, it's
3 contextual. It's built upon processes within a website.
4 There's so many sublayers to it that consumers just can't
5 get a good or bad measurement necessarily. So, there's a
6 lot of nuance that needs to be presented.

7 And once they have the information, not just
8 the choice, but the tools they can use to control, and
9 that could be stuff -- technology stuff that they
10 download and use or it could be interactions with the
11 business. And I think the key to the layer is give them
12 that portal of things they can do that are actionable and
13 over time, many years, they will become educated and
14 trained on how to use that. It's not going to happen
15 initially.

16 MR. MEHM: Let me ask a question of Jim. Jim,
17 there are some real differences between your privacy
18 policy generator and the one that Kevin just discussed
19 that's developed by TRUSTe. For example, you both use
20 different icons and you both use different short
21 disclosures. Can you discuss some of the research and
22 the testing you did to develop those notices and consumer
23 awareness and understanding of what you developed?

24 MR. BROCK: Sure. Really most of our efforts
25 were direct focus group, traditional focus group stuff,

1 going to the shopping mall, actually showing it to
2 people, an early build of it and then making notes about
3 what they did with it. What was interesting was it
4 wasn't exactly what we predicted in terms of the areas of
5 the policy that they would focus on could have been icons
6 we were using, it could have been lots of reasons. But
7 one thing that a lot of folks focused in on was this
8 disclosure that we all consider boilerplate, which is if
9 there's a court order or if there's an extraordinary
10 transaction, your personal data may be shared. We kind
11 of deprecated that and it turned out they were actually a
12 lot more interested in that than we thought.

13 The paradox here, the trick is that you have to
14 serve consumers who both want that moment, as Kevin said,
15 that instant trust moment, but you've also got to serve
16 the ones -- the people who really get into it and are
17 really interested in privacy, they don't want to be
18 handed off with too many icons and too much simplicity.
19 They actually want to go kind of deep and really
20 understand what's going on. And that, I think, is a
21 challenge for icons, but I also feel like if there's a
22 standard set of icons that emerge, we certainly would
23 support that.

24 The problem is, and I think as you, Lorrie,
25 alluded to, there's so many different permutations of

1 policies it's going to be hard to have icons that are
2 not, in many cases, cryptic to the user.

3 MR. MEHM: Well, on the topic of icons -- and
4 maybe this is a good question for Lorrie, you know, the
5 solutions devised by ACT, PrivacyChoice and TRUSTe all
6 incorporate different icons. How will consumers learn to
7 recognize multiple different icons and should we strive
8 for consistency?

9 PROFESSOR CRANOR: I think consistency would be
10 a good thing. I think that -- I mean, most of these are
11 not just one icon. There's a whole set of icons to begin
12 with. And if you have to learn three or four different
13 sets of icons, I think that's really not going to happen.
14 So, it would be great if we could get some consistency in
15 the icons, but also it would be great to have some
16 consistency in the back end metadata. I was really
17 pleased to hear that this has a computer readable
18 representation which allows you to do so much more with
19 it. But let's come up with one of them so we can have
20 apps and have the marketplace and have all of the phones
21 be able to read that metadata and actually do stuff with
22 it.

23 MR. MEHM: Pam, a question for you. Again, we
24 saw three different proposed solutions here. How do they
25 strike you from a notice and disclosure standpoint?

1 MS. DIXON: Thank you. I've had this feeling
2 all day and just -- if you'll bear with me, I'm going to
3 answer your question with a comment. So, really I think
4 what we've looked at today is all the different parts of
5 an elephant and we're all touching a different layer of
6 it. So, we've seen folks talking about the design layer.
7 We've seen, even on this panel, talking about the policy
8 layer. But what I'm going to say is that there's a much
9 bigger universe.

10 And when you start talking about disclosures
11 and privacy, the universe shifts a little bit, and I
12 think we really need to talk about four things. Number
13 one, back end; number two, front end; number three, we
14 need to talk about online; and number four, we need to
15 talk about offline. We need to take into account all of
16 these corners of the universe. So, for example, when I
17 say "front end" what I mean is that we've talked a lot
18 about the design layer, the timing, the icon. We've
19 talked about privacy policies, the front end policy layer
20 that consumers are going to read. This is great. I
21 mean, it's terrific, but we also need to remember that
22 those front-end layers are based on back-end layers.

23 So, for example, a company may have a retention
24 policy that allows data to be stored indefinitely. They
25 may have a retention policy that sheds data almost

1 instantly. They may have a use data that allows them to
2 share data. These are very difficult concepts to convey
3 in either icons or privacy policies. So, I think we need
4 to look at all of these and combine and join the front
5 end with the back end and make sure there's a consistency
6 of message and make sure that there's a persistency of
7 message, too, so that it's timely, yet permanent. We
8 need all of the elements.

9 And consistency, I think, is a great word. I
10 look at Ilana's -- her phone, it's orange; her power deck
11 was orange. There's a consistency in that group's
12 message. If only privacy policies were that way, we'd
13 all be in great shape.

14 MR. MEHM: That's a good segue to a question
15 for you, Ilana. You mentioned that consumers don't want
16 disclosures at the time they're downloading an app. What
17 are some alternatives and, in your opinion, is the only
18 solution an icon?

19 MS. WESTERMAN: So, definitely not the only
20 solution, an icon, and the icon might not be the
21 solution. I think the solution really is the goal. So,
22 it goes back to the design principles. What we want to
23 do is we want to understand the context of use. We want
24 to create awareness and attention. We want to make sure
25 that people understand what we do, they comprehend it.

1 We want to make sure they can find it if they're looking
2 for it, like a privacy policy. We want to make sure it's
3 easy to use. And, you know, we want to make sure we take
4 into account motivation, what do people care about and
5 when do they care about it and not getting in the way.

6 So, I just think that there's a lot of
7 different solutions. I just think that we're really
8 early on right now in innovation space and whether, you
9 know, it's going to end up being an icon or a centralized
10 place, I mean, I think there's a lot of different places
11 to explore and I just feel like we're a little bit too
12 early on in the process to say, you know, we need a
13 checkbox here or an icon there. We need to have that
14 ability to continue to say, okay, we're going to meet our
15 goals, but we're not quite sure yet how we're going to
16 get to them.

17 MR. MEHM: Thanks.

18 MS. DIXON: Can I respond to that? I agree
19 with that. I think we're very early and I think that --
20 it reminds me a lot of when AOL merged with Time Warner
21 and I got the press release on my desk and I thought, oh,
22 my heavens, this is a horrifying idea, it will never
23 work. And I didn't quite know why. I later figured out
24 why. And, right now, there's certain things I know that
25 are very important for privacy and for consumers.

1 I can't give you all the focus groups and tell
2 you why, but I can tell you they're really important and
3 I think icons are good, I think text is good. But I
4 think having a lot of reminders, a lot of different
5 platforms and a lot of different ways and timings for
6 consumers to access those messages, both online and off,
7 is very important.

8 MR. MEHM: In the interest of time, I actually
9 want to move on to a different topic because we've got so
10 much to cover in this panel. But the question is for
11 you, Jim. So, the timing is good.

12 I want to move on next to the role of platforms
13 and associations. So, what are some concrete steps that
14 platforms should adopt immediately to improve disclosures
15 to consumers? And similarly, what can the platforms be
16 doing now to make it easier for developers to make
17 disclosures to consumers?

18 MR. BROCK: Sure. I think it's well known that
19 the California Attorney General has come to an agreement
20 with some of the major platform providers to start to
21 embed privacy disclosure more closely into the App Store,
22 which helps with part of the issue, right? It helps with
23 the issue of if I want to know what the policy is before
24 I download it, I can do that. And, so, that's obviously
25 helpful.

1 I know Mozilla's gone even further in a really
2 good way and they're actually pulling up four key policy
3 terms into the actual experience. So you don't click
4 over somewhere else. You actually see the four key
5 policies, in their view, right on the top in the App
6 Store. I think that's very helpful. It doesn't, I
7 think, necessarily mean that we're training developers,
8 in the way that Ilana would, to embed privacy disclosure
9 and notices into the experience itself, and I don't know
10 how much the platforms can help with that except to point
11 people to resources and do outreach and education.

12 I think -- frankly, this gets back to Pam's
13 comment, too. So much happens on the back end that
14 affects privacy that is, in many cases, unrelated to the
15 policy and what it says, what information is retained and
16 so forth. Just by requiring them to have a policy and to
17 link it from the App Store is going to have a massive
18 effect on the attention paid to it by developers. So,
19 that is my answer. That's the -- obviously the first big
20 thing that could happen.

21 MR. MEHM: This question is for Sara. What
22 role can associations, such as the App Developers
23 Alliance or ACT, play in educating consumers -- sorry in
24 educating developers on how to make disclosures to
25 consumers?

1 MS. KLOEK: Sure. Well, I can't really talk
2 about what anyone else is doing, but I can talk about
3 what ACT has been doing. For the past year, we've been
4 holding webinars and meet-ups and I've been traveling all
5 over the U.S., and actually around the world, talking to
6 developers about, hey, here's some good options of where
7 you can build a privacy policy, here's some things you
8 need to disclose, contact me if you have questions.

9 We've been hosting boot camps because now
10 developers are actually getting tired of all of these
11 workshops and panels, like us talking and talking at
12 them. So, we've held two boot camps so far where
13 developers can go and actually produce a privacy policy
14 and walk out with the answers that they need. They get
15 the answers from the lawyers.

16 And they want to be done with this. They know
17 that privacy's an issue, they want to -- they take it
18 into consideration. They want to be done. They want to
19 continue to innovate, making cool stuff, and changing our
20 lives.

21 MR. MEHM: Before we move on to the next topic,
22 are there any other thoughts on the points that have been
23 raised? Kevin, go ahead.

24 MR. TRILLI: I just have one question on the
25 platform. So, I want to point out one good example. The

1 Google Apps marketplace, for their business-to-business
2 apps did a great deployment with TRUSTe around
3 integrating a privacy certification and policy
4 disclosure, like we showed, inside the app marketplace
5 that they have and their permission framework that's in
6 the manifest for each app that's submitted. So, this is
7 the first example I saw of really the role of a platform,
8 and Jim's points were exactly right. They control a lot
9 of the power of the presentation layer of the consumer
10 and I thought Google did a great experience there of
11 making that available for consumers, in this case,
12 business-to-business consumers for getting all that
13 information up-front.

14 MR. MEHM: So, let's move on to a different
15 topic, which is a really big topic that's been alluded to
16 on this panel and also others, third party data
17 collection. Assuming third party data collection is
18 occurring via a mobile device, how should consumers be
19 given notice that that is occurring and choice regarding
20 whether they want to participate in such collection.

21 Lorrie, why don't we start with you, and if
22 others have thoughts, we'd love to hear them.

23 PROFESSOR CRANOR: So, we've been looking at
24 third party data collection on the non-mobile platform,
25 and I think we have a big enough problem just dealing

1 with that. I think consumers still are taken by surprise
2 by the fact that it's happening. They view it as kind of
3 underhanded and behind their back and creepy.

4 On the other hand, you know, when you can
5 explain it to them, many consumers are okay with it once
6 they understand it. So, I think there is definitely an
7 issue of how do you actually communicate about it with
8 consumers so they don't feel taken by surprise.

9 They also like to know that they have choices
10 and we've found, though, that the types of choices
11 consumers are presented with today are not meaningful to
12 them. If you ask them, you know, do you want 24/7 Real
13 Media, BlueKai, all these different ad companies they've
14 never heard of, to collect their information, they have no
15 idea. They don't know who these companies are. They can't
16 judge between them. And, so, I don't think we should take
17 what we're doing on the non-mobile world and try to move it
18 onto the mobile world because I predict it will work even
19 worse than it's currently working.

20 I think we do need to have ways, perhaps with
21 icons, of showing people that this third party data
22 collection is taking place. But I also think we need to
23 tell them more than the fact that it's taking place, but
24 tell them a bit about what's going to happen to the data.

1 And maybe what we need to do is to be able to come up
2 with a small number of categories of things.

3 So, you know, for example, we collect -- a
4 third party collects your data, we're going to show you
5 an ad and then we're going to delete the data, versus
6 we're going to collect data and keep it forever and do
7 whatever we want with it. So, there could be these
8 different categories, and then a consumer can decide
9 among categories, which are okay, which are not, and
10 maybe even just set up their preferences on their phone
11 and not have to deal with it on every website, every app,
12 okay, I need to make a decision about this data
13 collection.

14 MR. MEHM: Jim, do you have anything you want
15 to add on this?

16 MR. BROCK: Yeah, just two points. One is I
17 think one of the challenges -- and this is what we do
18 with privacy score -- is separating more responsible data
19 collectors from less responsible data collectors, and
20 that even is another layer of challenge in the process,
21 but it is knowable. And there are industry groups and
22 certifications. And TRUSTe has one, others have them.
23 And you can start to surface that in a compact way and
24 that's something we're doing a lot of.

25 But on this point of third party disclosure and

1 also relating back to Pam's earlier point in the
2 discussion about innovation, if you look at what's
3 happening in the EU, you know, we're watching all these
4 flowers bloom in terms of the different approaches
5 websites are taking to this very issue. Non-mobile,
6 right? Non-mobile. But we're seeing the power of
7 innovation when you have a little bit of a nudge to do
8 it. And I think out of that, we'll look back 12 or 24
9 months and start to see more standards emerge and good
10 practices emerge from that experiment.

11 MR. MEHM: Let's move on to location tracking,
12 and this question is for Pam. You have written and
13 spoken extensively about the various forms of tracking
14 that occurs on mobile devices, including tracking that
15 occurs in the offline world through one's mobile device
16 as consumers move from brick-and-mortar store to brick-
17 and-mortar store. What are some best practices that
18 ought to be occurring to let consumers know that this is
19 happening?

20 MS. DIXON: Yeah, thanks. There's definitely a
21 hierarchy of privacy priorities. I'd say at the -- on
22 one end of the scale, you have display ads that are
23 popping into your mobile phone that are just -- you know,
24 you're searching for something and up pops a little
25 display ad. At the other end is a retailer that is

1 grabbing your unique MAC address from your smartphone or
2 iPad and then is retaining that so they can track how
3 often you come in their store.

4 So, I think that we need to take into account
5 that there is a hierarchy of this, and the best practice
6 will depend on where something falls in that hierarchy.
7 I really like the idea of instead of thinking, okay, one
8 privacy policy will fit all privacy priorities, I like
9 thinking about some of the more intrusive privacy issues
10 like the snagging of a MAC address and thinking, okay,
11 this is really akin to a negative option and it needs
12 extraordinary disclosure and a lot more attention and a
13 lot more work. So, that would be my answer.

14 The best practice is to look at what you're
15 actually collecting, how long you're collecting it. Look
16 at your back-end policies. Make a determination on how
17 you're using that data, how serious it is in terms of the
18 privacy scale and then start working on your front-end
19 best practices, the timing of the notice, the placement
20 of the notice. Do you want to require consent or no?
21 Do you want affirmative consent? Do you want a double
22 opt-in? There might be cases where you want persistent
23 reminders, as the 2000 report notes. So, I think that
24 this is going to be highly contextual, but, in general,
25 I'd say that if you're going to snag a MAC address from

1 someone, you had better have offline notice, online
2 notice. You better be giving notice to the mobile phone.
3 You better have -- the more intrusive, the more robust
4 and the more platforms you should be using.

5 MR. MEHM: You had a couple of slides you
6 wanted to show. Do you want to talk about them now?

7 MS. DIXON: Oh, I do, I do. Are they up?
8 Yeah, that would be great because it will really
9 exemplify that point. Okay, so this is just -- I don't
10 want to pick on any particular companies. This is a
11 really good illustration of if you're walking by a store
12 that's grabbing your MAC address that your phone has,
13 your smartphones or iPads, a store can just snag that
14 from you. And they can snag it from you before you're
15 inside.

16 So, this particular thing just shows that all
17 they're doing -- they're not saying, oh, Joe, you know,
18 XYZ shopped here and we're going to, you know, we gladly
19 respond to any subpoenas for him specifically. That's
20 not what this is about. This is about, look, there were
21 12,000 people outside and only 1,000 went inside and you
22 have XYZ repeat visitors from yesterday or even this
23 quarter or more than a quarter. So, this company's
24 retaining data for, we know, at least more than one
25 quarter.

1 This particular -- next slide, please. This
2 particular company is called -- well, this place -- this
3 is a report actually that we're getting ready to publish
4 very, very soon, like in days. There's a shop -- there's
5 a lot of shops doing this actually, but one of them uses
6 Euclid Elements, which is a third party company. It's
7 named Philz Coffee and it's in the Bay area. And this is
8 their notice that they're doing this. They say, we use
9 Euclid Analytics, an anonymous service, for optimizing
10 the shopping experience. So, a customer that walks in
11 with a smartphone is going to read that notice and then
12 be able to go to Euclid Elements.

13 But in my analysis here, I think this is coy.
14 It doesn't say that they're grabbing the MAC address and
15 it doesn't say if you want to opt out, go to this
16 website. But the truth is is that -- next slide, please.

17 The truth is is that if you do go to that
18 website, Euclid Elements, there's a prominent opt-out.
19 The opt-out's good and we have no problem with their opt-
20 out. However, the thing is is that that notice was only
21 in one piece of paper on one door in that physical
22 location. That's really good and it's an important first
23 start because there's a whole bunch of companies that do
24 the same thing and don't even give that much notice and
25 they don't allow an opt-out.

1 But the thing is is that this also needs to be
2 showing up on the mobile phone when the MAC address is
3 grabbed, or even better yet, how about this, why not have
4 a mobile app that says, okay, I'll download this mobile
5 app and we'll give you a lot of love, you'll get a free
6 coffee for downloading this app and, by the way, we're
7 going to track your MAC address, but you know what,
8 here's the deal about it, and give people more
9 information about it, give them a robust privacy policy.
10 I just think an app might actually be a good solution
11 here that gives people more information and more ability
12 to make more choices.

13 If you look at the privacy policy for this
14 particular brand, this coffee shop, the website privacy
15 policy doesn't even mention an opt-out, it doesn't even
16 mention that this is happening. So, there's got to be
17 consistency and this is just a good example of why online
18 and offline has now merged.

19 MR. MEHM: So, Sara, Pam has suggested that
20 there should be an app for that. What is your reaction?

21 MS. KLOEK: I'll let people know. I do have a
22 quick comment on the use of MAC address and things like
23 UDID and unique identifiers to the phone. That's not
24 really private information. It's not tied to the person;
25 it's tied to the device. So, we can argue about whether

1 or not UDID and the MAC address should be something that
2 is inherently tied to us, like our Social Security
3 number, but I think that's for another panel on another
4 day.

5 MS. DIXON: No, it's not.

6 (Laughter.)

7 MS. DIXON: The Euclid Elements privacy policy
8 is excellent because they're honest. They are not coy.
9 They say clearly that that information can be correlated
10 with your identity and is subject to subpoena. We've got
11 to be careful with these.

12 MR. MEHM: Lorrie, do you have any further
13 thoughts on this?

14 PROFESSOR CRANOR: No, you can go on to the
15 next.

16 MR. MEHM: Okay, we'll go to the next question
17 then, which will be for you, Lorrie. Let's say a
18 disclosure is provided at the time you download an app
19 and the disclosure says that the app will collect
20 location information. Would consumers understand this to
21 mean location information at this time or location
22 information over time and would this be material to
23 consumers?

24 PROFESSOR CRANOR: Well, from the studies in
25 which we've asked consumers about location, they don't

1 have a good understanding of what it means to download
2 location information. So, I think different consumers
3 would think different things and it would be fairly
4 inconsistent.

5 And would it be material? Well, yeah, if we're
6 expecting people to make informed choices, they need to
7 actually be informed about what they're deciding between.

8 MR. MEHM: Okay. We are running short on time.
9 It looks like we have about seven or eight minutes left.
10 So, I want to give each panelist one minute to describe
11 the number one thing that should be done immediately to
12 improve mobile privacy disclosures. And let's start down
13 at the end with Kevin.

14 MR. TRILLI: I'm going to cheat and do two.
15 So, you know, I think the first step by the Attorney
16 General to require policies is a good first step, but I
17 think that would be sort of not a good result if that's
18 all we did. I think the app platform gives publishers or
19 app developers who own more control of the consumer
20 experience, more power to really control the redeployment
21 of privacy policies in a new space from a fundamentally
22 different way. Just like we saw privacy policy end up on
23 every website for whatever ten million sites, it's
24 starting again now. And I think if we just went to the
25 text policy link that we have on the web, I don't think

1 we're being successful.

2 So, I think some effort to really at least
3 improve it the next level up would be critical. That's a
4 very broad consortium group of participants to figure
5 this out, but I think the timing is right here waiting
6 for us and if we blow it, I think it's a missed
7 opportunity.

8 Second, this whole discussion around data
9 sharing with third parties. I think -- you know, the Ad
10 Choices program, I think -- you know, we've got to keep in
11 memory that it is only two or three years old, you know,
12 consumers need to see it a few times, understand what it
13 is and, you know, over time, they're going to understand
14 what it is. A similar program is needed for mobile apps
15 because we all know there's not cookies in mobile apps
16 and a whole different framework of UDIDs and MAC
17 addresses, and I think that can naturally flow. There
18 are technological issues that make it a little less
19 straightforward to do that. But I think the similar
20 concept can happen in the next 12 to 18 months.

21 But I think both of those, to me, are unique
22 opportunities for the app space. It's a much more rich
23 environment for innovation in the layering or the
24 transparency and notice framework and I think there's a
25 great opportunity for everyone to do something here.

1 MR. MEHM: Thanks. Sara?

2 MS. KLOEK: Our developers want clear and
3 concise guidance and then they want to be done with it.
4 They want to continue to innovate, make cool things.
5 Privacy will be in their design going forward, but they
6 just -- they want to innovate, they want -- they don't
7 want burdensome regulations.

8 MR. MEHM: Pam?

9 MS. DIXON: I'd say -- if I had to only say one
10 thing, I think it's just important to think of really
11 approaching a consumer as a whole person. So, you're
12 really thinking cross platform, online and off, and all
13 the different ways that a consumer can be communicated
14 with, even if it's just an indirect communication. Have
15 the direct communication within the application or ad or
16 platform, but also think about indirect through other
17 communication means that are a little more permanent,
18 brand pages and so forth, brand communications.

19 PROFESSOR CRANOR: I'd like to see the app
20 platforms provide hooks for privacy metadata and require
21 the app developers to supply that in their apps and have
22 the app platforms not only require it, but then also
23 expose APIs that allow developers to actually make use of
24 that data for innovative things in their apps and
25 platforms.

1 MR. MEHM: Jim?

2 MR. BROCK: I agree with everything that has
3 been said and would say them all myself. I think clearly
4 the app marketplaces have a great deal of leverage. But
5 I would emphasize again the importance of them helping
6 push developers to make more educated decisions where the
7 rubber meets the road, which is on the server, and where
8 the stuff is stored and where the stuff is often shared.
9 I think that will happen if they just start to press
10 privacy more to the developer as part of uploading the
11 app.

12 MR. MEHM: Ilana?

13 MS. WESTERMAN: Yeah, I think, for us, we
14 really want to be able to continue to innovate. I think
15 our research really shows that we're not there yet, but
16 that's because I think we're just getting started. I
17 mean, if you go back ten years, look at ecommerce and try
18 to buy something online and how hard that was to do, now
19 how easy it is to do. Maybe too easy. But we can get
20 there through good design, but I think we can't -- we
21 can't force designers and say you're going to put a
22 checkbox here or a link there.

23 What I think we really want to look at are the
24 underlying goals that we have and what we're trying to
25 achieve. And I know brands don't want to have their

1 consumers lose trust in them. They lose customers.
2 That's not their goal. They're trying, too, to create
3 transparency and control. It's just, I think, we're
4 early stage right now. So, we just have to continue to
5 try to solve the problem and work towards those
6 solutions.

7 MR. MEHM: Thanks. I actually want to ask --
8 we did so well on that, we've got a few more minutes
9 left. I want to ask one of the questions that came in,
10 either online or through someone here in the room. And
11 the question is, can we reach agreement on four or five
12 practices that must be disclosed, location, for example,
13 sharing with third parties, collecting or sharing other
14 information like contact lists? How do we pick that list
15 if such a list is an advisable idea? Anyone who wants to
16 volunteer on that? Sara, go ahead.

17 MS. KLOEK: Well, since we have existing laws
18 like COPPA, we can start there. Obviously, you have to
19 disclose whether you collect information for people under
20 the age of 13. So, that's one thing that we can start
21 with.

22 MR. MEHM: Ilana?

23 MS. WESTERMAN: Yeah, I think one of the key
24 things is to look at what consumers care about and what
25 they don't care about, and I don't think we fully have

1 that picture. But what they care about is consequences
2 and understanding, well, what's going to happen if you
3 gather that. So, I think really it's less about the four
4 or five things that we need to disclose, but it's more
5 about telling people what that means to them so they can
6 make decisions.

7 MS. DIXON: I think that's right. And, you
8 know, I know that when people contact us, the thing they
9 scream the most about, there's two things. Location and
10 contact lists. The contact information in their cell
11 phone, they don't want people touching that at all
12 without their permission and probably not even then
13 unless it's just really amazing and, you know, has such
14 utility that it's okay.

15 MR. MEHM: All right, well, I want to thank all
16 of our panelists for being here today. Several literally
17 flew across the entire country to be here. I want to
18 thank everyone who's in the room for gutting it out and
19 sticking with us 'til the end. We're not entirely done.
20 We still have concluding remarks, and I would like to now
21 introduce Mary Engle, Associate Director of the FTC's
22 Division of Advertising Practices.

23 I want to say one other thing, too, before I
24 forget. We will also be accepting written comments on
25 the proposals and ideas discussed today. We'll be

1 accepting comments starting today and through July 11th,
2 2012, and those comments will inform whatever follow-up
3 results from today's workshop. So, with that, I'd like
4 to turn it over to Mary.

5 CLOSING REMARKS

6 MS. ENGLE: Thank you, Ryan. And good
7 afternoon, everybody. In keeping with the theme for
8 today, I promise to keep it short.

9 I just want to thank all of the panelists for
10 their wonderful presentations and the discussion we had
11 today. It's been a really educational experience for me
12 and the rest of the FTC staff.

13 One thing that we heard a lot today is that
14 context matters, that it's really -- what needs to be
15 disclosed and how it needs to be disclosed really is
16 going to depend upon the particular device, the consumer,
17 maybe the product, maybe the offer, and that we heard a
18 lot, it depends. But, of course, the job of the FTC
19 here, what our goal is is to provide guidance and not
20 just say it depends. We want to seek out as many black
21 and white areas as we can from all these shades of gray
22 that we heard discussed today.

23 We also heard that it's important to take into
24 account typical consumer behavior in the particular
25 online or mobile environment. For example, where they

1 look on the page and whether or not they will they click
2 on a link.

3 We heard the view that platforms have to adapt
4 to the law and not vice versa, so that if it's not
5 possible to run a non-misleading ad on a certain
6 platform, then that platform shouldn't be used.

7 We heard about the need for clear and
8 attention-getting labels on links that convey to
9 consumers the significance of the link. We heard about
10 the desirability of modifying or even limiting a claim
11 itself so that maybe a disclosure isn't needed in the
12 first place.

13 We heard a lot of agreement that appropriate
14 disclosures will also often make the consumer experience
15 a positive one in connection with the brand. We heard
16 that the timing of when disclosures are made is very
17 important to whether consumers will really attend or get
18 the information.

19 We heard a lot about the potential use of icons
20 or abbreviations, but the question there will be whether
21 consumers understand those icons or abbreviations and who
22 is going to be educating them about that. We heard a lot
23 about the importance of finding the right balance between
24 providing enough information and not too much information
25 that consumers are overwhelmed.

1 So, I want to -- that was in no particular
2 order. We'll be taking this all in. As Ryan said, the
3 comment period will remain open for another six weeks,
4 until July 11th, and we look forward to any additional
5 comments you may have. There's no timetable for the
6 output of this conference. We hope to have something out
7 by the fall, though. Thank you very much.

8 (At 4:32 p.m., the workshop was concluded.)

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1 C E R T I F I C A T I O N O F R E P O R T E R

2 MATTER NUMBER: P114506

3 CASE TITLE: IN SHORT: ADVERTISING AND PRIVACY

4 DISCLOSURES IN A DIGITAL WORLD

5 DATE: MAY 30, 2012

6

7 I HEREBY CERTIFY that the transcript contained
8 herein is a full and accurate transcript of the notes
9 taken by me at the hearing on the above cause before the
10 FEDERAL TRADE COMMISSION to the best of my knowledge and
11 belief.

12

13 DATED: AUGUST 7, 2012

14

15

16 RICK SANBORN

17

18 C E R T I F I C A T I O N O F P R O O F R E A D E R

19

20 I HEREBY CERTIFY that I proofread the transcript for
21 accuracy in spelling, hyphenation, punctuation and
22 format.

23

24

25 ELIZABETH M. FARRELL