>> ELLA KRAINSKY: Good morning, and welcome to our workshop -- In Short: Advertising and Privacy Disclosures in a Digital World. My name is Ella Krainsky, and I'm an attorney with the Bureau of Consumer Protection in the Division of Advertising Practices. We're very happy to see you all here, and we're looking forward to an informative and lively discussion today. Before we begin this morning, I do have a few administrative matters to mention. First, if you have any questions for our panelists at any time, please write them on a comment card, and hold up the card for one of our workshop team members to collect it. If you need a comment card, just raise your hand and we'll get one to you as soon as possible. If you're joining us via Webcast, please submit questions to ftcdisclose@ftc.gov. If you're tweeting about the workshop, please use the #ftcdisclose. Restrooms are located across from the entrance to the conference center, past the security desk, to the left. If you leave the building at lunch or any other time, please remember to allow for some extra time. Oh. Excuse me. Please allow for some extra time, as you will have to go through the metal detectors again. Finally, please remember to silence your mobile devices. And now without further ado, I'd like to welcome you all again and introduce Commissioner Maureen Ohlhausen, to open the workshop. Thank you very much. [Applause]

>> MAUREEN OHLHAUSEN: Good morning, and welcome to the FTC's workshop on In Short: Advertising & Privacy in a Digital World. I'm Maureen Ohlhausen. I'm the newest commissioner, having been here just about two months. But as part of my background, you should know that I served for almost 12 years at the Commission previously. During that time, advertising and privacy were two of the most important and interesting issues that I worked on. This workshop promises to be an incredibly informative program, on a topic that is changing as rapidly as any issue on which the FTC has jurisdiction. I know that the discussion today will significantly add to our understanding of this critical issue and, thereby, help advance our goal of enabling consumers to make their own informed choices. Also, I believe the FTC should use all of its tools to advance its mission and am thus a strong supporter of workshops and outreach like today's event, which bring together a variety of stakeholders. It is hard to underestimate the importance of advertising and privacy disclosures. Many of the Commission's advertising rules and guides and orders require clear and conspicuous disclosures, and the FTC Act requires that if an advertisement makes an

express or an implied claim that is likely to mislead without certain qualifying information, that information must be disclosed clearly and conspicuously. Similarly, with respect to privacy, transparency is the baseline principle outlined in the Commission's March 2012 privacy report. And one of the chief ways that businesses achieve transparency is through meaningful and clear disclosures to consumers. In Dot Com Disclosures, issued in 2000, and later in my speech, I will refer to it as DCD, so Dot Com Disclosures (DCD) -- Commission staff took up the question of how FTC consumer protection rules apply to advertising and sales made via the Internet and concluded that the same consumer protection laws that apply to commercial activities in other media apply online, as well. The central topic in that discussion was how to make clear and conspicuous disclosures online. The advice given was practical and flexible and, based on the tenor of the comments filed, has been well-received by online advertisers. And I certainly recall that when I was in private practice, I did turn to the Dot Com Disclosures guidance to help counsel my clients. But what a difference a decade makes. When Dot Com Disclosures was issued, who could have imagined the world we live in now? Tablet computers and smartphones and apps, social media, tweets, using your phone to get an instant discount, you know, on a meal at your favorite restaurant in your neighborhood, walking down the street and having your phone tell you that the coffee shop a couple blocks away has a special offer today, and then, also, simultaneously telling hundreds of your friends that you like a particular product. These technological advances have been nothing short of really amazing, but as is so often the case, each of these technological advances brings not only new opportunities but new challenges. As the 3-inch smartphone screen takes over from the 17-inch computer monitor as the means of delivering advertising to consumers, how do marketers ensure that the information consumers need to fully evaluate the advertisers' statement, you know, i.e., to prevent the ad from being misleading, are clear and conspicuous. How and where should that coffee shop tell you that you need to get a free cup of coffee -- that to get a free cup of coffee, you need to buy 2 pounds of beans? How do advertisers effectively communicate this information on social-media platforms that have their own space or content limitations? How should someone who can only use 140 characters tell readers that they got the product they're endorsing for free? Finally, as consumers increasingly utilize mobile devices to perform such activities, as browsing the Web to check out the latest headline or sports score, launching an app to find a nearby gas station, pay their credit card bill and possibly their rent or their mortgage, how should businesses relay key information to consumers about their privacy

practices, including how they may be collecting, using, or sharing consumer data? When the Commission first saw input on Dot Com Disclosures in May 2011, some commenters said the matter should be left to industry self-regulation, while others said any new guidance should be sufficiently flexible to account for future developments in technology. As those of you who follow the Commission closely know, we are strong advocates of industry self-regulation. However, we also believe that self-regulation usually works best when it's backed up by a law-enforcement presence. At the same time, we are cognizant of how fast technology is evolving, and we understand the need for and benefits of innovation. The original DCD Business Guidance document did not expand the application of section 5. It merely explained how the longstanding principles of advertising law applied to what were then relatively new online media. That is, again, what we are looking to do as we revise DCD. On the privacy side, we will explore later this afternoon how mobile privacy disclosures are made and how these disclosures can be short, effective, and accessible to consumers. Our discussion today will not focus on the question of what information must be disclosed in advertising or in practice disclosures. Nor in the case of ads will we focus on who may be liable among the parties involved in the process of creating and publishing the ads. And we know that there can be many parties involved in a single page. Rather, we will focus on the how -- assuming that certain information must be disclosed to consumers -- how can it be done effectively. Although the panelists will all have their own views, the collective goal of today's discussion is to develop and -- excuse me -- to explore and develop best practices for advertising and privacy disclosures in social media and on mobile devices. Clear and conspicuous disclosures have an obvious consumer benefit, but I'm sure that we all recognize that it is in everyone's best interest to ensure that consumers have positive experiences and are making informed choices when they use today's mobile or social-media tools or tomorrow's exciting innovations. So, today's workshop brings together all of the key stakeholders in this area -- consumer advocates, advertisers, trade associations, social-media platforms, and academics. These are the people who are on the front line in tracking these issues. Their presentations will help inform the Commission as we continue to develop our expertise in this area. Thank you very much for joining us today, and enjoy the workshop. [Applause]

>> ELLA KRAINSKY: Thank you, Commissioner Ohlhausen. We'd like to begin this morning with a presentation on usability research by Jennifer King, who's a PhD candidate at the University

of California, Berkeley. This presentation will provide some background into the challenges that consumers experience finding disclosures in digital and mobile media.

>> JENNIFER KING: Okay. Good morning, everybody. I'm Jennifer King. I'm a PhD candidate at the UC Berkeley School of Information, where my research focuses on using human-computer interaction methods to understand people's expectations of information privacy. So, thanks to the FTC for asking me to speak here today. I'm here to kick off today's discussion by talking about methods for improving disclosures and privacy policies. I realize that we'll be spending the day talking about what doesn't work, and my goal is to highlight some of the constructive work that's been done by my community, the human-computer interaction field, to improve disclosures and privacy policies. So, the FTC uses the perspective of the "reasonable consumer" to evaluate online disclosures and privacy policies. This is likely a familiar concept to many of you in the audience today, but to those who are unfamiliar with it, I will quote very briefly from the FTC's Deception Policy statement to provide a basic overview, which is, "When representations or sales practices are targeted to a specific audience, the Commission determines the effect of the practice on a reasonable member of that group. The Commission will evaluate the entire advertisement, transaction, or course of dealing in determining how a reasonable consumer are likely to respond. As an HCI researcher and a nonlawyer, when I read this, I ask, how do we reliably measure this concept? How do we approach this without an externally valid, reproducible method for gauging how a reasonable consumer evaluates a statement? The field of human-computer interaction, or HCI, approaches the concept from a -- approaches the concept of a reasonable consumer from a different perspective. But first, let me describe what HCI is, and I have a few definitions for you up on the screen. As an academic field, HCI has exited for over 30 years. Today, it's a diverse field of both academics and practitioners who typically have training in some combination of computer science, information science, visual design, and cognitive science. HCI practitioners work in specialties such as user-experience research, visual design, usability testing, and information design. We practice a methodology called user-centered design, where our approach is guided by our users' needs, perceptions, and expectations. HCI offers design principles derived from empirical research that take into account our shared, cognitive, and perceptual limitations. Disclosures in privacy policies exist to communicate information to consumers, and HCI practitioners are experts in determining how to present information to consumers in digital

environments. Crucially, a key component of the design process is user testing -- putting our designs in front of our users to ensure effectiveness. The benefit of using HCI-base design principles is they are suggestive and not prescriptive. By drawing on them, we can start creating disclosures that are user-friendly by design. Because our work is guided by human cognitive limitations, we may not be able to say with certainty what is reasonable, but we can say what is effective. The policy question is what level of success or failure presents an acceptable outcome. So now I'd like to introduce a few key concepts underlying how HCI practitioners approach improving disclosures using examples that are directly relevant to disclosures in privacy policies. Please note that these examples -- these are examples and I don't necessarily endorse them unreservedly as design solutions. So, the first concept I'm going to talk about relates to how people process information. People are goal-oriented. So whether you are seeking information online or playing a computer game, you have a goal in mind when you visit a Website or open an application. This goal orientation narrows a person's focus to concentrate on the tasks or content they need in order to reach that goal, and the consequence is what researchers call selective attention. So, my next slide, I have a quiz for you all. Nothing like starting the morning with a quiz. So, the first question is, can you spot the scissors on the next slide? And I'm only going to have it up for about two seconds. So, ready? Okay. So, quick quiz. Did the toolbox contain a hammer? Anybody want to say yes? A few people? Okay. It actually did. And so if you didn't notice, you are most likely not alone in this room. Because I primed you for that task, you were focusing your attention on that one activity, of looking for the scissors. So I hope it's not a surprise to hear that people aren't visiting a Website or using an app in order to read a disclosure or a privacy policy. As long as these elements are disconnected from a user's primary activity, they will generally remain unread and unnoticed. From an HCI point of view, this is reasonable behavior. We would expect anything a user was required to read would be part of the user's task flow. Thus, when considering how to present a notice or a disclosure, research suggests that timing is crucial. In order to get a notice noticed, its presentation should be tied to an action or to a goal with some relationship to the notice itself. So, here's an example of what's variously called a pop-over or tool tip within the browser. This is a disclosure made within the context of a specific goal. In this case, it's evaluating a potential purchase. The disclosure is approximate to the product and offered in the context of actually evaluating it. Proximity and context are key principles. Disclosures and notices need to be located both in the user's task flow and in a context that makes sense, given the other

actions that the user is taking at that time. So, my next example is from a mobile device, and many of you will recognize this as the location prompt from the iPhone. Again, this is not a perfect example, but it is a good example of something that's contextually relevant, it's well-timed, and it provides the user with an actionable choice, whether to disclose to the map application, their current location, or not. And so the next concept I want to discuss is how people read on screens. It's well understood that people don't read Web pages in their entirety, and they scan them quickly, typically reading only about a quarter of the content on a page. To some extent, this is due to the strain of reading on a screen, as well as to selective attention. This principle suggests that we need to aid users by designing for increased readability. This means that pages should have a clear visual hierarchy so people know where to look for information and that the writing itself should be concise and reader-friendly. So this next example is one of how people actually read on Web pages. This image was generated using eye-tracking software which tracks where people's eyes move on a screen as they actually read the page. This example is taken from the work of Jakob Nielsen, who has tested hundreds and hundreds of people as they read all types of different Websites. So you'll see that people look for clues on a page to determine where to find the most relevant information. That's why you see consistent patterns in eye-tracking studies -- people are scanning the areas where they have learned to find the most useful information. On Webpages, that typically leads users to navigation bars and menus and results in the F-shape reading pattern. And you can see from that image that the red parts of the image are where people are spending the most amount of time with their attention, and it gets cooler and cooler. The blue are the least and the gray areas are areas where people did not look at all when they were looking at the page. So, in contrast, here's an example of what most -- what most privacy policies look like today. This is a screenshot I took on what I'd call a medium/large screen, my monitor at home, a 23-inch widescreen diagonal. And what you're seeing here is the policy after I zoomed out my browser display as far as possible. I still had to take two screenshots to get it all to appear on one page. So you can see some of the criticisms I have on this. It's extremely long. It lacks a good visual hierarchy. People don't know where to look for information for this. There's no call to action. There's nothing that tells them what to do or what they can take away from it. And the reading level is fairly sophisticated. In a lot of cases, you're going to need a college degree or perhaps even a law degree to interpret these things. And so this next example is from a mobile device -- my own, in fact. So this is using the mobile browser and not an app, to make that clear. So, you can't read

this, and, frankly, I couldn't either when I took the photo of it on my phone, which is in my hand. Reading full-sized Webpages on a mobile device is a real serious challenge, and in this case, it's nearly impossible without a lot of zooming, a lot of scrolling, and a lot of patience. But using insights about how people read, designers are redesigning existing notices for better readability. One of the most significant flaws with existing notices is the lack of a visual hierarchy. Reading on screens is a difficult task. It's not natural for us. The more concise text can be made on a screen, with clear visual cues to help people find what they need, the higher probability that it'll actually be read. So next I'm gonna show you a few examples from academics and practitioners who are working to improve the existing system of notices. And so this is an example by designer Gregg Bernstein. He took the Apple iTunes licensing agreement and redesigned it, and he uses a clear visual hierarchy to draw attention to the key points of the document, uses a numeric outline, bullet points, and icons to help make it clear and digestible. He also parses the agreement into text that is far easier to read and concise. And he also includes some very clear calls to action for the consumer so they know what they actually have to do to get through it and to accept or acknowledge that they've read it. My next slide is work by a PhD student, Patrick Kelley, and some of his colleagues at Carnegie-Mellon. They've tested different variations of summarizing privacy policies, and they found that standardizing the presentation into what they call a nutrition-label-style approach has greatly increased both readability and comprehension in their studies, and this is due to both the consistency of that framework -- people know where to work -- and the distillation of the text into really concise, key points. So this example shows a standardized table that they came up with, as well as a much shorter version on the right. And so my next example, this is work by Travis Pinnick. He is a user-experience designer at TRUSTe. And he's been refining a similar approach called layered privacy notices. So, in this case, he's condensed the notice and organized it into a clear visual hierarchy. He's called up the choices and tools that are available to consumers. But note that it still does contain quite a bit of textual description. And one thing to note about this approach is that, while this design makes it easier to find information that you want, there's no guarantee that consumers are going to read the entire thing. So if there's information that people must read prior to making a decision, a contextual disclosure would be more appropriate. So let's next talk about mobile devices, which pose an even greater design challenge. A recent study indicated that the comprehension of privacy policies on mobile devices decreased from about 40% on the desktop, which isn't great -- 40% is a pretty low comprehensible -

- comprehensibility marker -- to only about 19% when they're read on phones. And this finding was attributable to the size of the task on the screen and the need to scroll to view a lengthy document on that small screen. We also need to be aware that mobile users can use their devices in many more contexts than desktop users, which makes effective design an even greater challenge. So the example on the screen right now is the example of a notice actually taken from an application on the phone, not the mobile browser. So this is from twitter, and they optimized this version of their privacy policy from their mobile app. And you can see that it is actually readable, compared to the example I showed you earlier. But that was just the first page. [Laughter] So, again, this is the device I took it on, which is my android phone. And, so, I had to scroll through the entire policy. It was 16 screens total to capture the entire thing. So you can see that, substantively, this really isn't an improvement. Again, there's little visual hierarchy. People don't know where to look, there's no call to action, there's no takeaway for people, and most people are gonna navigate away from this without reading the entire thing. And so my last slide, this is, again, an example from Travis Pinnick at TRUSTe where he offers a notice style that's actually optimized to work within a mobile form factor. This style is called the short notice, or progressive disclosure, and it gives users, again, an easier to way to find information on a very small screen. And so to close today, I want to emphasize that, despite the examples I've shown you, design and improvement of disclosures and notices remains largely unexplored by the HCI field. While there is a small group of academics and practitioners who have been working on improvements, to date, there's been little investment in improving disclosures by most companies. This is an area of research that would benefit from a multidisciplinary, multiorganizational group working together to make these experiences as consistent and user-friendly as possible. The benefit of the growing ubiquity of mobile devices is the recognition that we can't take what we've doing on the Internet, which we know hasn't worked, and apply it to mobile without significant changes. While designing for mobile is a challenge, I actually think there's reason to be optimistic because there's many talented designers and user-experience researchers out there who have yet to even take a crack at this problem. And the more participation we can get will yield many more creative solutions. So, in closing, I would hope that the outcome of today's workshop will be progress towards creating more consistent, engaging, and usable disclosures and privacy policies for consumers. Thanks. [Applause]

>> ELLA KRAINSKY: Thank you, Ms. King. I just wanted to remind everyone that if you do have questions for the panelists, please write them on a comment card. If you need a comment card, please raise your hand, and we'll get one to you as soon as we can. We're also getting a few more chairs in the room, because we have some people that need a place to sit. And I actually see a few in the middle section, if folks need to sit down. All right. So, we'll now have our first panel -- Universal and Cross-Platform Advertising Disclosures.

>> MICHAEL OSTHEIMER: Good morning, everyone. My name is Michael Ostheimer. I'm an attorney in the Division of Advertising Practices. And thank you for coming this morning. Before we start the first panel, I'd like to give you a little background, mostly drawn from the 2000 Dot Com Disclosure guidance document. After that, I'll allow -- I will ask the panelists to introduce themselves briefly, and then I'll give a little bit more background, we'll show the first example that we have, and we'll start our discussion. The first three panelists today will focus on disclosures that are required under the laws that the FTC enforces. We do not intend to address disclosures that might be required by other federal and state laws. As Commissioner Ohlhausen mentioned, disclosures may be required to prevent an ad from being deceptive or unfair under the FTC Act or they may be required under the various laws and regulations that the FTC enforces. When it comes to online ads, the basic principles of advertising law apply. A disclosure that contradicts a claim will not be sufficient to prevent an ad from being deceptive. Disclosures that are required must be presented clearly and conspicuously. To make a particular disclosure clear and conspicuous, a marketer should consider, among other things, the placement of the disclosure in an ad, the prominence of the disclosure, and its proximity to the claim that it's qualifying. Whether a disclosure is clear and conspicuous is measured by its real-world performance -- that is, whether consumers actually see, read, and understand it within the context of the ad. The key is the ad's overall net impression. In reviewing their online marketing, advertisers should adopt the perspective of a reasonable consumer, as Ms. King previously noted. Among other things, assume that consumers don't read an entire Website. Disclosures must be communicated effectively so the consumers are likely to notice and understand them. If consumers have to actively look for information available on a Website, it doesn't meet the clear and conspicuousness standard. And now I'd like to ask the panelist to briefly introduce themselves.

>> STEVE DelBIANCO: Thanks, Michael. And, in addition to an introduction, give a brief opening statement? Is that what you said?

>> MICHAEL OSTHEIMER: Just an introduction.

>> STEVE DelBIANCO: Just introductions? Steve DelBianco. I'm executive director with NetChoice, which is a coalition of leading e-commerce platforms and online services.

>> LINDA GOLDSTEIN: I'm Linda Goldstein, representing the Promotion Marketing Association.

>> SALLY GREENBERG: Never ask a group of people who are here to talk about advertising to only introduce themselves. They always want to do an ad. But, anyway, I'm Sally Greenberg. I'm executive director of the National Consumers League.

>> JENNIFER KING: Jennifer King, UC Berkeley School of Information.

>> PAUL SINGER: Good morning. Paul Singer with the Texas Attorney General's office.

>> SVETLANA WALKER: Good morning. I'm Svetlana Walker. I'm here with the Clorox company.

>> MICHAEL OSTHEIMER: I'd like to start the first panel out talking about hyperlinks. In 2000, FTC staff said that disclosures that are an integral part of a claim, or inseparable from it, should be placed on the same Webpage and immediately next to the claim without referring the consumer to somewhere else. We emphasized that this is particularly true for cost information and for certain health and safety claims and disclosures. At the same time, we said that a hyperlink disclosure may be useful if a disclosure is lengthy. We said that the hyperlink's label should convey the importance, nature, and relevance of the information to which it leads, and that a hyperlink simply labeled "disclaimer." More information, details, or terms and conditions does not communicate the nature or significance of the information to which the disclosure leads. Several of the public

comments staff recently received as part of this process suggested that staff revisit its guidance and be more lenient in terms of hyperlink labeling. With that background in mind, I'd like you to look at a hypothetical Website selling a Frostotron cooler. Right below the product's price, it says that satisfaction is guaranteed, and below that is a hyperlink labeled disclosure. If a consumer clicks on the hyperlink, it leads to a lengthy disclosure about substantial restocking fees that apply if the item is returned. Assuming that the disclosure is required to qualify the guarantee, is the hyperlink's label adequate? I'd like the panelists to weigh in. And just to remind the panelists...

>> STEVE DelBIANCO: Tip the card up.

>> MICHAEL OSTHEIMER: ...if people want to speak, please stand your card up on its end, and I'll know who is interested in speaking. [Laughter] Okay. Why don't we start with Linda Goldstein?

>> LINDA GOLDSTEIN: Thank you, Michael. Just before I answer the question specifically, we wanted to make some general comments just regarding the use of hyperlinks and disclosures, in general, which really will ultimately get to the answer. Because of the rapid changes in technology, the fact that we're looking at this particular message on a Website, but it may be syndicated, it may be viewed in other screens and other platforms with more limited real estate, we do think there are some general principles that should guide the FTC in its approach, particularly to hyperlinks, and that is greater flexibility, more leniency, and the notion that less is more. Without that flexibility, marketers will be precluded from using many of the innovative formats that the technology is affording. The second thing is, we think that the FTC needs to acknowledge that space considerations often make it very difficult to make lengthy disclosures, and, therefore, there has to be a more lenient, rather than a more restrictive, approach to hyperlinks and disclosures, in general. Third, we believe there has to be a fundamental shift in the way the FTC views advertising and consumer behavior. I think this is a good example that the FTC has historically viewed advertising in a linear fashion and has taken a very static approach to disclosures, meaning where on the page should it be? Sometimes in today's environment, there may not even be a page. Consumers today have the ability to multitask. They go in and out of disclosures and they interact with content differently than they did 10 years ago when these guidelines were first visited. And so I think what

this all leads to is, the answer to whether this disclosure is adequate is, it may depend. We think the use of a hyperlink, as a means to disclose information, is appropriate, and there should be more rather than less use of hyperlinks. In this particular case, the "depends" is, it depends what it is that's going to be disclosed via this hyperlink. If it's information that's likely to be within the consumer's expectations, things that the consumer might expect, like conditions associated with the satisfaction guarantee, what the consumer has to do in order to return the product, and they're reasonable conditions that would fit within reasonable consumer expectations, then the use of a hyperlink is probably appropriate. If there is some incredibly restrictive, onerous requirement that might not fit within the consumer's expectation, then perhaps some additional contextual disclosure might be required and perhaps some additional labeling might be required. The other thing we would say is, I know there's a concern about generic disclosures, in general, and there may be a concern just about use of the term "disclosure" and whether that's too generic to be a meaningful call to action for consumers. But, again, I think, given the realities of limited real estate and space constraints, marketers are gonna be forced to bundle together more disclosures, and that's going to make it difficult to have individually labeled disclosures for every piece of information. So as the Commission thinks about this, we would encourage the Commission to think more broadly and more generically and to embrace the idea of more generic disclosures that meaningfully tell the consumer there's important information but don't necessarily identify that specific information because there may be multiple layers of information that are being disclosed through that link.

>> MICHAEL OSTHEIMER: Sally.

>> SALLY GREENBERG: Yeah. Linda, I can appreciate that your organization and the companies that you represent, or industries that you represent, might want more flexibility, and I think that that's something that we should consider very seriously. However, if we take an example like this, where it says "disclosure" and their satisfaction is guaranteed, "disclosure" doesn't really tell you anything. If it said "Disclosure: restocking fees apply," that's gonna give the signal to consumers that there may be some costs involved if they decide to return this product. When I read "satisfaction guaranteed," that says to me, "I'm gonna get my money back." And a lot of claims will -- a lot of advertising will say, "No questions asked. Your money back, no questions asked," which gives me the green light, as a consumer, to say, "I'm going to buy this thing, and there's

really no risk involved if I end up not liking it, it's not a satisfactory product." So I don't think it's that hard, in a -- even in a different formats. And we know that the FTC has said that many Commission rules and guides are not limited to any particular medium used to disseminate claims or advertising and, therefore, apply to online activities. And I think what we learned this morning from Jen King is you can do this. There's a lot of science out there. There's a lot of research going on that says we can do this. And I think what I heard from her is really a call to action to companies to be more creative and to be much more agile in providing this information to consumers.

>> MICHAEL OSTHEIMER: Jen.

>> JENNIFER KING: Just focusing on this page, yeah, I would say what's here is inadequate. Again, the use of the term "disclosure" may be completely meaningless to consumers, especially if it keys off the idea of something that relates to a legal concept. Again, I apologize to the lawyers in the room, but most people don't enjoy reading lengthy policies, and so, at minimum, I would say that this needs to be moved towards the call of action, which is the "order now" button, and certainly most likely relabeled. And this is the sort of thing that if you test with a representative group of users, you can certainly find out if people are noticing it and if they do understand the terminology. But, yeah, as this page is designed today, I would say it's inadequate.

>> MICHAEL OSTHEIMER: Let me broaden the question, throw out some alternative labels. More information. Fine print. Terms and conditions. Details. Limitations. Important info. Are any of these sufficient, and under what circumstances? And what about alternatives, such as Sally suggested, such as "significant restocking fees" or "restocking fees apply"? Steve?

>> STEVE DelBIANCO: Yeah, thanks, Michael. The title of this first panel is cross-platform, so let me just focus for a moment about the multiple other platforms that this particular hyperlink would show up, right? Because this is a Webpage for the vendor. But that same claim about the cooler, and the accompanying necessity of a disclaimer, could also show up in other platforms, like an organic search result, which are all textual, or a search ad, to the right of a search result. Could show up in a tweet, could show up in a Google+ comment. And in all of those cases, the platforms

I spoke of -- the ad platform, comment platform, and Twitter -- those platforms don't allow a label on their hyperlinks. They require that the hyperlink show up explicitly "http:" for very good reasons.

>> MICHAEL OSTHEIMER: And that's gonna be the subject of our next panel.

>> STEVE DelBIANCO: Next panel.

>> MICHAEL OSTHEIMER: Yes.

>> STEVE DelBIANCO: But for very good reasons. And for these reasons, you can't expect that the label itself is gonna be able to convey the meaning. There's a good chance that clever use of things like CMPLY or other areas could help make it clear to people. And today, actually, ICANN is closing the window on the bids for new top-level domains. So we could actually see new top-level domains that would be clear -- things like dot disclose, dot disclaim or maybe even dot read this -- that I hope would be able to condition people to click on a hyperlink where there's no label to say what it's about.

>> MICHAEL OSTHEIMER: Paul.

>> PAUL SINGER: So, before I respond, I'll briefly mention, any opinions I express are mine and not necessarily those of the Texas Attorney General or any state attorney general. But we've talked a lot about this. I think, in terms of the label for this hyperlink, states have been consistent recently in, you know, in their actions that it has -- If there's a meaningful, material limitation on what's being represented to a consumer, you need to disclose that up front. It's insufficient to put it somewhere buried on the page or through hyperlinks. In this example, it's not just, right, the satisfaction is guaranteed. You have the big 100% satisfaction guaranteed seal on the page. I think it's conveying a significant message that -- like some of the other panelists have mentioned -- if I'm not happy with this, I'm going get my money back. The alternative labels that you ran through, most of them have the same effect. I mean, they were just variations on the word "disclosure." There's nothing substantively meaningful about those words to signify exactly what it's modifying

until you start talking about the restocking fees. So a label here that signals to the consumer that there are significant restocking fees can be made in a very concise manner. It can be made approximate, I would say, not only -- to Jennifer's point -- not only approximate to the call to action, to the order now, but approximate to the actual claim that it's modifying -- the satisfaction is guaranteed. You know, so I think that when you say and signal to the consumer there's significant restocking fees, that gets the message across. The other information, about maybe how much those restocking fees are, or other details, there may be different places for those details and for that full explanation, but you've at least given the consumer the ability to then signal in their mind they need to go read more about this, if they want to find out the details.

>> MICHAEL OSTHEIMER: Svetlana?

>> SVETLANA WALKER: Thank you. Yeah, for me, I think it's, while there's definitely two issues here, the approximate placement of the disclosure itself, the bigger one, I think, or the much more material one for consumers, is the way it's actually labeled. I think that even "significant restocking fees" wouldn't necessarily form a causal relationship that we reading that and the 100% satisfaction guarantee. So, as an alternative, I would suggest, and, of course, this is just my opinion, but something that really ties together the satisfaction, the potential limitations to it. So maybe something along the label of guarantee limitations, or important guarantee information, or guarantee conditions, that would allow consumers to click on that and understand that there is a material potential investment that will be incurred if they choose to return the product, that limits the guarantee in and of itself. But, certainly, I think the other approximate placement issues that the other panelists have mentioned are really in play here.

>> MICHAEL OSTHEIMER: If a consumer viewing the original Frostotron Webpage scrolled down, there would be a hyperlink labeled "important health information." Clicking on the hyperlink would reveal a somewhat lengthy disclosure about bacterial build-up and foodborne disease from using the product under certain conditions. This raises a couple of issues. An actual FTC case. Under a staff's previous Dot Com guidance, certain health and safety disclosure should not be made through hyperlinks. Is advice outdated or is it still appropriate? Steve.

>> STEVE DelBIANCO: Yeah, in this example, the hyperlink for the health disclosure -- just following your basic principles on placement, proximity, and prominence, ought to be closer to the claim -- the triggering claim -- that it keeps these things fresh and cold. So, for example -- I love to look at the mock ads examples. You guys have 62 pages of mock ad examples in the 2000 Dot Com Disclosure, and, undoubtedly, you're going to add some more for some more formats. But it's also important to understand how FTC is enforcing the guidelines, as well as section 5. And I would love to know whether over the past 12 years, since that's been out, have there been cases where the FTC has investigated, maybe taken action, because the disclaimer was too far away from the triggering claim. Because the notion of scrolling, that's not going to get us too far in this conversation because of the new device formats makes scrolling essential. So let's focus more about your basic principle -- sound principle of proximity -- and ask whether the claim, right at the top that says, "Keep cold drinks, fried chicken, fresh and cold," that's the place for which proximity of the health disclaim needs to be -- needs to appear.

>> MICHAEL OSTHEIMER: Is the advice about not making health and safety disclosures still valid? Linda?

>> LINDA GOLDSTEIN: Yeah, again, I think, as a general principle, we would agree that, if there are material health and safety considerations, those are sufficiently important. I think traditional section 5 rules in your existing Dot Com guidance would still apply here, which is this important, material information that we need to be certain the consumer will see before they make a purchasing decision and what are the consequences of not seeing that disclosure. So, when you're talking about health and safety considerations, obviously, the consequences of a consumer not seeing that disclosure are going to be more significant. I think, in general, it goes to a principle of prioritization. I know you're going to talk much -- you know, more on other panels about the realities of space constraints and cross platforms that, you know, in which disclosure is made -- appear differently and can't all be made in the same format, and I think that cries out for the need to really prioritize disclosures and ensure that the most material disclosures, or the ones that potentially have the great, you know -- could lead to the greatest consumer injury if consumers don't see them, need to be more prominent, and perhaps there needs to be more of -- more leniency with respect to some of the less material disclosures or those that have the less potential to create

consumer harm. But certainly we would agree that health and safety disclosures are important and need to be disclosed in a way that consumers will see them.

>> MICHAEL OSTHEIMER: Sally?

>> SALLY GREENBERG: Yeah. Well, if we take this specific example, I don't know how closely this tracks to the real-life case -- but we've got -- I mean, you asked the question, is it still relevant to mention health information? And so we take --

>> MICHAEL OSTHEIMER: Actually, the question was whether it's appropriate to -- is it still appropriate to say that one should make health and safety disclosures through hyperlinks?

>> SALLY GREENBERG: Okay. Is it still -- yeah -- important to make health and safety information available through hyperlinks? Correct?

>> MICHAEL OSTHEIMER: Guidance -- FTC's prior guidance was that one should not make...

>> SALLY GREENBERG: I see.

>> MICHAEL OSTHEIMER: ...health and safety disclosure through hyperlinks, and is that guidance still relevant?

>> SALLY GREENBERG: Right. Well, what I would argue is, this information here is -- has to be provided in a way that is readily available to consumers, because the information that is offered here about this Frostotron, is that it's stocked with fruit, sandwiches, cold drinks, fried chicken, fresh and cold, and the information that is provided through the disclosure is that items such as meat and mayonnaise are not going to necessarily stand the test of this particular product because they are obviously not going to be safe to consume if they're used with this particular product at a temperature higher than 80 degrees. So the question I would raise is, it's absolutely imperative that consumers have this information up front in this when considering purchase of this item. And we have to not become more lenient or we have to ensure the consumers have up-front notice of this.

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

>> SVETLANA WALKER: Actually, if I could, I'd just like to note about the health disclosure again. I think, as every one of the panelists noted, the issue here is really materiality. But a second issue may be -- I guess I should first and foremost say I do think it should be appropriate to disclose this type of health information through hyperlinks simply because, in the space that marketers are working in today and consumers are viewing, it's simply impossible, in many instances, to condense this type of information onto a screen that consumers are viewing. Given how material this information is, I would also maybe urge all of us to consider the fact that we don't want to create a false sense of security by leading consumers to think that by reading a health disclosure online at time of purchase they've read all the important information they need to know about the product. What's more important here is really that relevant materials regarding potential product misuse and dangers stemming from that should be distributed at point of purchase for the product itself. I think that neither the Commission, nor anyone here, wants to create a potential scenario where consumers are sort of relying on what they read online as a substitution for carefully reading, say, owner's manuals or instructions that contain other important health and safety information for a product, and that's definitely something that we need to consider when we think about, you know, is it sufficient, right, to place a, say, health and safety reminder sort of in a disclosure online at time of purchase. Is that really relevant to consumers within that context. And I will actually defer to other panelists on the scrolling question.

>> MICHAEL OSTHEIMER: Paul?

>> PAUL SINGER: I'll restrain myself from answering the previous question, too. But, no, I'll, you know, try to address the scrolling question. I think that those comments in particular sort of focused on the fact that consumers are more comfortable today using the Internet and navigating a Webpage to understand that, oh, they may have to scroll and understand what a scroll bar is,

compared to 12 years ago. But I do think that, with new technology, and certainly with mobile devices, scrolling is becoming an issue yet again in sort of a new fashion and in a new format. And we've certainly, in our office, handled cases where we've seen people making use of, for example, text messaging and inserting large amounts of spacing to hide material disclosures that would otherwise be communicated in that text message, and it's something that, in particular with smartphones and sort of the way that text messages get read, et cetera, it's something that a consumer may not understand. They need to open up this message or multiple messages to see the full terms and conditions that are in there. So I do think that there -- that if information is going to be placed on multiple pages or there still needs to be the same kind of trigger or, you know, something that draws a consumer's attention to the fact that they are going to need to scroll if there's other information there for them to read.

>> MICHAEL OSTHEIMER: Jen?

>> JENNIFER KING: Yeah, to echo some of what Paul said, as well. Monitor sizes are getting larger, but then we have mobile. People are a bit more sophisticated maybe than 12 years ago in understanding that you scroll -- you can scroll. But, again, pages have a visual hierarchy, to use the term I used earlier in my talk, and people generally expect that the least important information is placed at the bottom of the screen. And so, to the extent that people are putting disclosures and claims at the bottom of the screen, beyond the viewable portion, below the fold, it's still an issue. And, yes, again, as soon as we introduce mobile into the equation, that changes everything, but I realize that's going to be talked more about later.

>> MICHAEL OSTHEIMER: Moving forward, assuming that using a hyperlink for a safety disclosure wasn't an issue, is it a problem that a consumer could click the "order now" button and leave the page without seeing -- without scrolling scrolling to see the health disclosure? Steve.

>> STEVE DelBIANCO: Thanks, Michael. I think that scrolling is only part of the question, right? Because we heard from Jennifer that eye movements observe sort of an "F" pattern, so anything that's not on the pattern of the "F" eye movement is just as least likely to be seen as something to which I have to scroll. You said earlier that the key is to keep the disclaimers close to

the triggering claim, and the question would be, if they never said the words "fresh and cold" in the claim, would the disclosure still be necessary? And I'd love to know what the FTC would say about that. If they didn't make a claim about fresh and cold meat and chicken, does the disclaimer really belong somewhere below the scroll line? Does it belong on the purchase page? Or does it really belong on the inside lid of the cooler? Because the purchase decision is one thing, but it's the use decision that carries the risk that I could get sick from food that is put in the cooler. I don't know whether FTC covers that, but hopefully, on the inside label of this cooler, it says, "It's 80 degrees outside. Don't put meat, fish, or mayonnaise in here." And those kinds of user safety concerns happen post-purchase, right? So, what about the claim? If the claim's not there, "fresh and cold," do they still require this health disclosure, in your opinion?

>> MICHAEL OSTHEIMER: Does anybody else want to weigh in on that?

>> SALLY GREENBERG: Well, I don't think they're mutually exclusive, so I would argue that consumers need warning. I think important health information, given what the claim is here and how the health claim contradicts, in my mind, what the claim is, that important health information even through a hyperlink is not sufficient notice to consumers. And I think most manufacturers would say, "We're going to certainly put a warning inside the product itself," but we -- but as a consumer advocate, I would argue I need more warning than just important health information. And as Jen has pointed out, the visual hierarchy suggests that many consumers may miss this 'cause it's the bottom of the page.

>> MICHAEL OSTHEIMER: Paul?

>> PAUL SINGER: Yeah, two quick points. One, I would say this is still a cooler. Right? So I think its function is to keep things cool. And so if there is a limitation on that, and I'm going to get sick, I don't think it really matters whether or not it says "keeps things fresh" in the ad. But, that said, in turning to the specific question, I mean, I guess some of the answer may depend on what the full purchase flow looks like to the consumer. Because, you know, I would throw out there that this is, you know, so material and the kind of information that consumers really need to know that maybe it's appropriate for some form of affirmative acknowledgment prior to actually completing

the sale, and so if there's another disclosure somewhere that makes that prominent and would require the consumer to affirmatively say, "I understand that this may pose some health risks to me," that might be a mechanism to, you know, ensure they've read it and to ensure that they've got that information.

>> MICHAEL OSTHEIMER: That's a good transition to our next hypothetical. I'd like you to look a Webpage for a Dutch oven. To purchase the Dutch oven, a consumer has to agree to a trial enrollment in a recipe club that costs $4.95 a month after the trial period expires. This enrollment is disclosed on a product description page, clearly next to the "add to cart" button. In addition, after a consumer adds the item to her cart, she has to click either a yes or no box indicating whether or not she agrees to the enrollment in the recipe club, and if she can't really click away without answering yes or no that she understands. The Dot Com Disclosure document says that, "where advertising and selling are combined on a Website," like in this hypothetical, "disclosures should be provided before a consumer makes the decision to buy -- before clicking on an 'add to cart' button or an 'order now' button." Does anyone disagree with that guidance, the generic guidance, about making disclosures that are necessary to prevent deception and/or otherwise required by a rule prior to clicking on an "order now" button or an "add to cart" button? Linda.

>> LINDA GOLDSTEIN: We certainly support the general principle that material disclosures need to be made before the consumer gives their affirmative consent to disclosure. But we believe that that is the correct general principle, that consumers must be given notice of material information before they give their consent to purchase, but the consent to purchase can take several forms. So I think there is two components to this question. One is, does the disclosure need to be made? And we would certainly agree that the type of disclosure that you have here, which clearly states that, with the purchase, you will be automatically enrolled in a 30-day free trial, and the disclosure of the monthly fee is given is adequate and necessary disclosure of the free-trial offer and the continuity program. But we would disagree with the principle that a check box is the only mechanism through which affirmative consent could be given, and we would urge the FTC not to adopt that rigid an approach to what constitutes affirmative consent. A check box may work on a Website as we see it today, but there are many other platforms that, you know, where it wouldn't be possible to have a check box. And five years from now, we don't know what mechanisms and what

technological innovations may be in place that would be just as clear and reliable evidence of consumer assent as a check box. Again, a check box is a notion that's grounded in a very static form of media. We're moving to a situation now where your mobile device -- tapping your mobile device may constitute a mechanism for making a purchase, where there will be other features and mechanisms in apps and on mobile devices and other formats through which the consumer can evidence consent. And so to allow for that technological innovation, we think it's critical that the general principles of notice and consent be maintained but that the Commission recognize that affirmative consent can be given in a number of ways, and there should not be one mandated way through which that consent has to be provided.

>> MICHAEL OSTHEIMER: Let me ask my next question. Then I'll give Paul a chance to answer either or both questions. When asked, in this hypothetical, an affirmative acknowledgment after a consumer clicks "add to cart" is in addition to an earlier disclosure, does that acknowledgment make it more likely that a consumer has actually read the disclosure, and is it not -- as a requirement -- but is it a best practice? Paul?

>> PAUL SINGER: Well, I'm glad you asked the second question, too. Because, I mean, some of what I was going to say is that, I think, as a general principle, states and their actions have been consistent with the notion that these kind of material terms do need to be made prior to the checkout process. You know, I think that, in addition to having some form of affirmative acknowledgment, it's critical to have the disclosure up front, at that first -- on that first page, you know, when you're actually adding it to the cart, as well. Because this fact is a material limitation on what you're buying. You're not really buying a $220 Dutch oven. You're buying a $220 Dutch oven and a membership in this program. So, you know, the consumer needs to be told that and made sure they understand it. I do think that an affirmative acknowledgment is something that, you know, states have used as a means to demonstrate that the consumer has read it and understands, you know, that they're making a purchase. I think what's in that acknowledgment is obviously critical, and I think, you know, some of what Linda is saying is very true -- that I think it -- the form of what that affirmative acknowledgment itself may be, you know -- may vary, depending on, you know, the type of transaction that you're engaged in or the type of device that the consumer is

using. But I think that's also very relevant to the question of whether or not a consumer is going to read and understand the limitation.

>> MICHAEL OSTHEIMER: Steve?

>> STEVE DelBIANCO: Yeah, the prominence is one of your three key lets to the stool, with respect to these disclaimers. And prominence is a best practice, as you say, and you guys do a great job describing that in the 2000 Dot Coms. But then, if you look at the enforcement record, I believe the FTC has taken it further since then, by looking at offers for computers that have -- were very heavily discounted, but the purchaser had to sign up for two years of Internet service. Maybe it was the Prodigy case. I don't remember exactly. And those kind of cases, as they evolve, they change the standard that may be prominence really wasn't strong enough a word and that it actually had to be unmistakable. I think that was the word used in it. It had to be so obvious that you would not miss it at the point of making the purchase. And if that's the way the standards are evolving, I think it cries out for the need to update the disclosure guidelines to include not just your mock-up examples but to include a little bit of flavor of how your enforcement record shows where you're attaching responsibility, and whether the following of guidelines has a sliding scale of importance, depending upon the magnitude of the risk to the purchaser, right? The financial risk or the health risk. Because that -- all of this helps to paint a road map so that advertisers, sponsors, and others can try to find a way to fit within the law for cases that don't exactly match the examples given in the guidelines.

>> MICHAEL OSTHEIMER: Jennifer.

>> JENNIFER KING: So, just to add a little bit, I actually think this is a pretty good example, in the sense that the disclosure is in the task flow. It's tied very tightly to the action on each page. You're adding something to the cart. It's not guaranteed that someone necessarily may read all that. But when you do get to the checkout page, again, it's part of the task flow. I might improve it slightly by calling out the -- the negative option as an actual maybe line item for purchase in the -- on the purchase page so it's a little bit clearer that you're actually going to get charged for it, at least if not now then in the future. And I think the question of check boxes versus radio buttons versus,

you know -- We might find, on mobile devices, we're giving these consents verbally. You might actually say, "I agree" to something -- to your phone, in the future. So I mean, I would think, from design perspective, designers themselves would not want to be constrained to one particular type of interaction form because, you know, you would always want the flexibility to change it. But, you know, having a way of actually getting some type of affirmative agreement from the user is certainly important.

>> MICHAEL OSTHEIMER: Jen, what if, instead of yes and no boxes, the acknowledgment only had one check box to agree? Would that change your opinion?

>> JENNIFER KING: Yeah, actually, it would. I think this is better. What's not clear to me, though, by looking at this, is that I can buy the Dutch oven without the negative option. And making that -- Well, I guess if I said no, and I removed the item, and I couldn't purchase it, that would, you know, signal to me that, clearly, I can't do that. But that's the piece. That's the thing I lack right now is the sense of whether or not I can make the purchase at all without enrolling. But, yeah, if it were just a check box that said, "I agree to something," no, I would say that's not sufficient.

>> MICHAEL OSTHEIMER: And why not?

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

>> MICHAEL OSTHEIMER: Svetlana.

>> SVETLANA WALKER: Yes, thanks. I think we all agree, in theory, that disclosures for a continuity program such as this are really important, and I certainly agree that I don't believe we should be constrained at this time to a particular mechanics of disclosure, given sort of the evolving field of how these offers are presented. But I think what's also important to note here is the way the affirmative acknowledgment is made and the way it's phrased. So, in certain instances, maybe going beyond this example, it's -- I don't think it's sufficient to say "I agree," "I disagree." Maybe it would make more sense to phrase it in, "I agree to be auto-enrolled in this $4.95 30-day trial," -- right? -- as opposed to just a simple agree/disagree, which I think could lead to a lot of false-positives.

>> MICHAEL OSTHEIMER: Linda?

>> LINDA GOLDSTEIN: Yeah. I wanted to just make a general point here that I think, you know, this is a great example, because there are multiple issues loaded into this. One of them, you know, is, is the disclosure at the point of purchase sufficient? Or I think Steve had alluded to the fact there needs to be disclosure early on, and I think we would all agree that disclosures have to happen early enough in the order path to prevent the ad from being misleading and certainly if you made representations throughout the entire order path that all you were purchasing was a Dutch oven when, in fact, there was something else associated with that. That would be problematic. But, again, I think, in thinking about this issue, I would stress flexibility again in the sense that I think it's important to look at the principles of where and how the disclosures need to be made, from the vantage point of the consumers' entire path to purchase. In other words, again, not to specifically mandate that the disclosure has to be on the first page or it has to be on the landing page or it has to be on the page where, you know, the consumer adds the product to the cart. I think you have to look at it in the context of what is being said at each stage of the consumer's journey through this order path, and, looking at that path in its totality, are we relatively certain that the consumer will have seen all of the material information that they need to see before they make the purchase. And, again, it may not be a one-size-fits-all. It may depend on what is said on each page that may dictate where the disclosure would be most -- not only most important but most meaningful to the consumer. So I'd like to see us get away from, again, this static view of "It should be on page 1," "It should be on page 3," "It should be on page 4," and look at it from the

vantage point of the entire journey. The other thing I just feel compelled to say, in response to some of the -- to some of the comments that were made. is, again, we agree in principle that this kind of requirement, the -- you know, a bundled upsell, if you will, of a continuity offer -- is a very important condition that needs to be disclosed to consumers. But I think we're hearing a bit of overkill here in the sense that if you've made this disclosure and this disclosure is in a box -- meaning it's highlighted, it's in a stand-alone box, it's several points within this order path, and in immediate proximity to where the consumer is actually checking out -- it seems a bit of of overkill, number one, to force the consumer to necessarily have to check a box, as opposed to clicking "I accept the order" or taking some other affirmative action, and then to go beyond that and have to repeat the disclosures in the mechanism, if there were a check box, to have to say right after we've said, "With my purchase, I'll be automatically enrolled. I'll be billed $4.95 each month," to have to then include that disclosure as part of the, you know, "Yes, continue to check out, and bill me $4.95 each month." When we have this overarching concern about having limited real estate and space restrictions, hopefully, again, we can think about ways to do some of these things more concisely and not necessarily engage in that overkill.

>> MICHAEL OSTHEIMER: Sally.

>> SALLY GREENBERG: Yeah. I don't know if underkill is a word, but in response to what Linda just said, I would say -- I feel compelled to say that these kinds of negative check-offs are odious on consumers who are simply trying to buy a product that has attracted their attention, and it looks like a great oven -- Dutch oven kind of cooker. So I would say we are being kind by allowing companies to force you to buy a monthly membership when all you want is this product which they've advertised. Now, having said that, I think it's -- I'm sympathetic to the point Linda's making, which is that we need to be flexible in how we provide information about affirmative agreement to buy the product. I think one of the problems I'm having with this ad is that we don't have enough information. If Linda said to me, "These are the three or four different ways our industry would like to provide this information, and these are the places that we would like to provide it," I think I would like to take a look at that and see how effective the notices to consumers. The other thing we don't know enough about is the cancellation details. So I want to click on that hyperlink and see what those cancellation details are, as a consumer, before I'm going

to buy that $220 product. And I would also join forces with Jen in saying, I like the box, and I think it should be a yes/no, because it forces you to think through that transaction, not just a check-off that you've read it.

>> MICHAEL OSTHEIMER: Changing --

>> STEVE DelBIANCO: Before you leave this example, I just have to show one story. My brother calls me from college, because he's got a girl he really wants to impress, and he asks me how to make this great stew that he's seen me make before. So the first thing I says to him, I says, "Well, do you have a Dutch oven?" He gets off the phone for a minute and comes back and says, "No, it's a G.E." [Laughter]

>> MICHAEL OSTHEIMER: Amusing. One of the public commenters asserted that a terms-of-service type agreement should be considered clear and conspicuous if a consumer accepts it. Another commenter asserted that consumers do not read terms-of-service type agreements and requested that the Commission identify what information from such documents must be displayed on a Website in clear and concise language. Does anyone have views on what guidance the staff should give about required disclosures appearing in terms-of-service type agreements? Jen?

>> JENNIFER KING: They shouldn't, would be my viewpoint. People don't read them. I think I went over these reasons earlier why. And just, fundamentally, if there's anything someone needs to see -- they absolutely need to see that information before they make a decision -- it needs to be called out and it needs to be somewhere in their task flow versus bearing burying it in a document where most people are trained to simply acknowledge that -- click "I accept" and not read them.

>> MICHAEL OSTHEIMER: Steve?

>> STEVE DelBIANCO: I want to try to give an example. If you go to the Washingtonpost.com classifieds, as a user of those classifieds, there's an opportunity to read the terms of service. But I usually don't. I just look at the things in classifieds, whether you're looking for a car, an appliance, or a sublet an apartment. And the sellers who list their items in those classifieds, they may have no

clue about their responsibilities to give the disclaimers and disclosures that are actually required of a seller. And they're on an independent, third-party platform -- the "Washington Post" classified marketplace. So I'm curious about where the responsibility lies. It's clear from the FTC's case work that the "Washington Post" is not liable for the disclosure, but the question would be, how much do their terms of service have to inform buyers and sellers in their marketplace that disclaimers are required but that disclaimers may not always be given because the "Post" doesn't police every listing that goes into the classified? So I'm getting to the distinction about the terms of service for a platform or a third-party marketplace versus the terms of service for an actual Website that sells an item, which I know is the focus of most of what the FTC mock ads are are its own Website. But so much commerce happens in marketplaces and platforms where third-party users act as buyers and sellers, and the terms of service really just inform the buyer of what they can expect, and they inform the seller, to some extent, of their obligations in certain areas of law.

>> MICHAEL OSTHEIMER: Okay. And for purposes of this question, I'm asking about terms-of-service agreements for the seller themself. Linda.

>> LINDA GOLDSTEIN: Yeah, I think maybe one guiding principle that would be helpful here is I think there is an important distinction between terms of service that relate to, you know, use of the site, or, you know, the seller's Website, et cetera, versus offer terms. We would agree that putting offer terms in a terms of service, that's not where consumers are going to expect to see offer terms. So offer terms should not be placed in terms of service because that goes contrary to the consumer expectation. However, terms of service that really relate to the use of the service, or the use of the Website, I.P. protection, things like that, things that consumers would expect to be in those terms of service, that's probably the appropriate place for it to be. But what many marketers have done, and I think where the FTC has had issues, is where marketers have put terms of an offer, or conditions of an offer, in a terms of service, and that's not where consumers would likely expect to find them.

>> MICHAEL OSTHEIMER: Paul.

>> PAUL SINGER: Right. And, I mean, some of what I'll say echoes some of what's already been said, but, I mean, I do think that when we talk about terms material to the offer, certainly terms of service are not the appropriate place to put them. I think that the work that regulators have done has clearly demonstrated a consistent pattern that, no, that's not going to be a acceptable place for it. Now, I will say that, certainly, states have taken actions where, you know, we've looked at sort of maybe differing tiers of what kinds of disclosure needs to be made, depending on the materiality of those disclosures and whether or not it has to be -- Because, at the same time, I think we recognize issues like limited real estate and issues like "you don't want to overwhelm the consumer with everything right there next to a particular trigger." But, you know, if it's material to what's being offered to the specific offer, yes, it needs to be made outside of any sort of terms of service. There may be other kinds of disclosures relevant to visiting that Website, like Linda was talking about, that could be made elsewhere. I think it's just going to depend on, you know, how material it is to the transaction that that consumer's entering into.

>> MICHAEL OSTHEIMER: Okay. We just talked about selling combined with advertising, like on the Website for the Dutch oven. Let's talk about when advertising and selling are not combined. For example, assume that a consumer receives a location-based ad on her mobile device for a discounted cup of coffee because she is near a particular coffee shop. Are there any terms that do not have to be disclosed until the consumer enters the coffee shop, or should they all be disclosed on the mobile device before the consumer walks to the store? Linda?

>> LINDA GOLDSTEIN: Yeah. This is one that's very important to PMA members, because you're really now getting into consumer incentives, consumer offers, combined with location-based marketing. And let me say, just at the outset, that if it's a condition, such as was alluded to in the introductory comments, where the consumer has to make a purchase in order to get the discounted cup of coffee, we would agree that's a material term that has to be disclosed. But I think when we're thinking about what needs to be disclosed in the context of this kind of an offer, there's a couple of important considerations to keep in mind. First, the disclosure requirements really have to take into account the context in which the offer is being presented. Is it a mobile blast that's going to a wide, you know, range of consumers, or is it a very targeted blast that's maybe going to people who are in the daily coffee program, and they get this blast every day, in which case they

already know how it works? And so the level of disclosure that might be required in that context is very different from the level of disclosure that might be required if it's going to consumers who are not familiar with how the program works at all. And then, obviously, it also depends upon what's the nature of the information that's being disclosed. Again, if it's a location-based ad, you probably don't need a deadline date. If you say, "Come in now and get your free cup coffee," because you happen to be a block from the nearest location, there's probably an inherent sense within that offer that this is a very limited-time offer, whereas, in other contexts where you have a free offer, a deadline date might be required. So, again, I think the context of that offer and the target audience is important, and particularly here, because these messages often are so targeted and are being sent to consumers that already have a very strong relationship with the seller, some disclosures that might normally be required in a mass-media advertisement may not be necessary here. And then, again, you have to look at, what are the nature of the limitations and how material are they? Additional cost requirements are going to be important. Is it only available on certain flavors of coffee? That may or may not be material, depending on which flavor it is. If it's the most popular flavor, that's probably not a material condition. If it's a flavor that, you know, nobody's ever heard of and you can only get it on that one flavor, maybe that is a material condition. So I think all of those factors have to be considered.

>> MICHAEL OSTHEIMER: What if it said, "Come to our coffee shop five blocks from you," and the shop wasn't open yet for another hour?

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

>> MICHAEL OSTHEIMER: Sally.

>> SALLY GREENBERG: I think you've touched on something really important, which is, don't tick off the consumers. [Laughter] And one example might be, on your mobile phone, you'll -- would get -- It's hard to say because we're not talking about real examples here, so there's nuance to all of these examples that we -- all these -- discussions that we're having, depending on what the

offers are and what's missing from the information. But if you're suggesting to consumers that they come for a free cup of coffee and when you get there, it says, "Oh, but a purchase is required. You have to buy something for more than $5," you're gonna tick off consumers. You don't want to do that, as a company. There are many other examples of things that I think, as we -- everyone in this room has, you know, tried to take advantage of various offers and, you know, one thing that comes to mind is, I don't think I've ever been able, effectively, to use a coupon for a rental car. There's always a condition. There's always something that isn't -- "Oh, no, no. We can't use that. Sorry." You know, "You came the wrong day," "You came the wrong week." If there's a time limitation, that's, you know -- Again, you're just making consumers angry. And we know when we've been -- had the wool pulled over our eyes. And so I would say, when it comes to these mobile offers, let the advertiser beware because there may be a lot of unhappy consumers if what's promised isn't what's delivered.

>> MICHAEL OSTHEIMER: Svetlana.

>> SVETLANA WALKER: Yeah, I would agree with Sally that this is a really highly nuanced example, right? And what's material is really going to depend on the specific situation in play. So, obviously, the purchase, you know -- conditional purchase of something else in order to get this free cup of coffee is material and should be disclosed, as should probably the location hours and whether there's a limited number of cups of coffee available and perhaps if there's limited franchises in which this offer is available. But say something else, such as the free cup of coffee, can only come in a small or medium, is it material that the large size is not eligible for the free discount? Is it important that perhaps premium beverages are not available for this discount? So let's say you can get a free cup of coffee, but you can't get a soy mocha latte that costs $6 or something like that. It's hard to say whether a reasonable consumer would think that you can get sort of carte blanche for everything available at the coffee shop. So I think in this particular instance, it's really hard to draw sort of a line in the sand as to what's material or what's not material because so much depends on what the offer is, what the product is, and what a consumer in that context would be expecting from the marketer.

>> MICHAEL OSTHEIMER: Paul.

>> PAUL SINGER: So, following up on some of those comments, I mean, I do think that some of the question might be that what's material is going to change from consumer to consumer in a situation like this, right? And, you know, we've been talking generally about FTC principles of a reasonable consumer, which isn't necessarily the same as what state standards are, under their little FTC laws. But, you know, I would say that -- I mean, I think some of the beauty of mobile devices -- right? -- is that they empower consumers so that consumers have information readily available to them. It seems to me like the kind of details that we're talking about that may or may not be material, depending on the individual consumer, are things that you can still make available to a consumer, right? And so, I think that if there's, you know, something in the ad itself that could direct consumers to where they can find all of the details about, you know, the size limitations or, you know, the type of coffee or anything like that, certainly that helps to give them that information, you know, so that each individual consumer can say for themselves, "I want to know, you know, what kind of coffee this is on," and has the flexibility and the ability to look at it. I think it sounds like everyone's in agreement, though, there are some fundamental, core things that are definitely material that need to be disclosed and, obviously, an additional cost is one of them. And I think that's going to be universally true.

>> MICHAEL OSTHEIMER: Steve.

>> STEVE DelBIANCO: Yeah, in the example, I would agree with a lot with what Linda said is that, if it's somebody that's part of a service -- a Caffeine Addicts Club -- and they know that, in that service, they're going to get these pop-up notifications when their location information reveals a participating coffee shop, then for them the level of disclosure necessary is a lot less. They will have accepted some terms of service to join the club and presumably had some experience with it, as they feed their habit every day. But with respect to the notion of a scale, whether we've risen to unfair and deceptive, I think you have to look at the inconvenience and the investment that the consumer makes by relying upon the offer. So, putting aside the Caffeine Addicts Club, if I just get a text-based ad, a pop-up ad, a search-based ad on a page that says, "Come to this coffee shop for a free cup of coffee," if the very ad itself has a click for the disclaimer, well, then I don't have to suffer much inconvenience to learn that there are significant limitations or that the shop itself isn't

open except a couple of days a week. If that's one click away, I don't have to invest very much to learn more. If, however, I don't have any extra information, I literally invest the time to walk several blocks, maybe stand in line, and only at the register am I able to learn of these limitations, I feel pretty stupid about that. It might feel unfair, "That's deceptive." I might never come back to the coffee shop, but I also might file a complaint with the FTC. 'Cause it's like Adlai Stevenson said once -- he said, "There was a time when a fool and his money were soon parted, but now it happens to everybody."

>> MICHAEL OSTHEIMER: I was asked to tell all of you to do something that I have not been doing, which is to speak directly into the mike. Apparently, there are some problems with the Webcast audio. Let's add a nuance that Steve just mentioned. That same example where a consumer gets a location-based pop-up banner ad on their mobile device that says "Free cup of coffee, details." And a consumer could click on that link that says "details," and the details are that you do need to buy 2 pounds of coffee in order to get your free or discounted cup. Does that change -- Do people think that that would be adequate? Paul.

>> PAUL SINGER: Am I the only one brave enough to answer this? No. I mean, I think this circles back to some of the question that we had at the outset -- right? -- about, you know, a material-limiting piece of information needing to be disclosed clearly to the customer as part of that advertisement. And so, understanding limited real estate, et cetera, I don't think that changes the fundamental principle, which is a simple link that just says "disclosure," or something like that, is not going to be sufficient to signal to the consumer the material limitation that you're talking about, which is a significant purchase is required in order to take advantage of the offer. So, you know, there are certainly ways -- even in space-constrained areas, to make a material disclosure that signals it to the consumer. I think, you know, it was true 12 years ago that there were limitations when the original guidelines were being created and, in particular, when it talked about banner ads, et cetera. I mean, the same issues are true today, just in new technology.

>> MICHAEL OSTHEIMER: Linda?

>> LINDA GOLDSTEIN: Yeah, you know, we do believe, given the changes in technology, that we'd like to see some more leniency and some more flexibility, but some of the basic principles that were articulated, not only in the Dot Com Disclosure guidelines but are sort of at the core of fundamental FTC principles, still apply, and one of them is that, in determining whether disclosures need to be made, you have the general principle that, if you're looking at the ad, standing on its own, without those disclosures, is the ad truthful, accurate, and nonmisleading? So if you have an offer for a free cup of coffee but there's an underlying purchase requirement to obtain that free offer, general FTC principles would say that that ad, standing on its own, is not truthful. And I think those principles are as valid today as they were 12 years ago, and I think those principles will continue to be valid in the future. The challenge will be, how can we make those disclosures with more limited real estate? I know those are issues you'll tackle in the next, you know, two panels. But I wouldn't want to leave here suggesting that we need an overhaul of some of these very basic fundamental principles. I think a lot of the building blocks are there, and they're still valid today, and this is a good example of a principle that works.

>> MICHAEL OSTHEIMER: Steve.

>> STEVE DelBIANCO: Since so much of the effectiveness of your Dot Com Disclosure guidelines are in the examples and the mock ads, you have to attache lot of importance to the way you construct your examples. For instance, this example, what Michael led us to, was the word "details." That was the name of the hyperlink. Of course, it was in a text ad. You couldn't have a label. It would have to say, "For details go to "http://" And we're assessing that on the basis of the word "details." And Paul says that, you know, you'd have to disclose everything. It really wouldn't matter what the label said. But in short format, it's text messages and pop-ups, SMS, tweets -- it isn't possible to include all of the terms of the offer. So I would just invite FTC to think about phrasing the examples in a way that lead to best practices. For instance, if the word "details" doesn't convey enough about the investment I may have to make or limitations, then please use other best practices. Use words like terms, restrictions, limitations, requirements. Help to lead to us do commerce responsibly by using the word, that we can still fit in a limited format, limited space available, that conveys the importance of clicking on it. And maybe "details" doesn't go far

enough, but I wonder how Paul would have answered the question if it said "restrictions" or "limitations" or "requirements" instead.

>> MICHAEL OSTHEIMER: And, before I get to the next panelist, throw in the possibility of, let's say, free cup with pound purchase" -- "Coffee purchase with ground purchase." "With purchase." Jennifer.

>> JENNIFER KING: So, just to build on what Sally was saying earlier, as well, you don't want to present a bad user experience to people because you only have a limited amount of goodwill and trust that people have in your product or your company. And if you -- not to limit -- or, not to dismiss the disclosure -- like, the disclosure is important -- but if you're going to present offers to people that end up frustrating them or making them angry, then you've really blown your goodwill. So, from my perspective, you really want a design for the best user experience possible. And so if I have a customer who comes to a store, and, you know, is really -- or, is informed that their free cup of coffee has a whole bunch of other things tied to it that they have to purchase, you've most likely ruined your goodwill with that person. And so it's a poor user experience, and you really need to keep that in mind as you craft these offers -- that you're crafting offers that don't put up so many obstacles that people are frustrated by them, cause then the company doesn't win, either.

>> MICHAEL OSTHEIMER: Sally.

>> SALLY GREENBERG: Yeah. So, I want to agree with what Linda said, which is we should continue to return to some basic principles here, which is, is the ad truthful, accurate, and not misleading? I don't think it's that hard to say, in a mobile device, "purchase required." Little star, "purchase required" right under the free cup of coffee. Restocking fees may apply. Yes, we're talking about limited real estate, but Jen King and her colleagues have given us a real call to action about how this could be done effectively and well and, I think, probably economically. So the question, Jen, after your presentation was, you've given advertisers and companies a lot of information. The question is, is there a will -- the will to take that information and use it so that the consumer has the best experience possible? And I hope that is the case, 'cause there's a lot of great new information out there.

>> MICHAEL OSTHEIMER: Okay. I'll call on Linda and Paul in just a minute, but let me broaden the question, tweak it a little bit, and then you can answer either the prior question that we were discussing or the new one or both. What about consumer products, such as Clorox's, that might be advertised online but purchased at a brick-and-mortar supermarket or pharmacy? When, if ever, could disclosures be delayed, disclosures that are necessary to prevent deception, as opposed to, let's say, CPSC safety disclosure -- when could those disclosures that necessary to prevent deception be delayed until a consumer goes to the store shelf? Linda?

>> LINDA GOLDSTEIN: I'll do a little bit of both. I think it's very difficult to answer that question in the abstract. I mean, I think, again, it goes to very fundamental principles of looking first at the ad itself without those additional disclosures. Is the ad standing alone, truthful, accurate, and nonmisleading or are disclosures necessary to create the truthfulness of the ad? Then, secondly, I think you have to go back to the basic principles of materiality. How material are those -- is that information, in terms of it being likely to affect the consumer's purchasing decision, as opposed to disclosures that may relate to the use and enjoyment of the product? Because that information could more likely be delayed until the consumer reaches the shelf and can interact with the product versus information that's more likely to affect whether the consumer would elect to make the purchase in the first place. But the other thing I wanted to mention, as we're talking about labeling of disclosures, and there's been a lot of discussion -- "Is this label appropriate?" "Is that label appropriate?" -- that perhaps one of the things that should be considered as part of this exercise is the role of industry self-regulation and the possibility of developing some universal icon-- disclosures or icons that would, through consumer education, become more recognizable to consumers, much as is being done in the behavioral-advertising area. So that if it's safety and health information, maybe there are certain icons or labels that could be used that would alert the consumer to the fact that the disclosures relate to that type of information or, if it's cost information, that it relates to that type of information or, you know, more generic types of disclosures that relate generally to terms, conditions, limitations, restrictions, et cetera. Because we have to deal with these issues. We can't deal with these issues in a vacuum. We have to address the issues we're talking about on this panel in the context of the issues that will be addressed later today of limited real estate, multiple platforms that don't support universal ways of making disclosures and

disclaimers. So maybe industry self-regulation can play a role here in this helping to develop labels, icons, and other mechanisms that consumers will become familiar with and be better able to navigate these platforms.

>> MICHAEL OSTHEIMER: Okay. And just to be clear, the question I was asking about was about disclosures that would be necessary to prevent an ad from being deceptive. Is it okay for those to be delayed till point of purchase at a store on the shelf. Svetlana.

>> SVETLANA WALKER: Yes, thank you. This was a really interesting question, I think, for all CPG companies. And just speaking from my personal experience, and I think anyone who works with this subset of products, the space on a product label is really, really precious real estate. So it's almost hard to conceive of when you would want to make a disclosure on a product as opposed to make one in the context of an advertising claim online. It seems much easier to -- for purposes of proximate placement -- to make that disclaimer at the time that the product is being advertised, as opposed to the point of purchase, because in many contexts, it's actually much simpler to include that disclosure along with the advertisement, as opposed to unpackage itself. You know, if anyone's ever worked with a marketing department, believe me, they don't want to hear from legal about disclosures needing to appear anywhere -- on the front, the back, the bottom, the whatever -- of the product package. So just, I think, strictly from a CPG experience, although I'm certainly open to other viewpoints, it would be much more preferable to keep the disclosure with the advertisement itself, as opposed to separate them physically in such a way that a consumer would only see it once they get to shelf.

>> MICHAEL OSTHEIMER: Paul.

>> PAUL SINGER: So, I'll respond to sort of both of the questions that you were talking about before. And first, you know, let me sort of back up to -- back to the free cup of coffee example, right? I mean, Steve suggested that I was, you know, making the comment that all the terms should be there on the mobile device. I think quite the opposite. I mean, what I was suggesting is that there's a material restriction to that purchase, and -- or, to that free offer that's a purchase. And I think that was sort of the key point. And I think others have made that point well, that, you know,

limited real estate is not sort of a good excuse when that information can be clearly communicated, even in the most limited of situations because it fundamentally modifies what that offer is, which was a free cup of coffee. But I think, in terms of when we're talking about all of the various terms and conditions and whether or not all of them need to be made prior to a consumer, you know, going in-store, I think that some of the way that states have tackled it, certainly in more recent multistate actions that we've taken, has been to recognize that you can't necessarily put every piece of information in every part of the term in an ad directly proximate to particular calls to action or trigger terms, and certainly that's true in space-limited ads. And so the approach that we've taken is to have that information available to consumers and that some of the beauty of discussing about this in the online world is that, while it's true you may have space limitations on an ad or a particular platform, you know, the fact that consumers can act access other Webpages and other information, there's really no reason not to have that information available to them and to make it available for them to read all of the information if they want to have access to it before they were to take the action of going into the brick-and-mortar store.

>> MICHAEL OSTHEIMER: And just let me note that the FTC's Deception -- Commission's Deception Policy statement says that you can't correct a misleading ad through a label statement. And sorry, Steve. We were running out of time, and I want to ask a few more questions and then leave some time for questions from the audience. So, the guides give advice regarding disclosures on banner ads. Is that advice still relevant today for current, online space-constrained ads? Does anyone want to answer that question, or should we move on to another question? Linda.

>> LINDA GOLDSTEIN: I'm just going to make two quick points. I think the general principle, which is that, again, if what is stated in that "banner ad" is truthful on its own, it's sufficient to make disclosures elsewhere is still valid. But I think the term "banner ad," quite frankly, is an outdated term. I think it would be more appropriate to -- A banner ad is really -- It's an example of teaser advertising, and I think it would be more appropriate to think about those kinds of messages in terms of teaser ads. Teaser ads are really just designed to create awareness of the product, awareness of the offer. They're intentionally designed to direct the consumer to another location at which the offer is really being present. And once you think of it in that context, as simply almost a traffic cop directing a consumer to a location, I think you can get comfortable, or hopefully you can

get comfortable with the concept, that it is then appropriate to make the necessary disclosures at the point to which the consumer has been directed, where the actual offer is being presented.

>> MICHAEL OSTHEIMER: Steve.

>> STEVE DelBIANCO: I think Linda's right. The word "banner ad," I think, is too limiting. It gets to the notion of an ad that contains graphical elements. It can even contain hyperlinks that include labels, whereas, we said earlier, textual-based ads, which appear far more frequently than banner ads, don't permit hyperlink labels, except in limited circumstances, and they're often very space-limited. So I think ads would be a better way to go. And, Michael, if I could dovetail this with your last question on Clorox, it's not just ads, it's endorsements. Clorox -- fabulous product -- gives a lot of advice online, and there's a campaign Clorox had, which you could get a buck off coupon if you gave some advice on your favorite uses of Clorox. And I saw some -- you can use it to remove mildew from siding, and somebody said you can use it to clean the taps for your home-based brewery. That one sounds a little suspicious. And they're all shown on the Clorox Facebook page, which is fabulous, because right on the Clorox page, you know exactly what's going on, and you can see that Clorox has more information on safe uses of their products. But the thing is, since those were advice given by people, they also showed up on their own wall posts or pages, out of the context of the Clorox Facebook page. So one of my friends posted that advice about the mildew from siding and posted the advice about cleaning my home-brew equipment -- there's no disclaimer there. That's not an ad from Clorox. It's simply advice that's coming from somebody who feels good about the product, and in that case, Michael, you're going to have to rely upon my common sense to understand when not to use Clorox, or read the label on the box, because Facebook can't be responsible. I don't think Clorox can be responsible for that. It's more of our social interaction in life that the advice we get from friends is not always complete, and sometimes it's bad advice. And so we need to be careful about the things we do.

>> MICHAEL OSTHEIMER: Let me ask another question, and --

>> JENNIFER KING: Can I just add one quick thing before you move away from that? Which was just -- Yeah, death to the "banner ad" term. Unfortunately, I don't have a good

recommendation. But just a note. Things like "sponsored search" and "sponsored stories" in a Facebook news feed throw out all sorts of new paradigms for teaser ads.

>> MICHAEL OSTHEIMER: Okay. The next question is related to the prior one, so...

>> JENNIFER KING: Sorry.

>> MICHAEL OSTHEIMER: If a space-constrained ad simply said "3/4 karat diamond earrings, only $99," the consumer could not take any action without clicking on that ad. A banner ad that -- or, a space-constrained ad that a particular car gets 50 miles per gallon could impact a consumer who doesn't click on the ad and they could later have their impression changed about that car. Should the analysis of the adequacy of its disclosure on a click-through or in the space-constrained ad itself be different when a consumer has to click through in order to be impacted by the ad? How and why?

>> STEVE DelBIANCO: Michael, this one was in the 2000 Dot Com Disclosure. There was a handful of examples on the 3/4-karat diamond. And you guys used several pages to show how I had to disclose that 3/4 of a karat in the jewelry trade could be plus or minus a 1/16 of a karat and devoted a lot of attention to that in the FTC's 62 pages of mock ads. And so is that meant to convey that there's a risk of them being fooled that there's less than 3/4 of a karat? And there was quite a bit of attention said as to whether it could be an asterisk next to the 3/4 or a hyperlink underneath the word 3/4. So I guess I'm trying to understand, from that example, from 2000, where do you see that as putting the customer at risk, if they happen not to know that karats are plus or minus a 1/16?

>> MICHAEL OSTHEIMER: Does anybody else want to weigh in on that? Sally.

>> SALLY GREENBERG: I read all those, and they were meaningless to me because I had no idea. I had no experience with diamond weights. Obviously, we're talking with -- or, you're communicating in -- This was in the 2000 guidances. It was so out of context for me, as a consumer who doesn't have any experience at all with buying diamonds -- I'm a public-interest lawyer, through and through -- and so it -- You know, it was repeated over and over again as an

example. But, you know, maybe it falls into the context of, you know, you're working with a group of consumers who actually know a little bit about this and can be easily -- or can be misled unless the true weight of the diamond is -- is communicated on the Website.

>> MICHAEL OSTHEIMER: Let me ask a couple questions that I believe are from the audience. The first question is, "Don't advertisers control the number of required disclosures by deciding how many representations they make that require disclosures to make the ad not deceptive?"

>> STEVE DelBIANCO: Well, I'll start. Yes, of course they do. They control it by limiting the number of triggering claims they include in their ads. And I think your guidance from 2000 was outstanding on that. You asked the advertiser to consider disclosure responsibilities when they are making a claim.

>> MICHAEL OSTHEIMER: Anyone else?

>> SALLY GREENBERG: Can you read that again, Michael?

>> MICHAEL OSTHEIMER: Sure. "Don't advertisers control the number of required disclosures by deciding how many representations they make that require disclosures to make the ad not deceptive?" Svetlana.

>> SVETLANA WALKER: Yeah, I'd like to touch base on that. It's not how many -- necessarily how many representations you make but the sort of inherent complexity that may be surrounding those representations. Oftentimes, imagine a product launch that perhaps is centered around three principle claims, and obviously you would like to tout all three in an advertisement, as opposed to stagger them or choose the best one. And when you make those claims, even if you make a single claim, the complexity of the disclosure really is what governs where it's placed and whether it's in a hyperlink and also its proximity, not necessarily how many representations or how many potential sort of separate advertising claims there may be.

>> MICHAEL OSTHEIMER: Anyone else want to respond to this question? We have another question from the audience. This is a long one. "What recommendations can be offered on Website appearance and contrast, noticeability of disclosures, such as bolding, boxes, font color, background contrast, table of contents, and longer terms are the visual solutions to ensuring that something is noticeable?

>> JENNIFER KING: Yeah. I'll take a stab at that. I think the design community -- I'm not a designer myself, but I'll just say the design community -- would have a lot to say about that. And, again, I think that you can make -- you can offer up design guidelines that are suggestive and not prescriptive. So you don't need to say that all disclosures need to be made Verdana font and 10-point size, blah, blah, blah, blah, blah. But there's a lot research out there that goes directly to how people see what they see and how they perceive things online. And so without having to get into, I think, too many specifics, I think there's a lot of good general guidance that can answer a lot of those questions. I know, as I've thought about these issues, I wish that we could give guidance, too, around user testing and say, you know, if you test with the representative group of users -- I don't know if you could even go as far as to say you've earned safe-harbor status or something. I wish we could come up with something like that, but I'm also a realist in realizing that a lot of more unscrupulous people will take those type of recommendations and twist them to kind of skirt the requirements as much as possible. So I think there's a balance between being overly prescriptive and saying that you need to use bold versus, you know, you need to do something that draws emphasis and draws attention. So, I mean, I think that's at the point now we probably should give more specific guidance, but, again, try not to be too prescriptive, in terms of design.

>> MICHAEL OSTHEIMER: Linda.

>> LINDA GOLDSTEIN: Yeah. I would certainly agree with that, that it will always depend on the context of the ad and other features of the ad, but there are certainly certain design elements that are likely to make disclosures more prominent or more readable. I would leave that more to the design experts and suggest that perhaps additional consumer research, like the type we heard this morning, could be really helpful in that regard. The point I wanted to make here is, I think, to some extent, the FTC could be helpful here in supporting the notion that sometimes less is more. One of

the things we do know is that the -- from enforcement action -- is that the FTC doesn't like long, dense disclosures in long paragraphs with lots of text. That often results from the fact that marketers are afraid of not disclosing all of the information that the FTC might consider material. So there's a real balancing act that needs to happen here, and if marketers could get more comfortable with the notion that less disclosure on the Webpage may be acceptable, provided there are effective ways of directing the consumer to other locations where additional information can be disclosed, that would give marketers the confidence to shorten the disclosures, which, in many respects, might actually result in those disclosures being more readable and understandable to consumers. I mean, we saw that in the case of Magnuson-Moss when the FTC ultimately pulled back from the requirement that all of the material terms and conditions be disclosed and opted for a shorter disclosure directing consumers to where they could get all of that very difficult information, and I think if we could adopt that as a general guiding principle that that may be helpful in reducing the text and making those disclosures more readable.

>> MICHAEL OSTHEIMER: Steve.

>> STEVE DelBIANCO: Just a quick answer. The question might lead FTC to conclude that it should once again, 12 years later, focus, focus, focus on Websites and to focus on Websites where you can do bold and italic and contrasts would miss the entirety of tweets, SMS, wall posts, comments, search ads, as well as organic search results, none of which can do contrasts, italic, or bold. So it would be far better to stick to what you said in 2000 about prominence -- it's one of those three pillars -- and articulate prominence in the context of a Website where you might show an example using italic or bold. But then show us some text-based ads where prominence cannot be achieved through italics and bold. It has to be achieved through the other placement of words that are approximate and appropriately descriptive -- words like "purchase required," to go with Paul's example earlier. That's more about prominence and importance than whether the word is in italics or underlined.

>>

>> MICHAEL OSTHEIMER: Paul.

>> PAUL SINGER: So, real quickly, I would just note that I think even with, as Linda was suggesting, sort of clearer guidance in terms of the less-is-more approach and what information should be disclosed, I think you're always going to have the question of marketers feeling like they need to put everything in an ad, as long as they're still going to be class-action lawyers out there, there's still going to be issues that they're confronted with. And, you know, I'm sure there's always going to be this position and this feeling that that information should be there. And I think that, you know, in answer to your question, given that and understanding that backdrop, that's where some of these things like bold and boxes can really come into play to help distinguish material information. Now, I think Steve makes a really good point, and that's that, you know, in these differing new technologies, that's not necessarily available to you as a way to do it. You know, I think, though, that as the technologies develop and as it changes over time, I think there's going to be ways to call that out and to call that attention. I think the other thing, though, is that in a tweet, in that sort of context, you're limited in space anyway. I mean, you're not going to be overrun with information in that tweet itself. So, you know, the material information can be there, and as I was suggesting earlier, you know, the approach that states have taken is that, in those space-constrained ads, if the material limitations of that offer are there, you know, you can direct the user to somewhere else to get that additional information and to find those additional terms because there's really an impossibility element to it.

>> MICHAEL OSTHEIMER: Sally.

>> SALLY GREENBERG: Yeah. I think what we heard this morning, in the presentation, is that, yes, the formats are changing and real estate is scarce in some of the new formats and it's hard to use different fonts and different colors, but there are some people doing some very interesting research in understandability and readability and things that are -- can be seen and read much more readily than some of the other models that we're using. And I like the term that the FTC could be helpful, because that's what we want our FTC to be on behalf of consumers. And I think the way the FTC could be most helpful is to look at some of the companies and advertising that is actually taking up these new modes and these new designs and practices and maybe play -- give extra play to those advertisers who have really embraced ways of getting information to consumers much

more effectively and readily and not get bogged down in, "Oh, do we have to put everything into -- in a terms of use just to protect ourselves against liability?" Really look for best practices, cutting-edge, that it's going to provide consumers with the kind of information that we know consumers should have that also doesn't bog companies down in the way that Linda and Svetlana and Steve have talked about.

>> MICHAEL OSTHEIMER: Thank you, panelists. This has been a very interesting discussion. We're out of time, and we're going to take a 15-minute break. I hope you'll all return for the discussion about disclosures in social media. Thank you. [Applause]