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For The Record, Inc.
Waldorf, Maryland
(301) 870-8025
FEDERAL TRADE COMMISSION

In the Matter of: )
Internet Legal Issues Task )
Force ) File No. P974102

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Friday, May 14, 1999

Room 432
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

The above-entitled matter came on for meeting pursuant to notice, at 8:40 a.m.

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025
ATTENDANCE LIST

ON BEHALF OF THE FEDERAL TRADE COMMISSION:

Jodie Bernstein Director, Bureau of Consumer Protection
Elaine Kolish Associate Director, Division of Enforcement
Dana Rosenfeld Assistant Director, Bureau of Consumer Protection
Laura DeMartino Attorney, Division of Enforcement
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ON BEHALF OF THE PARTICIPANTS:

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Roy Green Legislative Representative, AARP
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              Associate General Counsel,
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David Clauson  American Association of
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1. Teresa L. Jennings  Direct Selling Association
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3. Beth-Ann Eason  DoubleClick, Inc.
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5. Wendy Schmidt Associate Counsel, Federated Department Stores, Inc.
7. James H. Skiles  Attorney, Grocery Manufacturers of America
8. William C. MacLeod Collier, Shannon, Rill & Scott
9. Mark Uncapher  Information Technology Association of America
10. Jeff Richards  Executive Director, Internet Alliance
11. Phillip C. McKee, III National Fraud Information Center, Internet Fraud Watch
12. Mary Tortorice  National Retail Federation
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ATTENDANCE LIST (cont.)

2 Ronald Goldbrenner General Counsel, Promotion Marketing Association
3 John P. Feldman Chair, PMA Subcommittee on FTC Interpretation, Promotion Marketing Association
4 Kevin Else Associate Counsel, QVC, Inc.
5 Michael Nelsen QVC, Inc.
6 Deborah Hagan Chief, Consumer Fraud Bureau, Office of the Attorney General, State of Illinois
7 Craig Jordan Assistant Attorney General, State of Texas
8 Eric A. Wenger Assistant Attorney General, Internet Bureau, State of New York
MS. BERNSTEIN: Good morning, everybody. Will the Senate please come to order? That means we can all vote later on. So we'll just consider ourselves that way.

Welcome, everybody. It's just marvelous to see all of you here for what we consider to be a really very exciting event at the FTC. I would note that there are a number of people here, and we particularly welcome them, who have been with the Bureau -- with the Commission in the past.

Bill MacLeod, who is one who was in my wonderful job sometime ago, told me he was very jealous this morning of this wonderful event. And I told him that was why we did it.

(Laughter.)

MS. BERNSTEIN: To make sure that he was enormously jealous. But welcome anyway, Bill.

MR. MACLEOD: Thank you, Jodie.

MS. BERNSTEIN: I would also like to note that Commissioner Thompson is with us this morning, Mozelle Thompson, one of our most recent appointees to the Commission, who has been very supportive and helpful of the Bureau's efforts and with the rest of the Commission.
He's also, I think, the youngest -- probably the youngest person in the room, which means he's enormously competitive technologically. So we welcome him and welcome his support of this effort.

I think you all know what this is about today. It's our effort to -- oh. Before I move on, there is another young Commissioner here in the room, Christine Varney, who just came in.

MS. VARNEY: Former.

MS. BERNSTEIN: Former. Yes, yes, yes. But you were so influential, Christine, that sometimes we think you're still here.

(Laughter.)

MS. BERNSTEIN: And we welcome you, particularly. I think you know what our goal is today, and that is to examine really with you and with each other what the application of the rules and guides -- many of which have been in existence for some time -- are to electronic commerce, most particularly the Internet.

I am really very proud of the effort that's been made today, because it really demonstrates, I think, the new way in which the Commission is staying not only competent, but hopefully ahead of the game in terms of applying existing law to this new area in a very informed educated way. We recognize the enormous benefits that
are already coming to consumers, and we want to be sure that what we do encourages that marketplace, makes it better for consumers and at the same time that we carry out our law enforcement responsibilities as we have over the years.

So we're continuing to proceed in the same way I think we have always proceeding, and that is to apply existing law to new markets, new technologies. I fortunately was here in the era when television was pretty new, and in some ways we went through the same thing then. So I consider myself an experienced hand in applying the Commission's law to new media and new markets.

I would like to add one organizational note, and that is that in order to really focus your attention -- our attention -- on what's happening and be sure we know exactly what we're doing as we apply law to these new areas, we have established something we call the Internet Advertising Group. It's within the Division of Advertising Practices, so it's not really a bureaucratic structure. Rather, it's an effort to see to it that experienced lawyers and investigators are focussing particularly on these areas.

We will also, in that context, build a state of the art Internet lab, which will hopefully put us in a
position to be able to monitor in a very systematic way.

I do want to make sure that I thank all of the people here who have been responsible for this marvelous workshop. And I must say, that when you see the stuff that has been created here, creation of new products and new ads, so that you can figure out how to apply the laws to them, and we can do it together. I don't want any of you recruiting any of my people.

(Laughter.)

MS. BERNSTEIN: They're fabulous. They're fabulous and creative. And they're going to stay here with us so that we can continue to stay ahead of the game.

So let me then close my very brief opening here and put for the record at least the names of the people who were so centrally involved in putting this together. And first and foremost Laura DeMartino, who is right there in the middle of the room, from the Division of Enforcement, has played a central role here. She really was the team leader. I don't intend to pass the hat in order to reward Laura today, because we have money in the budget to do that.

(Laughter.)

MS. BERNSTEIN: But she's really done an extraordinary job of pulling this together. And if you
will indulge me for a moment and let me just thank the others who have been involved. Beverly Thomas and Dean Forbes and Faith Veeno of the Division of Enforcement.

Several from the regional offices, Seattle, Boston and others have been involved as well. Orey Lief, Alice Hardy and Dana Rosenfeld in my office. Liz Grant in Marketing Practices. Lou Silverson, the Bureau of Economics. Randy Clark of the Division of Policy and Information. Bruce Jennings and Barry Hutchins in our Office of Information and Technology Management deserve mention for their -- and if they can be helpful today -- for their technical assistance.

Particularly acknowledge Elaine Kolish, who you will hear from for a moment. She did the management of this project, and I know will do an equally wonderful job in leading the discussion today.

And before I close, a special thanks to the Direct Marketing Association and the Grocery Manufacturers for generously providing us with breakfast this morning. That is a new -- in addition to creating an advertising unit here, we also had a break through in receiving permission from the General Counsel's office to receive this nice breakfast from these associations. And we thank you.

(Applause.)
MS. BERNSTEIN: So you see, we're all in this together. And with that, let's get on with the work of the day, because I know it's going to be very exciting and challenging.

Elaine?

MS. KOLISH: Yes. Thank you, Jodie. Good morning. My name is Elaine Kolish, and with me is Laura DeMartino, as you know, who has been the project manager, and Dana Rosenfeld, who is an Assistant Director in Jodie's shop.

Laura, Dana and I are going to moderate today's discussion about clear and conspicuous disclosures on-line. Or at least we're going to try to. I think with this crowd if we can try to get a word in edgewise, we'll be doing well.

Later in the day we're going to have a session on proposed interpretations for the online world, a term such as written and printed, as they are used in FTC rules and guides. And of course the good news is, since we've had a very, very active regulatory review program here, we have 50 percent fewer rules and guides than we did several years ago under Jodie and the Chairman's direction.

Our final session, the one on printed, is going to be moderated by Mary Engle, over there in the back of
the room, Assistant Director in the Enforcement Division, and Alice Hrdy, one of Director Bernstein's legal advisors.

I want to tell you why we're focusing on rules and guides in this workshop today. We're doing so, because for the most part the content of the disclosure is prescribed. Thus our discussion does not have to involve to any significant degree broad issues about what claims in all ads might need qualification, or what the content of a qualification should be.

Although we are not examining the wide array of matters that might be unfair or deceptive under section five, in identifying topics for today's discussion, we have considered how the Commission has evaluated clear and conspicuousness in all types of law enforcement actions, as well as the actual language of the rules and guides themselves.

I want to emphasize at the outset that the purpose of our workshop today, as we've previously noted in our Federal Register notices, is to have a dialogue. We are not planning on prescribing specific rules for making clear and conspicuous disclosures online today or in the future. Clear and conspicuous is a performance standard, and it is designed to ensure that the claim that is being modified has been appropriately modified.
That is, that the net impression of the ad is not misleading.

We would like to learn from all of you more about the circumstances that may affect whether a rule or guide requires disclosure, is clear and conspicuous, and about both the challenges and opportunities that the online world provides for communicating with consumers.

We hope that you will come away with a better understanding of the types of questions that we might ask when we're analyzing an ad, and any future guidance that we might provide will be designed along the same lines.

Now, as we have our discussion today, many of the commentors advocated that in evaluating clear and conspicuousness online that a reasonable online consumer approach be used. No empirical research was submitted by the commentors on this point, however, and the research that we have identified provides no basis for suggesting that reasonable consumers interpret ads differently in the online and off-line world.

But if there is such research, we would love for you to provide it. In the absence of reliable research to the contrary, common sense dictates that we assume that online and off-line reasonable consumers have common characteristics. Indeed, some research already suggests that with respect to advertising, consumer behavior
online and off-line is comparable in at least one material way: consumers don't read every word on every page, whether it's a web page or a written page. This, of course, has important ramifications for advertisers, particularly with regard to disclosures.

The Commission has long recognized that in evaluating disclosures, in many circumstances reasonable consumers do not read the entirety of an ad, or are directed away from the importance of a qualifying phrase by the acts or statements of the seller.

What we want to do in our session today is discuss the factors that are commonly associated with clear and conspicuous disclosures. For example, prominence and proximity to the claim as they occur in the online world. The written comments that we've received show that some commentors feel strongly that disclosures be on the same screen, while others believe scrolling down to a disclosure or using a hyper link should be acceptable.

We recognize that in having this discussion today that not everyone is going to get to express all of their views. And, of course, we had to limit the number of people at the table who could directly participate. Consequently, as we've usually done in the past, we will be leaving the record open for post-workshop comments,
and you'll be able to submit comments for about 45 days until July 1st.

We will be putting the transcript of today's proceeding on the public record and on our web page as soon as it is available, and we know that might assist you in preparing your comments.

Now onto our mock ads. Through these mock ads we can discuss the factors we've mentioned on a practical level. But we're not going to do so all at once. For the purpose of organizing the discussion and developing a record, we will be discussing factors such as scrolling and hyper links and asterisks and bannerettes somewhat separately.

We are confident we're going to have a fun and interesting day. But to keep it from being too, too chaotic, please allow us to call on you, rather than just jumping in. And to keep the record clear and to keep our court reporter from losing her mind, please identify yourself and speak into the microphone.

We are going to move on to the ads, but we wanted to note that we provided a brief description of the ads and the guides that are involved with those ads with the online version. But we thought it might be useful to just briefly review that to set the stage for the discussion and because maybe not everyone here has
had a chance to review that material.

So Laura is going to do a brief introduction for us.

MS. DEMARTINO: Thanks, Elaine. Our first two sets of ads from the FTC fashion jewelry site involve pearls and diamonds. The Commission's guides for the jewelry, precious metal and pewter industries state that when you're advertising or selling imitation pearls, you need to disclose that the pearls are imitation or simulated, so that consumers are not misled about the type of pearls that they're getting. The guides state that this disclosure, the word "imitation," immediately precede the term pearl.

For diamonds, many retailers, and FTC fashion jewelry included, use fractions to make diamond weight claims, fractions such as three quarter carat. But the fraction does not necessarily mean the decimal equivalent, .75. Instead, the fraction is used to represent a range of weights. In that situation, the jewelry guides state that the advertiser and seller needs to disclose that diamond weights are not exact, and disclose the range of weights that are being used for that fraction.

Our second -- or next two sets of ads involve our fake product, Quick DDRIP. Quick DDRIP is designed
to speed up your Internet access. And in our world, Quick DDRIP works for everyone. But Quick DDRIP works better for some consumers than others, depending on your computer equipment and depending on phone line conditions.

So the testimonials that we have in our ads represent the best case scenario. According to the guides concerning the use of endorsements and testimonials, the advertiser needs to disclose the limited applicability of the testimonials to what consumers may generally achieve.

Also in the Quick DDRIP ads on the Quick DDRIP home page, we have an endorsement from D. J. Blackhand. And assuming that D. J. Blackhand is not known to a significant portion of the viewing public, the advertiser needs to disclose that D. J. Blackhand was paid for his endorsement.

MS. KOLISH: Thank you, Laura. Let's put ad one up. We apologize to people in the overflow room that you may only be able to see screen one because of technical difficulties getting screens two and three to display. But that's not a problem for this ad.

This, as Laura mentioned, is an ad for pearl earrings, and there is a one word disclosure, imitation, which immediately precedes the word pearl. And that's
what the guides say you have to do. You have to have it immediately preceding it.

So we thought we would start with an easy example, and see if there is any disagreement about the fact that there is no reason this word -- this disclosure -- can't appear exactly where it is, or whether we should treat this ad differently in the online world. We all agree this is easy? Let's do it? Okay.

Let's move on to ad two, diamond weights.

MS. DEMARTINO: That was quick.

MS. KOLISH: In ad two we have a claim that this is a three quarter carat diamond earrings. And if you look down to the bottom of the page, you can see that there is a disclosure there: diamond weights may not be exact. So this disclosure is on the same screen as the claim that it is qualifying. On the other hand, it's below the claim at the top.

Are you having trouble? It's hard to see, I know. Can we turn down the lights a tiny bit? No? Oh, it's the camera lights probably. We found our eyes adjusted during the course of the day when we looked at these.

(Laughter.)

MS. KOLISH: The question we have for you, is it important to always have the disclosure on the same
screen, or only under certain circumstances to have it on
the same screen? And does it increase its noticeability
and accessibility and effectiveness if it's on the same
screen? And what kinds of considerations may affect
whether it appears on the same screen?

Anybody want to -- Jean Ann?

MS. FOX: We think it's important for material
disclosures to be as prominent as possible to be on the
same screen with the sales pitch. This would be improved
by moving it above add to cart so that the consumer has
seen the important disclosure before they make the
decision to purchase.

MS. KOLISH: What does anybody else think?

FEMALE SPEAKER: Elaine, we mirror that. We
were concerned about it being below add to cart. It
seemed to be too close to a purchase decision at that
point and they had not seen a disclosure.

MS. KOLISH: So in your view, the fact that it's
on the same screen isn't even sufficient. It needs to be
closer to the claim that's being qualified?

FEMALE SPEAKER: And before a purchase decision.

MS. KOLISH: Let me ask you whether it makes a
difference in this ad -- if we scroll down a little bit,
you'll see that there are other relatively important
information about this item here. I mean, this is a pair
of earrings selling for nearly a thousand dollars, and all you know is the diamond weight. And although that might be the only thing of importance to some people, you might want to know what kind of setting it occurs in. Whether it has -- you know, what color the diamond is. Whether it is included or not.

So it's possible consumers could choose to do the add to cart before they read this. But would a reasonable consumer likely look for additional information about this product and therefore inevitably have to see this information?

Jerry, was there something you wanted to say?

MR. CERASALE: Well, yeah.

MS. KOLISH: Jerry Cerasale.

MR. CERASALE: Jerry Cerasale from the DMA. The first thing is talking about what's on the screen that you see, and that depends on the recipient's computer, not on what the ad is. Not on what the -- the only thing you could make sure that is on the screen, I guess, is if you had the disclosure the first words on the ad before anything, because you don't know the size of the screen.

So I'm not positive. I mean, this happens to show on the same screen in your ad here, because of the computer you have. But someone could have the whole thing on one screen, or someone could have just down to
the bottom of the picture on the screen, or even less. So I think the screen itself is a problem for you to make that any part of your rule or any part of your real interpretation because it depends on the recipient. It doesn't depend on the advertiser.

MS. KOLISH: Ron?

MR. GOLDBRENNER: Yeah, I would like to expand on that just a little bit.

MS. KOLISH: It's Ron Goldbrenner.

MR. GOLDBRENNER: If you look at the range of regulation that comes now from the FTC and the states in this respect, where you put the disclosure --

MALE SPEAKER: Could you put the mic to your mouth? We can't hear you. Thank you.

MR. GOLDBRENNER: Where you put the disclosure often demands upon how important that particular disclosure is. So materiality is relative, and prominence is relative, and accessibility is relative. And we need to keep that in mind when we deal with the technology of the Internet, because the ability to do different things -- scroll down, clip to, etc. -- increases your ability to give prominence, to give access, etc.

And so if you set very specific rules, if you say only this is sufficient access, not only are you
freezing the technology, but you're freezing creativity. You're dealing with a whole range of technological capabilities -- as Jerry said, the different size of the screen -- that you really can't foretell. And so I think you're getting into a very difficult area.

And I just want to make a comment about something that was said before about the reasonable Internet consumer. While it is true that the perceptions of an individual of an ad and the content of the ad are the same, what those people who have postulated a reasonable Internet consumer mean is that because you're more familiar with the technology of the Internet -- clicking through, scrolling down and doing all of these things -- that brings an extra dimension to the consumer's ability to gather information. The ability to go to another site and look something up immediately adds to your ability to gain information about the product.

And so when you say and we consider here what are the technological ways we can enhance disclosure or use these technologies to get better disclosure, or not hide things through technology, you have to take into consideration the level of the knowledge of the people who are using the Internet, who are using these computers. How much do they know that they can click through? How much do they know they can scroll down?
And so the reasonable Internet consumer is a concept that you need to consider with respect to technology and how one perceives that. Thank you.

MS. KOLISH: Would you please remember to identify yourselves for the court reporter?

MR. UNCAPHER: Mark Uncapher for the ITAA. Let me expand on that particular point. I think beyond what the reasonable consumer expects, or rather would anticipate, I think there is an expectation on the Internet that information doesn't necessarily have to be on one particular page, that there can be hyper links. And there is this expectation that additional valuable information that the consumer can exercise the choice to move on to will be available on one page.

In that format, quite a part from just e-commerce is something that is available across the board on the Internet. And trying to cram additional information on a particular page really runs counter to that particular expectation of the consumers. And I think actually has the effect of defeating the purpose of disclosure, because, you know, dense text is something that consumers will click through and won't bother reading.

MS. KOLISH: Is there any empirical evidence about how consumers are going to act? Oh. Did a plug
just get pulled?

MALE SPEAKER: Yeah.

MS. BERNSTEIN: Either that or we blew a fuse.

(Laughter.)

MS. KOLISH: One of the things we're interested in is consumer research on consumer behavior online, and if people have that, we would like to see it and, of course, take that into account.

In terms of materiality, let me just comment that because we're talking here about rules and guides, for the most part the disclosures we're talking about are ones that the Commission has already made a decision are necessary to prevent a consumer from being misled. So we're not just talking about any information that might be of interest to a consumer that an advertiser might like to provide -- and certainly hyper links are a fabulous way of doing that.

But we're talking about important information that should qualify the claim so that a consumer isn't misled. And would you be confident if at the end of the day you did a copy test on your web ad, whether the net impression would be appropriately qualified.

So that's one of the reasons we think it's important to focus on how noticeable and prominent these disclosures are and make certain they're not overlooked.
Because as we can take for granted, consumers typically aren't going to read every word, whether it's a web page or a written page.

But I'll stop editorializing. I think Dan had a comment next?

MR. JAFFE: Dan Jaffe with the Association of National Advertisers. What you're talking about is a very significant moving target. I carry one of these. I'm sure lots of people have palm pilots. People are getting information in smaller and smaller equipment, and therefore you can talk about unavoidability, as was discussed in the FTC's notice, but that may be impossible.

Also, the other thing that I think makes this medium different than all the other medium that we've ever dealt with before, or at least significantly more pronounced, is that the receiver of the information has more control over what he sees. I can -- even with this very, very small screen, I can split that screen so that I can be taking notes, or sending information back, or taking an e-mail while I'm seeing something else.

And so I can configure it. However you may say the advertiser should put the information out to the consumer, the consumer now can say no, I'm not going to get that that way. I'm going to make the screen very
smaller or very large.

I saw something in the paper just the other day, which was a telephone -- a hand held telephone that you flipped out and had a little screen, and the screen was no bigger than that. And so I think it's going to be very, very important that we not start asking advertisers to do the impossible.

And the other aspect of this is that maybe when you put something with, you know, color and a click screen, it's more likely that someone is going to look at it, particularly if it's tagged to particular key information than having just a lot of words. Because you're saying this is important, and people are being trained in this area to say, this is important information in a particular area.

MS. KOLISH: Thank you. We would like to get to more about the technology issues, but does anyone else wonder about why as we get older, everything is getting smaller and harder to read?

(Laughter.)

MS. KOLISH: I think Phillip was next.

MR. MCKEE: Thank you. Phillip McKee from the National Consumers League. Many of the previous commentors have been quite correct in stating that we do have a large amount of control as to the way the
information is presented to us. Our screens can be made much smaller.

And so the statement -- as many of the industry representatives have said, insisting that the statement is on the screen can be very difficult to monitor. I can force the statement off the screen if I so desire. What I cannot do if the statement is properly placed, is force myself not to see it prior to placing my order.

So in this case, to look at example number two, I can very easily re-size the screen, so that just because of my personal viewing preferences, I may not see that disclosure prior to placing my order. But if the disclosure statement concerning the weight of the diamond is moved upwards, above the add to cart button, it becomes impossible for me not to see the disclosure statement prior to making my order.

So it becomes incredibly important to consider the placement of these disclosures, not simply in a vague position on a screen, but in relation to the other components of the web site. Be it the hyper link, whether you are considering scrolling, or whether you're considering the ordering information, it has to be considered relative to the rest of the web site.

MS. KOLISH: A good point. I know that people have their hands up. I want to put up a couple more ads
so you can see some additional descriptions. We'll take
down ad one, and we're going to put up ads 19 and 20.

    MALE SPEAKER: Well, there's a jump.

    MS. KOLISH: And then I'll try to call on people
in order. Our little surfers over there are coming up to
-- we could leave up ad one if you -- yeah. I mean leave
up ad two, that's right, and put up 19 and 20.

    In ad 19, which is over here on the right, you
can see there is a disclosure at the top about speed
improvement. And this is the disclosure meant to explain
that the endorser's experiences that follow are not
necessarily the same experience that everyone will
receive.

    On ad 20, however, you see the same disclosure,
and you can see an obvious difference between the two.
In ad 19 it is in blue type. It contrasts well against
its background. And in ad 20 it's in light gray type,
which does not contrast well. And I think -- I doubt
there's any argument that, you know, ad 19 is superior to
ad 20.

    However, I think that people have raised some
good questions about the technology, that there are
differences in browsers and hardware and software that
can make a difference in terms of what consumers see.

    So as sort of a preparatory note, because I
I think this all relates to the prior question in ads you saw, how do advertisers design their web sites so that most consumers are going to see their ad in an optimal fashion? Obviously you are aware that there are different browsers, and you may have some concern and consideration. Are there defaults and, you know, can you plan for your ad to consider the impact of a different browser, or could you evaluate and plan for the prominence of the disclosure relationship to other elements of the ad?

For example, if most of your ad copy was in 12 point type and you had your disclosure in 15 point type, and then the recipient changes their browsers so they don't ever see it in 12 point type, can you still ensure that that disclosure will be in larger type and thus may be more prominent in relationship to the rest of the language on the ad?

So I'll go in order -- unless people want to have different views and don't want to raise hands any more, I'll go with the ones who were up before. Did you, Phillip? Right. You already talked, so --

MR. MCKEE: Yeah. I just had a comment with regards to your statement on point size. As a web master myself, point size is not really a very good way of discussing size on a screen. If you are using a what you
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see is what you get web editor, you can sometimes have a statement that it's going to be in a particular point type, but that's not actually the case.

When you look at the HGMO code, what you're saying is size one, two, three, four, five or six, and it's a relative size statement. On your browser you can set what is a standard font size that you're at. Anything of a number higher than that will appear larger. Anything of a number lower than that will appear smaller.

And so to make any kind of statement of point type as a guiding principle loses its ability to apply in the realm of the Internet. So we need to consider it in terms of relative type size to other sections of the screen.

MS. KOLISH: Well, that was part of my question. Before we move on to other commentors, let me note for people who are standing that there is an overflow room in room 332 if you would like to sit. Although maybe if the cameras aren't here all day, we'll be able to put in a few more chairs.

Okay. Katharina I think was first.

MS. KOPP: Yes, thanks. I just wanted to reiterate what Phillip was saying earlier, that we are dealing with a problem that we have different sizes -- computer screen sizes -- and therefore I think that what
we should learn from that is that we have to move up the disclosures high up on the web page as possible. And at the very least it should be before the purchasing decision is made. It should be disclosed there.

And then there was another point that advertisers should take advantage of the ability to hyper link and therefore that the disclosures -- you know, the hyper links then can disclose more information. And I think the second ad is a good example of that. In fact, it's not that important to have that much information in the disclosure. Like this one sentence here is sufficient to provide a lot of information that can be put in the initial ad and there is no need to hyper link.

And also if the hyper link is very, you know, down and hidden in the page, the consumer might never find out that there is all this information and will never click on that to obtain all the additional information.

MS. KOLISH: Well, we're going to get to some examples involving hyper links in a minute, so we will be able to pursue that point. And I think Jean Ann was -- you don't want to. Okay. Melissa?

MS. MYERS: Elissa.

MS. KOLISH: Elissa. Elissa Myers. Remember to say your name for the court reporter.
MS. MYERS: Sorry. Elissa Myers, President of the Electronic Retailing Association. You know, we read different -- in different languages in different products in different ways. Russian is read right to left. English is read left to right. And so the whole question of prominence and how an Internet page is read is a complex and interesting one.

It occurred to me -- in looking at the example, which is your ad number 19, and the comments that have been made relative to positioning the disclaimer at the very beginning of the page, it occurred to me that if I -- as a consumer looking at that, I'm not ready to absorb that information until I've begun to address the sales message. So the disclaimer has no relevance to me if I'm reading it linearly on the page. I'm not interested yet, because I don't know what it is that I'm interested in buying.

And going back to the earlier ads and the placement above the button that adds the item to the cart, as a passionate shopper both in brick and mortar, from catalogs and online, it's one of my great passions in life, and I wish it was so easy to push a button and consummate the order online. Perhaps it will be one day. But right now all that button does is to take me beyond to another page where I have copious -- additional
information and blanks. So the Internet is a contextual environment, and it perhaps becomes more relevant once I get to the order decision. You don't know -- we don't know looking at these ads what is on the order page. There may be a very prominent statement that says any time you're purchasing jewelry, you want to be very careful about the conditions and here are some of the things you should be aware of.

We don't know that, looking at the ads you have provided.

MS. KOLISH: Right. But we will have an example of that that we can talk about later. I think David Clauson from four A's is next.

MR. CLAUSON: Thanks. Dave Clauson representing the four A's today. In some of the discussion -- first of all, I think I'm one of the few people in the room who actually design this work for many different kinds of clients. I've heard some assumptions today that I would like to challenge.

First of all, we're speaking in very generic, general terms about who the consumer is, how they behave and where things need to be. From our experience with our clients, that is a very, very misleading assumption. The first lesson you learn about marketing on the Internet is that the minute you start to assume that all
consumers behave one way, or that all consumers desire things in a certain way, you're in deep trouble.

What we consider first in marketing online is where is the consumer in the purchase process, and you have many different variables here. In this instance we're talking about diamonds. If we were talking about cars, if we were talking about credit cards, or if were talking about food, you would find that the consumers behave and react to information very differently.

Probably the most generic thing you can say is that the more information you can give earlier on in the sale cycle, in the consideration phase, that is where the Internet has its most value. We have done research with a lot of consumers in various different product categories, and from that research I can at least argue the point that consumers behave very, very differently.

So when it comes to disclosure, what most marketers are discovering, is that the more information about the product that can be put in the consideration cycle, rather than saving disclosures and things like that for just before you buy, actually empowers the consumer and makes the consumer an expert.

If you consider the fact that what the Internet really represents is a lowering of the cost of information, consumers are getting smarter out there
about the information they can get and are empowering themselves. And that's a very important dynamic that marketers need to recognize, that the choice to control the convenience is now in the hands of the consumer. And that is the way the Internet behaves.

So we advise a lot of our clients that the best marketing we know of is to provide as much information early on in the sales cycle as you possibly can. And if you can make that consumer smarter, you actually empowered the consumer to deal with brands who are making you smarter and in that way more effectively.

So many of the considerations about technology and browsers are important issues, but they are not as relevant to the discussion. Most consumers are not out there configuring their browsers in different ways every day. They usually plug it in out of the box and go. The expert techs may want to -- the web masters of the world may want to adjust their browsers and things like that, but most consumers just want to be informed as best they can. But they want the information on their terms, not on someone else's terms, not on the government's terms and not on the marketer's terms.

So as representing marketers, what we need to do is recognize that dynamic and step into the consumer's shoes for a moment and give them as much information to
rely on as we can.

MS. KOLISH: Thank you, David. Carla Michelotti?

MS. MICHELOTTI: Carla Michelotti representing the American Advertising Federation. I want to follow up on what David just said, because it really is a key principle for what we're all going to talk about all day, which is this reapplication of -- I don't know -- 70 some years of consumer protection law.

So for 70 some years, we've had consumer protection law that's been written to protect consumers against media which was out of their control and forced upon them. And so as a result, there were a lot -- there is a lot of information that is commanded and demanded, because the consumer was not empowered. The consumer was not in control.

So in this new media, we've now reinvented the power base between the consumer and the media. And in this empowerment of the consumer, the reapplication of consumer protection, I think we have to look at the goals of consumer protection to provide key information to the consumer before the purchasing point, which it depends on the behavior, as David said, where the purchasing point is. But the consumer must be provided with all the key information before the point that they spend the dollar.
So if you look at consumer protection law and reapply it, with the understanding of the empowerment of the consumer, you don't have to have the demands of placement and location, and you look much closer to what Ron Goldbrenner was talking about with the ordinary, reasonable Internet user, and the education of the Internet user, and the experience of the Internet user.

You know, one of the clues here that would tell the ordinary, reasonable Internet user that there was other stuff to read about, is just that little bar on the side. You know, if you put an eight year old on this web page, the eight year old would go to the bar and go down and see what else is there. It tells the consumer something else is there.

So I think as we move forward, it's the empowerment of the consumer and reapplication of consumer protection law in this empowered society where we can control the media as an overriding concept.

MS. KOLISH: Let me follow up on that for a minute, because a lot of people have talked a lot about that.

MS. MICHELOTTI: The new medium is so interactive and consumers are in control. But when we look to the media consumers have now, they get many -- often get multi page solicitations. They have the power
to read every single word, to turn every single page if
they choose. But what we know is that they don't.

And that the Commission has long decided that
the advertiser has the responsibility of making certain
that the information is placed prominently so that they
see it. That burying it in the middle of a multi page
document, or in fine print at the bottom of an ad, simply
isn't good enough. But you have to assume they're not
responsible for reading every word, that advertisers
spend a lot of effort to draw consumers' attentions to
certain points, and they can be equally responsible for
drawing consumers' attention to a disclosure.

So in terms of empowerment, I think there has
been empowerment in other media, too. We probably don't
think of it. You have the power not to open the
evervelope, to open it and read every page, read the little
sub-pieces within it. And, you know, in terms of new
media, as Jodie was saying, she was, you know, here when
television was in its infancy.

(Laughter.)

MS. BERNSTEIN: That's not quite right.

(Laughter.)

MS. MICHELOTTI: Advertising. When advertising
was really developing, is what I meant to say.

MS. BERNSTEIN: I think I just heard Carla refer
back to my origin -- 70 years?

(Laughter.)

MS. BERNSTEIN: And I would add a more serious comment other than, Carla. In regard to your very good point, doesn't the new medium also empower, if you will, the marketer or the advertiser as well, in the sense that the advertiser or marketer also has more flexibility than in the conventional media, where the limitations are the 30 second spot, etc., etc.

So from that point of view, which I think is valuable to both, it does provide more flexibility to provide more information in a less restrictive media. So in a sense, the power is more balanced between the two.

MS. KOLISH: We have some other people who already put their hands up, so we'll try to call them. Debbie?

MS. HAGAN: Deborah Hagan from the Illinois Attorney General's Office, and the New York and Texas Attorney General's Office, too. In terms of the bigger picture that Carla was talking about, I think we would be very concerned if the standard moves towards material disclosures before a payment purchase decision. To us, that moves the whole information situation from the trigger term to a purchase, which could be many screens and far down the process.
We think that it is still important -- particularly we're talking about rules here in which the Commission has already determined that certain qualifiers are material and that they should be in close proximity to the trigger term. And in particular, we think that based on what's been said here, because of consumers' differing levels of understanding and maybe ability to vary technology, it becomes even more important for a material disclaimer to be in close proximity to the trigger term.

MS. KOLISH: Thank you. I think Phil had his hand up and then we'll go to you, Kevin.

MR. MCKEE: Okay. Just a couple of issues here. One, earlier I had stated the necessity of placing the disclosure prior to the add to cart button on number two. I wanted to make sure that it was very clear that we did also intend that the disclosure should be close to the trigger term, that it not be on a separate screen.

In regards to Ms. Myers' statement about some of the places that she has purchased online, I, too, purchase a lot of things online, and several of my favorite online sites actually have complete profiles of my information located on their servers. And so for me, it is actually as simple as one click of a button and a password and that item is mine and my credit card has
been billed.

So it isn't as simple as all of a sudden you have a screen with a large amount of information that you have to put in. On many stores it has gotten to the point where online purchasing is as simple as a single click.

Also, to get back to one of the earlier questions that you had asked, in regards to ad number 19 and ad number 20, the coloration and the points and the font size is incredibly important. And something that we had noticed in looking over the ads is the necessity of stating that it be clear, that it be concise, and that it be easy to notice.

That can be difficult when creating a web site because of the large amount of control that the advertiser has and the consumer has. If you mandate a certain color, or a certain exact size, it may turn out that that size is smaller than the type the advertiser has chosen to use for the site, or a color that would react quite negatively with the color scheme that the advertiser has chosen.

Instead, an unfortunate need is created to use guidelines that are slightly vaguer, but that more accurately describe the clearness and the ability to perceive it based upon the surrounding background. It
does become a completely contextual concept.

And finally, in regards to Mrs. Michelotti's statement about scrolling, yes. When an experienced Internet user goes to a web site and sees a scroll bar -- for example, the scroll bar on ad number two is not very large -- they're quite likely to scroll down and read what the rest is. However, that same user shows up at ad number 19 or ad number 20 and sees that based on the size of the moving section of the scroll bar, there is a very large amount of information on that page. They are far more likely to avoid the scroll bar.

That's why when you look at advertising sites and you look at online sites, the most successful sites, the ones that are having the largest amount of hits, the gateway sites that are becoming the most popular, they tend to be single screen or simple, small scrolling screens. People don't want to have to wait for a huge amount of information to download. They're going to click away.

People don't want to have to scroll down through everything to get to what they want. They want it right there. They want it now. If that means they have to hyper link to it, that's what they're going to do. But they don't want to have to scroll.

So if you embed that disclosure at the very
bottom of a page such as 19, the vast majority of people are never going to see it, because they are going to exercise their choice to control the media and not scroll through everything.

MS. KOLISH: Well, Phillip, hold that thought, because maybe we'll show an example of that later. Next is going to be Kevin.

MR. DUKE: Kevin Duke with America Online. Just a few points on the discussion so far. I think it points up the need to proceed with care and caution here. Even though we've got ads up on the screen, we're all talking about the same things.

You know, defining our terms is so important here, and that's why I think it's a good idea, the approach the Commission is taking. You know, I know when I read the materials and they were talking about should the disclosure be on the same screen, I took that to mean the same page, and didn't realize they were talking about the display. There is a difference there.

People have been throwing around the idea that, you know, disclosures need to be made before the purchase decision. You know, again, the way people click through web pages and cruise the Internet, it's hard to say what that before means.

And again, there's been discussion about other
media. I know a mail package comes to my house with a
catalog. There is information materials. There is an
order form. The advertiser there is not required to make
sure the order form is the last thing I see and, you
know, that it's stapled to the back or whatever. It's in
the envelope. All the information is there and is
available to the consumer.

And while I think it's important to recognize
and to take advantage of the flexibility of this medium,
we also need to approach in such a way as not to
discriminate against a media and impose rules here that
aren't imposed for other media.

MS. KOLISH: No, we agree. Our goal is not to
discrimination, but merely to see what the applicable
type of clear and conspicuous would be in this medium.
You know, what's the equivalent of saying, you don't have
fine print at the bottom of a written page. Is it buried
fine print if it's at the bottom of a web page.

And to go back to define terms just for a
minute, we use screen to mean what you're seeing on your
computer now, and that a page -- a web page -- could
consist of multiple screens. Is that how everybody else
is understanding it? Carla, you're looking puzzled?

MS. MICHELOTTI: Because I've never -- AOL, I've
never thought about a web page, because of the web page
variation. I can't tell you --

MS. KOLISH: Well, I know it's going to vary. But that's how we were using it here for the purpose of these ads, to say that this is what's on the screen -- is the screen -- and then the page is when you stop -- you get to the end of it however screens later, that's the end of the web page.

Okay. We had some other people who had had their hands up. Jo, you did?

MS. REED: Thank you. Jo Reed from AARP. I wanted to speak in support of the importance of having disclosures up high on the screen very near the claim. And specifically I wanted to respond to Dave Clauson's remarks, which I appreciated with respect to diversity of the audience we're talking about, the group of people who actually use the Internet.

There has been some tendency in the discussions today to talk about the Internet users, the fairly sophisticated person who is quite experienced. Actually, one of the fastest growing group of users of the Internet is older people. And I think we have to realize that we have a very broad diversity of people, some of whom are not at all sophisticated.

And I think that disclosure, like all consumer protection principles, should be geared to the most
vulnerable. So having that in mind, we should apply it very carefully.

MS. KOLISH: Okay. Renee, you were next, I think.

MS. BARUCH: Renee Baruch, Bell Atlantic. We have a concern as a newly soon to be deregulated industry --

(Laughter.)

MS. BARUCH: -- that as such we are going to have to make huge amounts of disclosures to consumers, all of which will be mandated, all of which will be required to be displayed with prominence and conspicuously.

Accordingly, we're very concerned about any standard which would require a display on a single screen. We would like to be able to have as much flexibility as possible to hyper link, to do anything that is appropriate, to bring information to the consumer.

I do think that there are other considerations when designing hyper links and your pages that make required disclosures more easily available to the Internet consumer. Specifically, I think if you create a page with huge amounts of graphics which require a great deal of time to download, you will discourage consumers
from viewing your disclosure.

I think there are different considerations that you have to take into account as we move into this new media.

MS. KOLISH: And I think that's what we would like to do. I think Jean Ann was next, then Bill and then Elissa. And then Jeff.

MS. FOX: I think it was Katharina.

MS. KOLISH: Okay.

MS. KOPP: Katharina Kopp, Center for Media Education. I just wanted to follow up with what Kevin Duke was saying. I think actually that the Internet is a different medium and that there should be different standards that apply to the Internet.

Obviously on the Internet you can order directly immediately, and that puts it in a different category. I mean, it's different from television. It's different from the print that you get in the mail. So I think we need to take that into consideration and have stricter standards here.

MS. KOLISH: Okay. There's a voice for a stricter standard. Bill? What a nice lead in to Bill.

(Laughter.)

MR. MACLEOD: Thanks, Elaine.

MS. KOLISH: If I can anticipate what you might
MR. MACLEOD: This is Bill MacLeod from Grocery Manufacturers of America. We are mixing some standards here as we're talking about them, and I think that can get very dangerous, especially in the Internet context. We are talking about design standards, and we're talking about performance standards, almost as if they are the same thing.

The ultimate performance standard, of course, is that the advertisement or the message on the web site not deceive. Clear and conspicuous is kind of a performance standard, but it starts to mix elements of design. Proximity is almost entirely a design standard. It is a prophylactic that is designed to make sure that people get information.

I have heard a number of suggestions here as to why the standard -- or why the disclosure, ought to be high in the screen or ought to be near the particular representative to which it applies. And there are other ads that you have coming up pretty soon which I think may even be better under some Internet circumstances of getting this information to consumers.

When we are talking about design standards on the Internet, that is when we are at the most danger of
designing out of the Internet the effectiveness that this medium can offer. And I think it will be useful to look at these other ads as they come up, and we can ask the question, is something actually better for consumers when it is not proximate in the old paper or TV sense, but it is much easier to stumble across when you are winding your way toward the purchase decision.

MS. KOLISH: Well, let me just note that in terms of design versus performance standards, you know, we're mindful that you can lapse into design. And that's not the intent. We think when you're using the word proximity, it really is performance. It's not saying it has to be immediately next to, or within three words of. It isn't very specific. There are still leeway about how close is close, and how close does it need to be.

Anyway, sorry for the editorializing. Elissa, I think you were next?

MS. MYERS: I know we're talking about commercial applications for the Internet now, but as I was sitting and listening, I was thinking about statistics. I'm a statistics junkie. I love research. And I was thinking that when I am surfing around -- searching around -- different statistical sources, if I find a set of statistics that is relevant to my purposes, then I want to find out all of the disclaimers and the
facts and the information about how -- where those
numbers came from and how they were created. But until I
find the numbers, again, the background is irrelevant.

Second, just -- I'm not sure what the
implication is, but adding a layer of complexity to the
discussion, we've so far been talking about the Internet
as a computer experience. And we believe that the
Internet is rapidly going to become not a one-on-one
consumer computer relationship, but a multi person
relationship via the television. And I think that adds a
layer of complexity.

And then finally, Phillip, I know what you mean
about storing data on your credit card and so forth. But
it would scare me -- scare the bejesus out of me, if
you'll excuse the expression, if I had no other
alternative than to click, because my hand so often
slips.

So again, I hope that we can keep thinking about
not only the consumer protected in terms of the offer,
but in terms of the whole transaction. What is the final
outcome of the consumer relationship to the purchase.

MS. KOLISH: Okay. Jeffrey is going to be next.
But I was just going to add, in terms of you mentioning
television, that when the Commission was first dealing
with television ads long ago in the 1970's, it actually

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issued a policy statement on clear and conspicuous for television ads.

And one of the requirements there, one of the pieces of advice, is that no matter what the size of the picture tube, the lettering of the disclosure has to be in a size large enough to view it. So in a way, you know, 20 or 30 years ago the Commission already dealt with a new technology in advertising medium and said, okay, advertisers, you've got to figure it out.

So keep that in mind as we're talking. You can go on, Jeff.

MR. RICHARDS: Thank you. Jeff Richards, Internet Alliance. You know, so far in our discussions here, and this is an important dialogue, we're still assuming -- we all have our old media hats on. It's so hard to break through. Each of us here in this room is not only a potential consumer or an actual consumer via the Internet, we're also all potential advertisers individually as well.

And we all know the explosion of advertising and sales that are occurring between individuals. We all know the impact on traditional and even classified advertising that may occur. All kinds of issues are at stake here. But our guiding principle here needs to be simplicity such that each of us can be appropriate
advertisers as well as consumers, because that's what's
going to happen worldwide.

MS. KOLISH: Thank you. Ron?

MR. GOLDBRENNER: On behalf of the advertisers
who I represent, I think we have to keep in mind that the
advertiser is engaging in Internet advertising or selling
to accomplish a specific purpose. And I think it's fair
to say that we should preserve to the advertiser and/or
the seller the fundamental benefit of what he does
primarily.

So a lot of what I've heard, unfortunately,
seems to me to require disclosure over the advertiser's
desire to use this media properly. The most important
thing to people advertising on the Internet now, and it
is statistically supportable, is to get the visitor to
come to the site. The second most important thing is to
hold him at the site, to make him go through the site.

I think the Commission and everybody who
criticizes or comments upon what we must do on the
Internet has to keep that in mind. And you have to
measure what you finally do against that and say, am I
destroying those values. Am I going to destroy the
ability of the advertiser to capture and hold people by
the manner in which I require these disclosures, by the
size and all of the rest.
How can we accomplish a full and fair ad? A full and fair ad is not one that immediately says don't buy this product because, or be leery of buying this product because. We all would agree that a fair context is that the advertiser should be permitted to get his message across to some degree initially.

And so, again, measure what you're going to do against some kind of ability for the advertiser to do that.

MS. KOLISH: Of course. I mean, we all agree that the advertiser, you know, has the right and should make advertising claims. In fact, if there is not claim, there is no need for a disclosure.

(Laughter.)

MR. GOLDBRENNER: That's where we don't want to wind up.

MS. KOLISH: Right. We're not talking about --

MR. GOLDBRENNER: And with respect to what you said before the proximity of disclosures and print and all of the rest, that's true. But we have a variety of disclosures in print. Some of it appears in the bottom in small type or on later pages, and that is permissible.

So again, you have to measure the requirement for a particular disclosure. How important is it that it be up front. Can it be later on. Can it be just before

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the order. Why must it be right after the trigger. You can do any of those things. You have to have a good reason for them.

MS. KOLISH: That's right. We agree and that's what we want to talk about. You know, do all disclosures need to be in the same place. But remember that the purpose here is so that your ad isn't misleading, which would be bad for you as a business if consumers were misled.

MR. GOLDBRENNER: Absolutely.

MS. KOLISH: I mean, Bill probably knows from having represented jewelry people before that consumers who bought a three quarter carat diamond and later had it appraised and found out there was only 70 points and not 75 points, are real mad. So that's why if they don't see the fact that oops, there is a range here. It's not necessarily going to be -- guaranteed to be 75 points on the dot, that's going to help ensure that you don't have really angry consumers.

MR. GOLDBRENNER: We're all talking about achieving the balance.

MS. KOLISH: Right.

MR. GOLDBRENNER: And all I'm asking is that -- I think the primary element of the balance ought to be that first and foremost the advertiser be guaranteed a
shot at the consumer first and a shot at holding him.

MS. KOLISH: We agree. We have some other people who had their hands up first. Dave Clauson, did you still want to speak?

MR. CLAUSON: Just a quick comment on comparing media. It's a very fuzzy arena. In considering design of a web page or a screen, the first thing you have to think about is that there is an information architecture that we consider. There is a flow of information that the consumer wants and goes through before they come to even consideration of whether to purchase or not, and that is critical.

And even though we mentioned that this is not about art direction, when you talk about where disclosure buttons need to be, that very much is our direction. So I just want to be careful that we're not misleading anybody here.

The second thing is that -- well, it is a new medium and to take Katharina's point, you can buy -- you can also buy on 800 numbers on a screen. The Home Shopping Network is very adept at doing that. There are many other mediums where immediacy of buying is very real.

I think what is different here is that because it is information based, the Internet actually is a
better opportunity to have more informed buyers. The points that were just made a moment ago about where information needs to be in disclosure is important. It does need -- the advertiser needs flexibility to respond appropriately to the individual consumer of his or her product.

So if I'm buying a car, where I need to disclosure information is very different than if I'm buying jewelry. And I would not want to see us mandated to saying this is the one and only place to have disclosure and have it be uniform.

MS. KOLISH: Well, Dave, let me draw on your advertising expertise for a minute, since you mentioned information flow. Do you think an add to the information flow isn't good, that you have, you know, the weight of the diamond or its size, then a price, a shipping weight, add to cart and then disclosure, and then if you scroll down more information?

I mean, is this just bad information flow?

MR. CLAUSON: That's bad information flow. It is.

MS. KOLISH: So how would you have done it differently, you know, having the information flow work well and having the disclosure work well?

MR. CLAUSON: You would want at the top more
information about diamonds, something that the consumer language -- is in the language of the consumer that they understand, or if you click there you would have all of the information about diamonds and then back to the page.

MS. KOLISH: Do you mean like information that these are classic diamond earrings, their sparkling design, round, six prong, you would have moved it up some place in here?

MR. CLAUSON: Yeah. I would have -- what you would want on the page -- and the point was made earlier -- is that simplicity of information delivery is the key. That on this page where we are talking about price and those kinds of things, you're assuming that a transaction is going to happen here. We find that that is usually not the case.

The consumer will come to a page like this in consideration mode. So what you would also want to have on here is maybe a bar at the top that says more about diamonds, how to evaluate a diamond, diamonds come from different places and have different capabilities, so the consumer has the ability to go back and drill down into the information as he or she feels they need to.

So in terms of selling, again, this is providing information. I wouldn't use the term disclosure. It's empowering the consumer when they are at this point in
the consideration cycle to either drill down more, be
informed more, and then come back. And then if there is
a formal disclosure that needs to be there, that would
probably, you know, be a matter of debate about where
that needs to be.

But I think again, assuming that everybody
responds the same way to a page is a big mistake.

MS. KOLISH: Okay. I think Teresa was next.

MS. JENNINGS: I would also agree with David.

With your ad right here, it kind of builds on the point
that I wanted to make, that the consumers are going onto
the web sites -- I'm Teresa Jennings with the Direct
Selling Association, by the way.

The consumers are going on the web site not
necessarily just to buy something. They're going on
there to be entertained, to do research, to find out
information that they want to share with their friends,
and maybe they'll come back next time or the next time
after that. We have a responsibility to give them what
they want, or they won't come back.

And we want to hold them there, but we also want
to give them the appropriate information at the time that
they're ready for it, and not just pretend that it is a
newspaper ad where there is the picture, there is the
price, there is the information. It truly isn't like
that here.

And I think we need to use this medium in the way to get the consumers the information that they want at the time they want to have that activity appropriately, but also, again, make it easy for them to do research and to get the entertainment they want.

MS. KOLISH: Thank you, Teresa. We're going to go to Elizabeth Wang, then to Phillip, then Carla, then John, and then I would like --

(Laughter.)

MS. KOLISH: Remember your order. Try to keep it short, because then we're going to move on to scrolling after that. So we will have opportunity to have more debate as we look at some different ads in different contexts.

Okay. So Elizabeth -- no, you don't want to talk? Oh, I'm sorry. Then Phillip?

MR. MCKEE: Okay. What I want to do is to go back to Mr. Goldbrenner's point about allowing the advertiser to make his or her point concerning the product, to make the sales pitch prior to being forced to make a disclaimer that might make the consumer leery of purchasing.

If we use ad number 19 as an example, you look at the top and you have the menu bar, which shows the
layout of the site structure essentially. The home page for this single product web site is going to be where the initial product pitch has been located. You're going to have something similar to, say, ad number 16B, for example, or any of the 16 series of ads.

You're going to have this home page. It's going to give you a quick blurb about it. It's going to tell you what has been happening. Then the consumer will look at the menu bar and say, oh, let me see what other people have purchased -- have experienced. Click on that and go to this other page. They already know something about the product. They've already read the initial sales pitch. And now they've decided they want to go read some testimonials.

At that point, having a disclosure prior to reading the testimonials does not deprive the advertiser of making their sales pitch. They have made the sales pitch. There is nothing at all wrong with insisting that prior to testimonials, they be told that these testimonials may not represent what their experience is going to be in this case.

And the same situation applies to anything else. If you have links that take you deeper into the information, the consumer knows where they're going. They don't need to be not told the disclosure concerning
that information until well afterwards.

MS. KOLISH: Thank you, Phillip. Then Carla, I think you're next, and then John.

MS. MICHELOTTI: Carla Michelotti with the American Advertising Federation. I think that we -- someone down here was talking about how hard it is to take off the hat of the old medium. We continually are talking about geography here, folks, because we're talking about the geography in a two dimensional world of paper, or even the flat world of a television screen, and in the digital world, where there isn't any paper, there isn't any two dimensions.

We're into a cyber space world. It's like the movie Matrix, you know, and there's a depth to it. And you go deeper and deeper and deeper, and it's very hard to be talking about geography. And when I say geography, I mean the placement, the location, the before and the after.

And I'm here representing AAF today, but I'm going to quote from the DMA comments, which I pulled off the web, because they -- I thought it was really good what they had said here, which is --

MS. BERNSTEIN: That's an endorsement, Carla?

MS. MICHELOTTI: Well, we're a member of DMA, too, Jodie.
MALE SPEAKER: So it's a paid endorsement.

MS. MICHELOTTI: Yeah.

FEMALE SPEAKER: Paid by moi.

MALE SPEAKER: There's disclosure for you.

MS. MICHELOTTI: But the standard -- they were talking about that DMA believes that a disclosure should be easy to find, easy to read and easy to understand. Easy to find, easy to read and easy to understand, with just the value of the disclosure going to a value based standard, going to the goal of consumer protection and not the geography of where it appears on an individual screen.

MS. KOLISH: Well, we think those are great goals. And the question is, what does easy to find mean to different people. And, you know, some people -- well, I think we'll have disagreement about that.

MS. MICHELOTTI: You know what, I had one more sentence which I forgot.

MS. KOLISH: I'm sorry.

MS. MICHELOTTI: Which you reminded me of, Elaine. And it's also very premature to allow -- you know, the technology is developing. The creativity -- the people -- I don't know how many people here have ever
developed a web page. I never developed a web page. The creativity is spanning geometrically with the technology, and it would be very hard to tie down specific rules, regulations and guidelines that are going to become outmoded or outdated very quickly.

MS. KOLISH: All right. Just remember, we're not talking about prescribing specific things. If anything, we're talking about types of questions that might be asked, like we are doing today.

Anyway, I keep editorializing. John, you were next?

MR. FRUEHE: John Fruehe from Dell Computer. One of the dangers that we have here is that we're evaluating web pages in a vacuum. I'm looking at one page and I'm making a judgment about some type of disclosure, but I don't know what's happened prior to that.

We do a lot of research at Dell, and one of the things we found that's typically is that someone comes back to the site five or six times before they make the purchase. The average visit is somewhere between eight and 15 pages. So if you start to do the math on that, people are looking at, you know, 50 to 75 web pages before they make the decision to make the purchase.

And I think this is something that is extremely
important that we understand, and that we don't go down a path of saying, we have to, you know, prescribe to these particular specifications. Or we're going to take this one path for the consumer and, you know, this is the path that they have to follow in order to make the purchase, but we have to be flexible in the way that the customers want to buy.

We find that they come back. They comparison shop. They go around and check out different manufacturers. They probably do more research as the price goes up. You're probably less likely to find someone making an impulse buy on a thousand dollar pair of earrings than on a book. I've got a one click buy with an organization that sells books on the Internet. I would never do one click buy with jewelry.

So we have to look at things in context of the selling process also.

MS. KOLISH: That's a good point. Is that research that you mentioned something that you could submit for the record?

MR. FRUEHE: Pardon me?

MS. KOLISH: Is that research that you mentioned something that you could submit for the record that we could all look at?

MR. FRUEHE: Most of it would be confidential
Dell information, but we would be more than happy to
share what we can with you.

MS. KOLISH: Thank you. We would appreciate
that. Okay. Let's go to some -- Elissa, did you want
the last comment on this and then we'll move on. Because
I'm sure people's comments are going to be relevant to
lots of other ads, too.

(Laughter.)

MS. MYERS: Again, just tagging onto a couple of
things that were said. Just a reminder that in this new
media you're talking about -- when you're looking at the
Internet on television, you're talking about multiple
people in the audience potentially with only one driver.
Typically.

MS. KOLISH: Good point.

MS. FOX: Elaine, could I add one point?


MS. FOX: Jean Ann Fox, Consumer Federation of
America. As I recall your rules, an awful lot of the
information that you want to be sure consumers get is
cautionsary. It is not the information they're
necessarily searching for. If they knew they needed to
be cautioned, you wouldn't have required the advertisers
to tell them.

So it's not as if you're looking for how big the
engine is the car you want to buy. It's that you need to be told some cautionary word about the claim the advertiser is making. So there is a tension here between what they want to tell you and what you think they ought to tell us.

I also think we need to bear in mind on the question of how sophisticated consumers are, that as a new medium is being launched that is supposed to appeal to a mass market, we need to write the protection in early rather than allow problems to develop and have great consumer disenchantment later. We should have learned something from the 900 number debacle, from the alternate operator service problem with telephones, and with all of the other new sales methods that have taken place.

We believe it's in everyone's interest for consumers to feel confident when they shop in cyber space, and that it's in the advertisers' and the marketers' best interest to find every way possible to fit what they are doing with the Commission's requirements.

MS. KOLISH: Thank you. Let's move on and put ad three on the screen. We're going to look at some issues that involve scrolling, which we've already talked about a little bit. But some of these ads will bring it
to a point more closely.

A lot of people have talked about scrolling and how it is part of the Internet culture, and therefore scrolling down to reach a disclosure should be permissible. What we would like to do is explore what circumstances where scrolling might be acceptable, and ones where maybe it's less desirable, and see if we can come up with some principles for distinguishing the two, if possible.

So in ad three you'll see that here we are with our three quarter carat diamond earrings. And if you would scroll through this ad, please? Keep going. Keep going. Oh, look. There's a disclosure at the end. Here you have to scroll, as you can see, beyond a fair bit of white space.

Are consumers likely to keep going when they hit white blank space? And, you know, in general what factors are going to affect whether a consumer will continue to scroll. Now, some of you may think, oh, we just made this up. But we saw this on our surfing of the web, and so we thought well, it happens, so let's talk about it.

People have comments there? John?

MR. FRUEHE: Yes. Contextually what you want to do on a web page, is you want to have something that
breaks the visual plain. If you look at all the pages on
our site, we've got -- the left hand column is a dark
blue column that will break the plain. So if somebody
looks at the screen, they see that this column goes down
to the bottom and it does theoretically continue on.

Or having the text at the bottom on some of the
others that you had up, where it's actually at what we
call the fold, which is the bottom of the screen, you
actually see the text, a partial line of text. It's a
visual indication that there is something below.

So having some type of visual, either broken
text or some type of line or something that helps show,
are all ways that you can help encourage people to
scroll.

MS. KOLISH: What do you mean by plain when
you're talking about that. Do you mean what they're
actually just seeing at the moment?

MR. FRUEHE: What they're actually seeing. When
you had the page up, you couldn't see that there was text
below. Because of the visual plain, it was a very clean
line across the bottom. But if there was something to
cut it, that may give an indication to the consumer that
there is something further down and to continue
scrolling.

MS. KOLISH: Okay. Carla had said earlier that
because there is a scroll bar here that consumers would
know that they could keep scrolling. Is that really
reasonable to, you know, assume here?

MR. FRUEHE: I think that you probably couldn't
get to this site if you weren't familiar with the concept
of clicking on hyper text or the concept of scrolling.
It's probably fairly difficult to get this far into a
site on the Internet.

MS. KOLISH: Phillip and then Dave and then --

MR. MCKEE: One, I do think it is -- it is
fairly reasonable to assume they understand how to
scroll. As I said earlier, however, that has negative
consequences. They can see a scroll bar that's very
large and decide oh, there's nothing there.

They are also used to the concept that if you
scroll down just a little ways after you've gotten the
hint, as Mr. Fruehe has said, that there is something
else down there, that you've found something that has
broken the plain, be it a color bar or just the top of
the line of text, then you know that there is something
else down there.

If you begin to scroll down the page, and you
just get white space after white space after white space
-- something that I've seen on several sites is, all
you've got is a bunch of empty space until you get down
on the bottom. And oh, great. I really wanted to waste
my time scrolling down so I can read the copyright
information. That's exactly what I wanted to do with my
time today.

Some people after they see that white space will
assume it's lazy coding. Poor site design. Just a
really stupid advertiser. Something along those lines.
They're not going to assume that there is something of
use down there. The clues that are normally provided by
a good e-commerce site are the ones that the
representative from Dell Computer has mentioned. There
is something to lead you down.

Something else that was just brought up to my
attention regarding these sites, unless we're to assume
that where it says FTC Fashion Jewelry Number 3 there's
going to be a menu bar with scroll -- with buttons to
take you to other sections of the site, frequently what's
going to happen on a site of this nature is that the
consumer will have scrolled down just a little to get rid
of the logo up there to try to get a nicer fit on the
screen of what they're looking at.

And so what we might be seeing here is not quite
what a consumer might be looking at. It would just be --
just a little bit enough down. So in this case you might
see that.
MS. KOLISH: But you still don't see it, because I have disclosures.

MR. MCKEE: You don't see everything.

MS. KOLISH: Yeah.

MR. MCKEE: You don't see the disclosure, but you see a little -- you would see something slightly different. And we do have to take into account the scrolling behaviors out there. But like I said, there are negative consequences to scrolling.

MS. KOLISH: That's right. Well, the FTC fashion jewelry is a one product retailer.

(Laughter.)

MR. MCKEE: All right.

MS. KOLISH: Dave, you're going to be next and then Kevin.

MR. CLAUSON: Could I ask the people controlling the screen on the left -- could you move it all the way to the top, please, because I think this illustrates a perfect point.

First of all, no disrespect to the people who designed the screens, but you won't make it as an information architect in our firm today.

(Laughter.)

MS. KOLISH: We'll keep our day jobs.

(Laughter.)
MR. CLAUSON: Can you take the screen on the left and just bring it down just a little bit? Right there. Perfect. If you look between the left and the right, this is a classic case of what you might get on the same screen with different information designs or different technology issues.

If the consumer on the left is reading that screen, chances are when they get to the end of the paragraph, they will not necessarily be inclined to scroll, because the information architecture of that page suggests that that is the conclusion. And if you look on the right, there is information even in more bullet form, but just the essential price of the diamond earrings there. On the other hand, in this case because there is no copy, you actually might be more inclined to scroll on the page on the right.

So again, information architecture is science and design and creativity, and it has to have enough flexibility to be adaptable to the needs of the audience who this is being designed for. So in terms of whether someone is scrolling or not, I think the gentleman from Dell hit it right on the nose. If you want to convey more information, you need to suggest to the consumer in the easiest way possible that there is more here and it's your choice to go down more, if you would like to.
But in design here, this would be just a very straightforward design. And on the left in particular, and on the right, I would want you to buy right now. So again, scrolling is a very nebulous science, and to assume that people scroll the same way or for the same reasons is a huge mistake.

MS. KOLISH: Thank you, David. We accept your criticism about our design.

(Laughter.)

MS. KOLISH: All I can say in our own defense is that we borrowed liberally from sites that we visited.

MR. CLAUSON: I would comment that I thought you did a very good job in showing the breadth of creativity on the web.

(Laughter.)

MS. KOLISH: Kevin?

MR. DUKE: Kevin Duke from America Online. Some people have been talking about, you know, the reasonable Internet consumer or reasonable consumer. There is sort of one in between, and that's a reasonable computer user. And anybody that has used a computer or, you know, typed half a page in a word document, has seen a scroll bar. And we've seen that the appearance of a scroll bar is a good indication that there is more.

And again, there's been discussion about, you
know, do people really go and reset their defaults and
their browser or change their fonts. One thing people do
do is they use -- they work in different size windows,
and whether a scroll bar is even going to appear, depends
on how big their window is. Whether you have, you know,
expanded the window to take up the whole desk top, or if
you, you know, are using the Jargon Multi Tasking and
have two windows open, the windows are going to be much
smaller and you're probably going to have to scroll
through everything.

MS. KOLISH: Right. I know, Ron, you have a
comment. I want to put up this other ad, ad 12. You can
leave ad three up, if you want. Oh, no, just put ad 12
up. This is the Quick DDRIP ad. And you'll see if you
scroll down through this, I think as you would, because
you want to see more about it, you'll see on the right
hand side this endorsement from D. J. Blackhand, who is
just a great guy and has won lots of games.

Somebody had mentioned earlier that other stuff
-- well, John, you had. That if there is other
information on the page -- scroll back up and let's go
through it more slowly. If you're looking at stuff that
is of interest to you, and all of a sudden you're in the
middle of this endorsement, you might keep going if
you're interested. If you stop before you read very much
of it, who cares. You don't have to know he's a paid endorsement.

But you're likely to get through the whole thing. Is this the difference -- an importance difference between this and ad three, the jewelry ad, where there is tons of white space?

MR. FRUEHE: Absolutely. Yes.

MS. KOLISH: Okay, good. Let's just put up ads 19 versus 21 now. And this is, again, the Quick DDRIP ad with the pages of endorsement. As you saw from ad 12, that was the home page where there is a menu. You can go -- you can click to see what satisfied customers have to say about Quick DDRIP.

And we have in ad 19 that the disclosure is at the top. You've seen this one before. And on ad 21, just scroll, scroll, scroll. Keep going. Keep going. Keep going. You see there is a disclosure at the end.

And some people -- I think Phillip mentioned how if you had clicked into this page because you had said oh, I want to see what satisfied customers have to say, maybe you would notice this. But does everyone agree that at the top of the page, you know, it's good enough here?

I see a lot of heads being shaken yes. Okay. So we'll not talk about that. But -- no, you're not
agreeing, Bob?

MR. GOLDBERG: No, I was agreeing.

MS. KOLISH: Oh, you are agreeing.

MR. GOLDBERG: Absolutely.

MS. KOLISH: Okay. Great. What about in ad 21, where you have to go to the bottom. Other people have said well, you know, at the top I'm not really ready for that information. I'm not interested enough yet. It's only going to be relevant to me later on in the process.

Is this good enough where consumers have to scroll down, in this instance seven screens of information, the equivalent of four written pages? I don't know whether you guys read these endorsements, but they're hysterical, I think. So maybe you would read all four pages of them, but maybe you wouldn't.

Is it good enough when it's at the end under these circumstances? All right. We'll let Ron, and then Elissa and then Phillip.

MR. GOLDBRENNER: There is a very old joke, older than my --

MS. KOLISH: Okay. Identify yourself first.

MR. GOLDBRENNER: This is Ron Goldbrenner and I'm with the Promotion Marketing Association. There is a very old joke about a boy scout who helps an old lady across the street, and she's beating him with the
umbrella all the way. But there's traffic and he perseveres and gets her to the other side. And he says, you know, I was just trying to help you. Why are you beating me with your umbrella? I was just trying to help you get across the street. And she said, because I don't want to go across the street.

So we have to keep in mind the consumers' preferences -- the consumers' choices. We're talking about a spectrum of making information available. Do we just make it available somewhere. Do we make it available at the right place, at the trigger point of the order point. Do we make it unavoidable so that he absolutely can't miss it no matter what. Do we make it that he has to assimilate it. He has to sign a statement saying I read this, and I agree, and I understand.

So there is a spectrum. And where you put a particular disclosure on that spectrum depends on how material it is and how important it is. You have to analyze what the particular disclosure is.

We seem to be ignoring that issue, and we seem to be talking about disclosures with the same weight. And that's not true, because you just said you have to scroll down seven pages. Well, we permit a lot of disclosures to be made at the end of very long ads, or at the end of very long direct mail presentations, or at the
end of commercials on television, or at the end of a radio commercial.

So it's not such an easy decision to say that just because it's at the bottom of a page it's wrong. And I'm not making a judgment on this particular ad. But again, I think when the Commission decides how to do this, you have to keep that spectrum of availability. Really it's a spectrum of information delivery. How important is this piece of information to be delivered, because that's going to determine whether it can go on the bottom, or right next to, or on the top.

MS. KOLISH: Okay. We're not trying to make a judgment about the bottom of an ad in all circumstances. We're trying to say, if this is something that consumers might typically encounter, does this work here, and to get people's reactions to that.

Elissa, I think you were next.

MS. MYERS: This doesn't work for me, because it is not readily noticeable, legible or audible and understandable, which I think is the value standard that was expressed earlier similar to the statement quoted from DMA. That statement comes from the ERA marketing guidelines for online marketers.

But right above that, we also have the statement -- and I want to come back to this, because I don't want
this to be lost in the discussion -- that another requirement that we make of our members, we require them to agree to respond to complaints, inquiries or refund requests promptly and courteously. So no matter how smart and prominent, if the consumer makes an error, it's the whole transaction that is at issue. What is the consumer experience in its totality.

MS. KOLISH: Elissa, you said that you didn't think that this was, you know, very noticeable. Is it because it's of the type -- if it were this same blue type appearing at the bottom, would you feel differently?

MS. MYERS: I actually don't think either one of these would prompt the average consumer to stop and read. I don't think it's the type. I don't think it's the placement. I think it's the graphic treatment. I think it's the architecture of the way the message is conveyed, to quote -- not to speak for in this instance, but to quote from what David said.

MS. KOLISH: Well, I think that's a good point. I mean, I've commented as we've been looking at these ads, that below the disclosure this, you know, AWESOME in capital letters and all those exclamation points always grabs my eye first and I always go to that. So I always had questions about whether people would notice that language, even in blue.
But putting that aside for a moment, I'll let other people comment. I think Phillip, Dan and then Jerry.

MR. MCKEE: Thank you very much. Phillip McKee from the National Consumers League. Ms. Myers, thank you for being very concise in stating why ad number 21 is bad. It's very difficult to read. You do have to scroll down. And I agree, of the two number 19 is the better one. Both of them, however, desperately need jazzing up. They need something that grabs the consumer's attention.

In the case of ad number 19, the endorsement directly below it does grab your attention to a greater degree, but it is also a matter of context. The specific reason why ad 21, though, is difficult is the format of the page. A specific reason is simply that if you have to scroll down that many sections, you're unlikely to do it.

If you're actually reading every last one of these endorsements of this huge list of testimonials, and you're believing every last one of them, you're going to get to the bottom of the page. And at that point it may not even be material to your decision. It truthfully may not. You've gotten incredibly excited at this point. Now you've got this thing. It's in slightly smaller type. It's a little bit -- it's less difficult to read.
Oh. Let me just go back up here. I want to get back to this one that said Awesome. I want to reread this section. The first one grabs your attention at least a little bit. It comes in at a point where you have the ability to make a decision. You know before you got to this page, like I said before, it's going to be testimonials. So you don't need to wait until after the testimonials to find out that this testimonials may not apply to your experience.

MS. KOLISH: Okay. So, all right, we take your criticism. We have to make it jazzier. All right. Then Dan?

MR. JAFFE: Dan Jaffe, Association of National Advertisers. I think we get back to something that Bill MacLeod said earlier, which was we are again going back into a design approach. It's one thing to say that this would be a nicer way to make something even more clearer and conspicuous, and jumping from that to saying that's how you have to do it.

As I have understood how the FTC has been doing its business in all media, it's not to say there is only one way to do this, but you have to have a reasonable consumer. And there's been some discussion that we should now have the most vulnerable consumer become the test for the reasonable consumer. And I hope we're not
going to suddenly change that, because that would be a major backtracking for the FTC. We went through those battles, as I'm sure some of you remember.

MS. KOLISH: That was expressed by somebody else.

MR. JAFFE: That's right. I understand. I'm just saying that there have been some suggestions to move from the reasonable consumer to the most vulnerable consumer. And I think that would not be a good idea.

But also I think that all of these examples actually understate the problem, because you can have -- you're having a single trigger term and a single product. And it's not at all clear that that's how it would have to be. You could have a pearl, a diamond and a third type of jewel on there, all of them having a trigger term involved with them.

If you're going to demand that they all have it on the top, you're suddenly going to have three disclosures on the top. Now, the question is, are some of those disclosures going to get lost, or is the consumer going to say, no, I'm not going to look at that because there are too many. I'm only interested in one and I can't find it right away.

So I think we've got to be very careful about not confusing design standards with performance. And I
think it's useful to talk about some of the kinds of things that you would think about. I think we're then drifting to say, well, you had better jazz it up, because if you don't jazz it up, it's not clear and conspicuous. And I'm not sure that that -- at least we would not believe that that is necessarily accurate.

I think we could find some that I would at least say I don't think are clear and conspicuous that the reasonable consumer would find. But I certainly would like to have some data that would show whether in fact my instinct -- my gut -- is actually accurate as to how consumers operate in the real environment. And I think we will all start working to try to give you some of that.

But I don't think it's so easy, even with this one, to be sure that people wouldn't find it and get the information you need.

MS. KOLISH: Okay. Just to make sure everybody is on the same page, Dan, when you're using trigger terms, you're meaning here like when there is an endorsement, it triggers the need to have a disclosure?

MR. JAFFE: Or three quarters, you know.

MS. KOLISH: Yes. Have a disclosure of a typicality --

MR. JAFFE: Or imitation.
MS. KOLISH: -- or a disclosure of the fake --

MR. JAFFE: Imitation pearl.

MS. KOLISH: Okay. I just wanted to make sure everyone is on the same page.

MR. JAFFE: Or you can have an ad where you would have five or six of these things, and of course you have the privacy terms, and you might have warranty terms. If you get into a car -- I mean, just the one product alone may have a whole series of things that you might demand about, you know, a very short little disclosure. But each one of them may have some trigger term that you have to go look to, and then you certainly are going to probably want to jump site, you know, by going to somewhere else to get the information.

If you try to put it all on one page, that's going to be a very long page. You're going to be scrolling for hours.

MS. KOLISH: Yes. We recognize and we're trying -- we're basically doing single products here. It's not a real web site. We thought it would be impossible to have a discussion that was not chaotic if we did that. So we understand.

MR. JAFFE: Well, I'm saying, what you're driven to, is if you look at the simple things and you say oh, we put it up on the top, isn't that nice. But if you had
multiple trigger terms and they all had to be on the top, you would be in a very different situation.

   MS. KOLISH: Right. We understand that.
   MR. JAFFE: So you may be led into a simple situation and come to a conclusion that it doesn't work in the world that advertisers deal with, because they have very, very different products.

   MS. KOLISH: That's right. I think we're just trying to talk about does being at the top help it make it more conspicuous, and then you would still have other things that you would have to look at.

   MR. JAFFE: Right.
   MS. KOLISH: But, Dan, would you -- is your view that you wouldn't conclude that in ad 21, that this disclosure at the bottom is ineffective without a copy test?

   MR. JAFFE: Well, I might conclude it, but I would certainly like to have much more information about how people read. I think that this is an ad that certainly would raise questions and you would have to -- you know, I think someone would then maybe have to say, well, yes, they will find it and here's some data to show it.

   But all of us are, I think, suffering a little bit, except for some of the companies here who may have
proprietary information, as to exactly how the average consumer works. And that's not so surprising, as we've only been selling on the net for what, four years?

MS. KOLISH: Exactly. Thank you. Jerry?

MR. CERASALE: Jerry Cerasale of the DMA. I wanted to -- Dan took some of the points I was going to make, one being that I think his idea of taking a look at multiple triggers on the same page I was going to raise. And I think it raises the issue that we all know that these rules and these disclosures are going to apply to the net, and that you're stuck, because we're so young here in e-commerce on the net, to looking more and more at a case by case basis for the FTC to take a look at things.

And one of the things, if you put everything at the top, then it becomes that every disclosure is always the first thing. It becomes -- as Phillip said, I have time. It becomes automatic that I don't look at the top. Your attempt to try to make something obvious and unavoidable makes it easy for me to avoid. I will clearly click down past it.

If every disclosure is always at the top, the consumer who doesn't read it all -- and you're trying to protect them to make it so they will read these things or have the opportunity to read it -- will automatically go
elsewhere on it because of time.

So I think that sitting right now, trying to
look and think about how you want to dictate copy and
where it's going to go and dictate design, we're way too
soon and the consumer is going to find -- is going to
react exactly in the opposite that you want the consumer
to react potentially.

MS. KOLISH: Thank you. Jeff, you're next.

MR. RICHARDS: Jeff Richards, Internet Alliance.

I just want to quickly echo this, because it is so
important. The first time I used a scroll bar was on a
Macintosh in 1984. It was not in the Internet
convention. I mean, a scroll bar -- all the navigation
tools we're seeing up here and that we're talking about
as if they are here forever, in fact are a product of the
moment.

Scroll bars have been around for a long time,
because they work pretty well for a whole lot of people
in a lot of computing environments. But there are lots
and lots of things on the horizon to replace navigation
tools like scroll bars.

So I think this is really valuable to have the
discussion. I do get concerned that we're talking about
things which are destined to go away or radically change,
and not very long from now.
MS. KOLISH: And that's a good point. I mean, one of the issues that we talked about among ourselves was the fact that on different platforms, such as web TV, you won't have a scroll bar and you might use Tab. And in that platform, would it be even more difficult or less likely that someone would get to the bottom of the web page? Or on your pager, yes.

Okay. And then Mark, you're next.

MR. UNCAPHER: Yeah. I wanted to drill down a little bit on this particular example, and of course we're dwelling on placement with one particular page. I would think that the sort of average Internet consumer might expect that at some point with the variations and sort of specifications of what would work, that there would be a hyper link that would allow a consumer to get additional information to find out whether their equipment or their particular configuration would work well. And this, you know, would be part of the selling process to be able to get that additional information. And that a consumer that wasn't able to do that would be less likely to buy.

So again, we shouldn't just be looking at one page and where it is on the page, but understand the broader context of the availability of information to provide additional information, which is both in the
advertiser's and in the consumer's best interest.

MS. KOLISH: Right. Bob and then Elizabeth.

MR. GOLDBERG: Bob Goldberg with the Business Technology Association. I'm concerned when I hear that if you're using multiple triggers, it might be an opportunity to delay or diminish the disclosures that are necessary. I would hate to get on a ride at an amusement park, which says if you're pregnant or have a heart condition you shouldn't ride, and then get to the end and find out four other conditions that you shouldn't have gotten on, either.

(Laughter.)

MR. GOLDBERG: I am not as concerned with those people here who suggest that it becomes boilerplate at the beginning and consumers avoid it. That's a consumer's choice not to read it and avoid it. I'm more concerned with those consumers that never get to it and never see it, and as Mr. MacLeod said earlier, don't stumble upon it.

I am concerned about any site that might start off on the top that says, fire and you have to scroll down to find out where the fire is, and then hyper link to find out where the fire extinguisher is. So I think once we have these triggers, we should make these disclosures.
And I think the colleagues on either side of me are about to hit me.

(Laughter.)

MS. KOLISH: Thank you, Bob. Well, I think we're going to --

MR. GOLDBERG: But not in a room full of lawyers.

MS. KOLISH: Oh.

(Laughter.)

MS. KOLISH: Elizabeth, you're next. And she needs a microphone so she can speak into it and identify herself.

MS. WANG: Elizabeth Wang from DoubleClick.

Expanding on a few of the comments that have been raised so far, one thing that is clear is that in the two case studies we're looking at, it's very straightforward in that you see the product. You get the pitch. You can buy it right away.

Standing back a moment looking at the entire context of how web -- how the web has helped marketers market, the fact is that there is more than one source of information. So one thing that in, say, the Dell context that Mark raised, in this case it may be that -- well, this is actually perhaps not the perfect case. But you could have a toll free number and we can call up and find
out for your particular computer configuration what the speed might be. And so it's not really just relitigated to the hyper links or the scrolling and all that.

And also, in a much bigger situation where you couldn't click and buy online, at least not easily, is in the car situation where you are getting a lot of information from a lot of difference sources, not just what is on the web. You also probably have brochures, and you talk to friends and all that.

So I think that in terms of what the disclosure is in getting information to the consumer, it's not a uni-dimensional experience for any consumer, even the most vulnerable. I think people really do look to people they know and all that. And so in terms of getting the disclosure up front, I think we should make it -- we should view it in terms of what the consumer receives from other media as well.

MS. KOLISH: Okay. We're going to go to Bill and then Phillip, and then we're going to go to Jodie, and then we're going to go to a break.

MR. MACLEOD: Elaine, you said two words which I think might be the most important words that were said in the last several minutes, and that was copy test. And I think that in the situations that we're looking at here, it is very hard for us to tell whether or not the
disclosure on the top is any better than the disclosure
on the bottom, or how much better it is if it is better.

And the question in the end is going to be, what
did consumers think after they went away from this web
site. If the FTC is going to haul some advertiser into
court, the question is not likely to be, was this a
conspicuous disclosure. The question is going to be, did
consumers take away the proposition that their
experiences may vary.

And I would be very surprised, no matter how
much your eyes are attracted to the word awesome in the
first one, that you will ever have any advertiser in
front of a judge with that disclosure on top of the
awesomeness. Would you be a little more intrigued, and
would we have a little more of a fight, if we had
disclosure number two there? Maybe so.

But I don't know what people are going to take
away from reading these endorsements themselves. They
might find after reading the first three that none of
these apply to me. They may scroll to the bottom, and
they may not scroll to the bottom. But they may have
taken away the very message that that disclosure is
intended to impart.

So it is very hard sitting here, without the
benefit of the research that you mentioned, really to
give a clear answer to whether number 21 does the job.

       MS. KOLISH: Now, that's a good point, and of
course copy tests are always valuable. But in our
experience we find that advertisers would like some clues
or suggestions about what things are likely to enhance
the effectiveness of a disclosure, because they don't
always want to do copy tests. They like to have a little
bit of knowledge that these things have a better chance
of working than other things. Otherwise, you do have to
go to a copy test.

       And of course, if an advertiser wants to copy
test their ads all the time, we think that's great and we
would encourage that. But we doubt that's what they
always want to do.

       Phillip?

       MR. MCKEE: Once again, something that keeps
coming up and that many people have brought up, we're
dealing with a different situation here. We're not -- we
do not have a simple printed page, so top and bottom can
sometimes be confusing. And in regards to the particular
ad number 19 and those that are similar to it, it becomes
very confusing.

       Mr. Goldberg brought up a very good point. It's
the trigger word that really makes a difference. If the
disclosure is nowhere near the trigger word but very
prominently displayed, it's not going to modify the trigger word. People aren't going to understand, for example, if they see a disclosure and they haven't yet gotten to something that explains why.

In the case of number 19, one of the reasons why the disclosure at the very top of the page works better than the disclosure at the bottom is the trigger for the disclosure was when they clicked on what customers say. So the instant after they had clicked on the desire to read an endorsement, they are given the disclosure concerning endorsements.

That's why in regards to this particular page, the disclosure at that absolute top most part is important. If there is a very long page of legalese, for example, such as an acceptance agreement which many of us are familiar with from installing software, and you need to make some kind of explanation of a term that appears in the last paragraph, placing it at the first page of a 31 page document is not necessarily going to be the best place for someone not trained to be looking for these items.

So it does need to be near the trigger word, and that does need to be taken into account, and it's not simply a matter of saying top, bottom, middle. Where is the trigger word? What is the context and how is the
consumer going to be navigating?

    MS. KOLISH: And when you mean trigger here, you're talking about the claim that requires that a disclosure be made?

    MR. MCKEE: Yes. And in this case it's not just the claim, but the fact that you're moving to the claim. We also have to consider that in the realm of the Internet, you are navigating around. You're moving. It's not simply a matter of flipping pages. You're jumping back and forth between lots of different sections.

    It requires an almost a four dimensional map of a site. You have to consider not just placement in relation within a page, but also relationship between pages and the way in which people move through time looking at pages. It's a very difficult process to design a good web site. It's why it's such a major headache. And in this case, it's the clicking on what customers say. You're looking for an endorsement. Let's get the disclaimer on endorsements.

    MS. KOLISH: Okay. Ron, I know you want to speak. We're going to go to Jodie first and then we're actually going to go to a break to try at least to stay on schedule a bit.

    MS. BERNSTEIN: Thanks, Elaine. I just thought
that I might close this section with a couple of remarks. First of all, I myself have found this a very informative and helpful discussion.

And just to go back to what we on the staff were trying to achieve here, I think most of you know that for the most part the Commission has already applied the law to Internet in its law enforcement effort. We brought a number of cases. They have not raised questions or issues about whether there is a significant difference between the new technology and the way the laws have been applied.

In these particular areas in rules and guides, and especially where there is a clear and conspicuous disclosure requirement where it says written or some other kind of application, those to us were perhaps once where it did raise issues.

So we were not talking about revising the law. And I want to make that point, because we're not talking about revising the definition of the reasonable consumer. That's not before us at all. Nor are we talking about changing the basic direction of law enforcement that the Commission has taken over the years and its flexible approach.

But we are trying to learn together whether in these particular -- and they're fairly narrow instances

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in the greater sense of things. Whether we can inform each other so that the Commission and the staff particularly will be better able to continue, I think, the Commission's longstanding ability to understand that advertising is critical to the market and informative advertising, and always recognizing the ability of the advertizer to creatively engage the consumer who wants to make a purchasing decision, to continue that.

So I think the rest of the day will be very informative and helpful to us, if we can try to really focus on how we can best continue the kind of flexible approach to application of existing laws to the new technology. We really are not -- and probably a lot of people here would like to think, well, we could throw out a lot of the consumer protection laws. But we're really not going to do that today, and we're really not talking about being hauled into court either, although, of course, if an opportunity arises.

(Laughter.)

MS. BERNSTEIN: So feel comfortable, feel free, and continue to work with us as you have in the past, to keep us as informed as we can be so that we don't make mistakes in applying longstanding Commission law to these new areas. We think it will be a great success, the day, and the Internet as well, if we do that.
Okay. You get to have a break now.

MS. KOLISH: The voice of wisdom. Yes. Please come back at 10:45.

(Whereupon, a brief recess was taken.)

MS. KOLISH: Okay. While you're still taking your seats, let me just say that the downstairs room reports they can hear well, but that they would like it if people would refer more often to the ad that they're looking at by number in the upper right hand corner. Because they can't see them all, but they all have black and white copies so they can refer to them.

So I try to do that at the outset, but a lot of times the commentors might want to be a little bit more specific about which ad they're commenting on at the time. A few more seats have opened up up here if people want to move. Not very many, but a few.

As we begin the next part, I just want to repeat something that Jodie was talking about, or draw some greater emphasis to it. Which is that although we're not trying to judge ads here saying this is good, this is bad per se. You have to do it this way. You can't do it that way.

What we would think would be helpful is if people can do some comparing and contrasting of what works better, or is likely to work better, understanding,
of course, we're not doing this in isolation when we
would actually investigate an ad that we would consider
lots of factors. But I think it may be possible to say
well, gee, I think people can pretty much agree that this
is less good than something else. Maybe not. But if
possible, I would like to get some kind of specific
comments out on those points.

So let's go to hyper links. We're going to be
looking at ad four. But the reason we want to talk about
hyper links is because you all want to talk about hyper
links and what a great way it can be used to present
information in a positive way. And we think that there
is lots to discuss about that.

So we have prepared some ads using hyper links
that we think will provoke some discussion about whether
they can be an effective tool, and if so, under what
circumstances. So let me put a few questions out on the
table to sort of frame the rest of the discussion. You
don't have to answer each of these, but just sort of keep
them in mind.

And one question is, are disclosures that appear
on another that is the link to page close enough to the
claim to be effective and qualifying it to make certain
that the net impression changes appropriately? And
another question is, what factors affect whether
consumers will actually click on a hyper link? There may be lots of different issues to explore there.

So let's start with ad number four, which is, again, an ad for the three quarter carat diamond earrings. And in this instance you'll notice that three quarter carat is underlined and represents a hyper link.

And sort of a preliminary opening question I have for you all is, is a hyper link through a simple underlined word something that most consumers know to click on, and if so, would this hyper link technique be sufficient to put consumers on notice that important information that qualifies the claim is on the link to page? Or could it reasonably be construed as general information that an advertiser wants to provide about -- as Dave said -- what diamonds are, and what mine they came from? Something that could be interesting, but not important.

Does anybody want to start with some views? A whole bunch of people. No, one. Jean Ann and then Phillip and then Jeffrey and then Don.

MS. FOX: Jean Ann Fox, Consumer Federation of America. I'm here representing all the unsophisticated Internet browsers in the world. And I will tell you, that when I looked at this ad, I didn't even know that was a hyper link. It wasn't obvious to me. And I don't
think that having the key disclosure on a separate page
is sufficient notice to customers. And there is no
incentive there for a consumer to go to the link, even if
they recognize that an underlined blue word meant there
is more information here. There is nothing to lead you
there.

MS. KOLISH: Thank you. Phillip?

MR. MCKEE: I would like to echo some of what
Jean said, but specifically I was wondering if the people
controlling the screens could also bring up on the third
unused screen ad number 13? I would like to reference
that real quick as well.

MS. KOLISH: Now, aren't we interactive here?

(Laughter.)


MR. MCKEE: Okay. If you will scroll down to
where the disclaimer is concerning this ad? Thank you.
When you have the disclosure and you're having it as a
hyper link, as you said, the key issue is, does the
individual know that this is going to lead to a
disclosure of some sort.

In this particular instance, frequently a link
links traditional information. And there are many
occasions when an entity, be it an individual or a
company, is mentioned and there is a link, that link does
not lead to a disclosure concerning that individual or company. The link leads to that individual's or company's web site.

I have to admit that the first time I saw this ad, I saw a link there --

MS. KOLISH: Which ad?

MR. MCKEE: On number 13. I actually thought that the link was going to lead not to a disclosure statement, but to something concerning D. J. Blackhand. I didn't know whether that was a company that D. J. Blackhand runs, whether it's his personal home page, or whether it's further additional information concerning his endorsement. Is it a longer endorsement? Is it the full text of his letter? It may even be a link over to the wrath of Thor. It's not necessary -- it doesn't necessarily state that because he's got a link there that it's a disclaimer.

If you're going to use that kind of method, there has to be something that definitively states to the consumer that this link leads to a disclaimer. And if you're going to have this additional information sitting right there saying this link leads to a disclaimer, you might as well have the disclaimer right there the way it's done in ad number --

MS. KOLISH: Phillip, I think you're preceding
our script here.

MR. MCKEE: The way it's done on ad number 12.

MS. KOLISH: Okay. We'll take some other comments. We can take down -- shall we take down -- oh, leave 13 up for a minute, although we actually were going to use that ad for that purpose at a later time. But sorry. That's okay. That's okay. We won't have to do it then.

All right. The order was Jeffrey, John, Eric and then Renee.

MR. RICHARDS: Jeff Richards, Internet Alliance. I just want to back up for one second. We're focussing already on hyper links as in this case purple underscored objects on a screen we're looking at.

MS. KOLISH: Okay. That is intended to be blue, except it has already been clicked on.

MR. RICHARDS: And because I'm somewhat colorblind, it looks different to me. And so what I would just like to say here is that hyper links are not only ways of getting to disclosures. Hyper links are the fundamental basis of the worldwide web. It's the break through in thinking that Tim Bruners Lee had and that we're all utilizing today.

It was preceded by the whole notion of hyper text, which is -- the inventors of that we're not even
remembering today. But the whole idea is that we can be linked worldwide to each other and to information and make use of this.

And what we've seen in the consumer explosion on the Internet is exactly that. It's everyone's use and excitement about that. So I just wanted to frame -- just remind us for a moment here that we're talking about that which differentiates this medium from the paper I'm holding in my hand. And as we talk about hyper links, let's see that as a fundamental part of the architecture.

Thanks.

MS. KOLISH: Good point. John?

MR. FRUEHE: This --

MS. KOLISH: Say who you are.

MR. FRUEHE: John Fruehe, Dell Computer. This particular example is very clear in what it's trying to indicate, which is that there is more information about three quarter carat diamond earrings behind that. Now, what I would assume a general consumer looking at that -- if the word diamond were the one that was hyper linked as opposed to the three quarter carat, it generally would indicate that here is some information about diamonds.

The fact that three quarters carat is highlighted, or even if you just had just the word carat, these would all be ways to help identify that there is
something very particular about that piece of the
information. Again, if earrings were the one that was
hyper linked, you wouldn't necessarily assume that you
were going to find some information about the weight of
the diamonds.

But because that particular one -- and as
Phillip pointed out, looking at the name of a person
there is already an indication that is building in
consumers' minds that this is information about the
person or a mail to for that person. So what you're
seeing is, you're actually categorizing it and
highlighting one particular piece of information that
you're telling the consumer there is more behind this.
This is an area to go look.

And another point about hyper links is that the
most important piece is consistency. So throughout the
site, one of the most helpful things you can do for
consumers is to be consistent with your links, always
using the same types of visual indicators, such as a blue
underline or in our case, a small yellow arrow that we
use to indicate a hyper link.

These are things that when we test with
consumers, it becomes very easy for them to identify and
say, yes, this is clickable. That is not. And quite
often we'll have a page. We'll give them a piece of
paper that is not a web site, and we'll ask them to
circle the things that are clickable on the page. So
from a hyper link standpoint, if you are consistent,
consumers generally would pick out all of the things that
are clickable on the page.

MS. KOLISH: Well, John, let me ask you this.
You said because the three quarter carats is underlined
rather than diamonds or earrings that, you know, it's
more likely to draw attention. But what if consumers
would think, oh, that's going to tell me there is a
hundred points in a carat or, you know, it's a fifth of a
gram, blah, blah, blah. I already know that. You know,
I already know what a carat is.

And so they're not going to click on it, because
eye're going to think it's just sort of generalized
information about carats that they already know, as
opposed to saying, this diamond earring isn't necessarily
75 points. It could be, you know, as few as 70 points.

MR. FRUEHE: Well, how in the real world then
does somebody who already has that predisposition to say
that I understand all about carats. How are we informing
them, then?

MS. KOLISH: Well, in print ads and stuff people
have to say on the page that it's not exact, and they're
allowed to reference charts about the diamond weight
ranges to another place. But the question is, they have
to do it so that it's, you know, clear and conspicuous.

And we're saying this is hyper linked as clear
and as conspicuous as having it on the same page or not.

But I take your point, and we will take on some other
questions and then we'll move to some other ads where we
can explore different types of links.

Eric is next.

MR. WENGER: Hi. Eric Wenger from the New York
Attorney General's Office. And I'm sure that this is
clear, but I have to make it very clear that these are
just my views that I'll be giving here and I don't
necessarily represent the opinions of my office.

I think there are a number of questions that are
raised by this particular ad, and even though it's a
simple ad, there are a number of things that are quite
complicated here that we need to address. One of them is
the point that was raised by Jean Ann Fox. Is it clear
at all that this is a hyper link. And I think that many
consumers might not recognize that this is a hyper link.

So that's the first threshold issue that needs to be
addressed.

Let's assume that people do know that this is a
hyper link. The next question I would ask, since there
is a specific guide on point here, does this hyper link
-- or does this disclaimer appear in a way that is clear
and conspicuous. And I don't think that it does.

If you read the guide, it specifically requires
that the language weights may vary must be within the
bounds of the ad itself, and then there can be a
reference to the actual ranges. And I think that that
seems to be an appropriate use of a hyperlink, if there
was some sort of disclaimer that said that weights may
vary. Click here for more -- and we see this in later
examples, so I don't want to jump ahead.

And let's assume, again, that there is no guide
on point. Then you have a question about whether or not
a hyperlink can be a clear and conspicuous disclosure
under section five itself. And I think in this case it
seems to me that it would not, because it does not
provide any hint about what the type of information that
will be disclosed if you click on the link is.

And so in that case, you're going to have to
look at what claims would be required to be made. And
again, we're assuming the absence of guides here. And
that's a facts and circumstances based analysis, I think.

If the disclaimer is long, then probably to give some
hint about what you'll see if you click on it and then
jumping you to the details may be appropriate.

But in another circumstance where the

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information that needs to be disclaimed is rather short, then as Phillip pointed out, maybe there is no real need for a hyper link. And in that case, the only purpose that a hyper link can serve is to make the disclaimer less prominent and more avoidable. And if you look at those standards that the Commission has laid out as being factors that it would analyze in determining whether or not a claim is clear and conspicuous, that might lead you to determine that a particular disclaimer is not clear and conspicuous.

MS. KOLISH: Thank you, Eric. Renee, you're next.

MS. BARUCH: I think the thing that we're all speaking of here is the concept of accurate labelling of hyper links. If you have an accurate label for the hyper link, then that should suffice to advise consumers of what they might find.

For example, in -- I guess it's ad four where the three quarter is the hyper link. If instead of underlining three quarter, you had under it a small button that said "about our weights," or something like that, that would be a much more accurate label for this particular hyper link.

There is another issue as well, and that is the issue of a mandated hyper link. If you really, really
want to have a safe harbor and want to be assured that
your consumer has seen the information there, you could
actually create an unavoidable hyper link that the
consumer would have to go to.

I don't think that that's what most people would
want to do, but nevertheless it's there as an option.

MS. KOLISH: Okay. Wendy, and then we'll move
to show some other examples.

MS. SCHMIDT: I wanted to respond to the --

MS. KOLISH: Oh, state your name.

MS. SCHMIDT: Oh, I'm sorry. Wendy Schmidt from
Federated Department Stores. I wanted to respond to the
point that links might be used to obscure or sort of hide
information. And actually I think they can be used --
actually to highlight information, it will allow you to
give it in one place.

I know on our web site if you had a disclosure
on diamonds, there might be multiple places where you
wanted to make that disclosure. If you have it in one
place, number one, it can provide more information in a
more user friendly format; number two, you'll have
consistency throughout the web site, and number three,
having a button or something like the three quarter carat
underlined, if you've trained your consumers to know what
that means, it can actually be a easier or more prominent
way to give the disclosure.

And if you think about print media when you're doing the jewelry guides, oftentimes you would have an asterisks. And the customer can always decide whether they're going to look further down the page to find the disclaimer that carat weights may vary, and two, whether they are actually going to look at the chart. We can't necessarily control what a consumer does, and I think we need to make sure we're maintaining comparability between the print.

MS. KOLISH: Thank you, Wendy. Let's pull up ads five, six and seven. Here we have the same jewelry ad, the three quarter carat diamond earrings, but we have three different ways of presenting the hyper link. This one I think says jewelry disclaimer, and this one says click here for more details on the jewelry you are purchasing -- and that's in ad six. And ad seven says, diamond weights are not exact. Click here for weight ranges.

And Renee raised the point that accurate labelling of a link might make a difference and came up with her own example. And, you know, here are three examples of different kinds of labelling of a link.

Does anyone have any views? Are these more effective than ad four, which just had three quarter
carat underlined, to put people on notice? Do any of these links -- do they vary in their effectiveness? What do people think the word disclaimer means? Is it just legalese? Does click here for more details mean oh, it's information about sales tax and delivery, blah, blah, blah?

So, you know, here are some questions I'll put out. And we already have hands up. Jo, Eric and then Phillip.

MS. REED: Jo Reed, AARP, with allergies. You actually raised the question earlier what people might interpret from the hyperlink in terms of whether it was just going to be general information about jewelry or actually a disclosure about something they needed to know in terms of the claim being made.

And I think that being in Jean Ann's constituency of unsophisticated types, I would definitely require that diamond weights are not exact in number seven line of disclosure. I want to go there to learn more about it.

And that goes back to my earlier comment about vulnerability. I was not suggesting that FTC's approach to the reasonable consumer was wrong, but rather that in looking at who a reasonable consumer is, we have to recognize that there are people new to cyber space. And
they can be quite reasonable, but need more information
in order to be well protected.

MS. KOLISH: All right. Thank you, Jo. And
then Phillip, I think.

MR. MCKEE: I think Eric was next.

MS. KOLISH: Oh, I'm sorry. I was out of order.

Eric and then Phillip and then Mark.

MR. WENGER: Eric Wenger, again, from the New
York Attorney General's Office. I think that if you
compare five, six and seven, I would like to go back to
the framework that I used before. Five does a better job
of explaining that something is a hyperlink, because the
idea that it's a disclaimer probably would put somebody
on notice that there might be some information that
they're going to click to that relates to the jewelry
claims in the ad.

But it does not, I don't think, comply with the
jewelry guide, because it doesn't provide the information
regarding weights may vary. And again, under a section
five analysis, I think you would have a similar
conclusion.

Six pretty clearly puts you on notice that you
can be clicking on something and that it is a hyperlink,
because it has that language, click here. And it depends
-- under the 17D, I think again it doesn't make the
weights may vary disclaimer. And if that rule did not exist, then you have a question about whether or not the claim about weights may vary would be important enough to be required to be made in the hyper link itself.

But when you look at six and seven, I think it highlights something that I raised before. I didn't mean to suggest that hyper links are necessarily bad. But they can be used in ways that either convey information to consumers, or make information more avoidable and less prominent for consumers.

And it's approximately the same number of words in six and seven, and if you're going to say that six is okay and it's not overly burdensome from a design perspective -- and I'm not trying to dictate what is a good design. If as an ad designer you think that that's not overly burdensome, then I don't see what is -- what makes it harder for you to do seven than six, because it actually conveys the information that would be required under the jewelry guides.

In addition, assuming that the jewelry guides did not exist, it probably conveys the most important disclaimer -- sorry. Important information that the consumer needs to know about what they're going to be clicking to.

MS. KOLISH: Thank you, Eric. Dave, you wanted
to comment?

MR. CLAUSON: Yes.

MS. KOLISH: And then we'll do Mark, and then we'll do Carla.

MR. CLAUSON: Dave Clauson.

MS. KOLISH: Oh, I thought you had already --

MR. MCKEE: You have gotten out of order.

MR. CLAUSON: Sorry.

MS. KOLISH: I'm sorry. I lost my place. Well, Dave is talking and then we'll go to you, okay? And then we'll go to Mark, and then we'll go to Carla. And then who else has their hand raised? Kevin.

MR. CLAUSON: Dave Clauson. Just to comment on a couple of questions that were raised. First of all on this issue of experience, it's okay to be a novice. Everybody has a first time on the web.

(Laughter.)

MR. CLAUSON: So you can all lower the anxiety about your first time. It's okay. I don't think you will ever use the Internet without being able to master the point and click metaphor. It is the way the basic navigation functions. You will never get past the home page of your browser unless you can move a mouse and click a button. It just doesn't work without that. So to assume that people would not be capable of doing that
I think is a mistake.

Secondly, just a quick point on some of the technologies. I could have very easily used ad four, and with the basic browser technology of rollover made any statement on five, six or seven in a rollover on the hyperlink on ad number four.

MS. KOLISH: What do you mean. I don't get that.

MR. CLAUSON: If we go back to ad number four, please, but leave six and seven up, please? If you would move the arrow cursor over the three quarter carat just for a moment? In many browsers, do you see the way the arrow changed to a hand? In rollover technology that could very easily be a text bubble containing the text in six and seven.

So in other words, a simple hyperlink on ad number four could very easily, if it's designed properly, contain the information in six and seven. Without necessarily having the full disclosure on the page, it can very clearly signal what that hyperlink is about if it is designed carefully.

So, again, design does matter here and experience in information architecture matters and use of technology matters. You can't leave these things as separate issues. They have to be considered as a
collective whole. And in general information architecture, the simplest, most effective way of conveying the basic information is always best.

So in terms of these three, if I would simply use the rollover technology of most browsers today -- you cannot buy a personal computer with an Internet browser without rollover capability -- that you would have that -- I would have designed that hyper link in that way.

So a couple of questions. One, where is the disclosure close enough to the link? I could argue that ad number four would actually do a better job, because it would say very clearly not only the three quarter carat, but that it's disclosing information about that if I click there if I designed it properly.

Two, what factors affect click through? Signaling the information soon rather than later affects click through. But how you signal does matter, and you have to pay careful attention to that. So users will very quickly tell you that if you're not giving them the information they want, they'll go away.

So I click through on that three quarter carat and found that it was disclosure. I'm not interested in disclosure. And you would notice the click through rate drop to less than two seconds, because I would hit the back button in about that time.
So again, this is an inexact science and it has
to be considered from all those dimensions.

MS. DEMARTINO; Can I just jump in for a second.
The rollover technique that you're talking about is
unique and it sounds great, except would there be any
concern of a consumer missing that information, because
in the scenario you're presenting a consumer would have
to roll their mouse over the three quarter carat claim.

You know, are there concerns that a consumer
might not roll their mouse over that? I mean, they see
it as a link and they might continue scrolling down the
page or click some place else. And then I guess there is
a twofold of will the information stay up on the screen
long enough once you've put your mouse there for a
consumer to read it.

MR. CLAUSON: I'll break both of those questions
down.

MS. DEMARTINO: Thanks.

MR. CLAUSON: And those were good questions. We
wrestle those issues every day. The first point is that
you just brought up the issue that no two consumers
operate the same way, okay. And the fact that -- again,
this is what I was trying to get at in terms of my
decision cycle. My decision cycle on when to buy this
product may be very different than yours.
In fact, in some cases -- and I'll go back to
the gentleman from Dell who was referencing the math of
75 pages potentially before a product is purchased. I'm
likely to come to that three quarter carat at my first
time, and if I don't know anything about carats, I'm very
likely to click on it, because I might like to know more.
But I might not, okay. I mean, that's the individual
nature of it.

In terms of the rollover technique, if the mouse
or the cursor is left on the hyper link, it will stay
there as long as the cursor is on it. So it will stay
there as long as I want it to. So if that rollover comes
up and it's long enough for me to read it, fine. If it
comes up and I want to roll away from it, that's up to
me.

(Staff speaking, not picked up by the
microphone.)

MR. CLAUSON: Can you point out -- she's
referring to ad six in the middle screen? If you watch
her --

MS. KOLISH: Are you talking about this bar
here?

(Staff speaking, not picked up by the
microphone.)

MS. KOLISH: What yellow one that pops up?
MR. CLAUSON: Right there?

(Staff speaking, not picked up by the microphone.)

MS. KOLISH: Yes.

(Staff speaking, not picked up by the microphone.)

MS. KOLISH: Yes.

(Staff speaking, not picked up by the microphone.)

MS. KOLISH: Oh, okay.

MS. DEMARTINO: So for the people downstairs, we're demonstrating through the use of the tool bar the rollover technique so the information will stay up. But I guess, you know, just to follow up on what you were saying. Is there still a concern that a consumer might miss an important disclosure if they choose not to, or don't know that they need to, roll their mouse over the link?

MR. CLAUSON: I'm not attorney, but I play one on T.V.

(Laughter.)

MR. CLAUSON: I think there is -- regardless of whether it's disclosure information or any information, again, the nature of the information architecture dictates such that a consumer may miss it or they may
not, depending on -- you cannot sit there and ask them to point the button here and say press this. That just doesn't work.

So will some consumers rollover a hyperlink, not read it and not click through it? Yes.

MS. KOLISH: Okay. Let's put five back up, so we have five, six and seven for our general discussion. And we'll go to Phillip now.

MR. MCKEE: Thank you, Elaine. Phillip McKee, National Consumers League. The mouse over technique, another name for rollover, can be used very effectively on web sites. Another convention that is already displayed on all of the ads on the screen, five, six and seven, and something that online shoppers are very used to, is the idea that the button add to cart and buttons of similar design, if you have a consistent site design, mean that it's a link.

You click on it and it does something. You click on a submit button, it submits your form. You click on add to cart, it's going to add to cart. You have buttons that are of similar design. They're also going to have a similar function.

Another way to provide a disclaimer that has obvious functionality and is also eye catching on the screen -- yes, I realize I'm edging to the realm of
design, again; please indulge me, everyone else -- is to have a button of similar design that says something along the lines of the language Mr. Wenger from the New York Attorney General's Office mentioned, that weights may vary.

You can place that very near the statement, three quarter carat diamond earrings. It becomes an obvious sign that this is something that you can click on, because it's of the same design. It has the same functionality. And at the same time it has a little bit more obvious positioning.

So a problem that I have with all of the ads, five, six and seven -- even though I like the language of number seven the best. The problem that I have with all of them is the actual placement of the link and its relationship. Everything is syntax to the three quarter carat diamond earrings statement.

I am most likely -- I've gone to this page because I want -- personally I wanted to look at three quarter carat diamond earrings. My eye, therefore, is automatically drawn to the statement, three quarter carat diamond earrings, something in about half the size up at the top. Yeah, it's a link, but I'm looking down at what I wanted to look at, the bullet point of the three quarter carat diamond earrings.
The language is the best on seven, but I'm dissatisfied with all three.

MS. KOLISH: Well, Phillip, you're always ahead of us. We're going to talk about placement of those links, too. But we'll get through some more stuff about language. So we're going to go to Mark next, then Carla, then Kevin, then Ron, then Eric. Did someone else just have their hand up? Okay.

So Mark is next.

MR. UNCAPHER: Sure. I was going to, I guess, make the point --

MS. KOLISH: Say who you are.

MR. UNCAPHER; Mark Uncapher for ITAA. I think a similar point to the one that David made is that, you know, we have some data which would be able to track in terms of whether or not each of these would be used by consumers to click through. You know, the more legal it may well be, and I realize this is more in the realm of conjecture.

It may well be that the more legalese or the more specific the link is, say a disclaimer or something that suggests that it's a more narrowly focused piece of information, may well be information. Although on one hand providing more information than text in the main document may be less likely to attract a consumer to go
forward than sort of a more general one that says click
here for more details, because they may have a number of
questions that need to be answered. And I'm more likely
to choose that and get the additional information.

So in some respects, the more specific -- the
more sort of text of a disclaimer nature that ends up on
the hyper link itself, if that's not the information the
consumer is interested in, it may in fact discourage them
to go forward and look for additional information.

I guess this goes to the point that sort of
reasonable people could look at the exact same thing and
draw very different conclusions.

MS. KOLISH: So, Mark, are you saying that you
think the ad six disclosure is better than seven?

MR. UNCAPHER: Not necessarily better. And I
guess that's what I'm trying to say. Just the data
again. It's purely in the area conjecture. The data may
show that more consumers are likely to -- and again, this
is not an issue of the quality of the disclosure. But an
issue that that information may encourage consumers to
hit that hyper link, because they have a variety of
questions that they want information, and they want that
information. It may not necessarily be about the size of
the carat. They'll hit that and obviously come across
the disclosure information.
Again, reasonable people -- different consumers -- will respond differently and in different points in the context. But all of this is really kind of a game of percentages in terms of whether or not somebody is going to go forward.

MS. KOLISH: Well, let me ask you this as a follow up. Is there anything that would, you know, prohibit or interfere with an advertiser using something more specific, like diamond weights are not exact, so that consumers see that there is something important about the carat weight in ad seven that's being qualified, and also having a disclosure down here -- or a link down there that says, you know, click here for more information?

MR. UNCAPHER: I mean, the dilemma with that, though, is that at some point if you're requiring a high level of sort of substantive information to be contained in the hyperlink itself, then in many respects you're losing the advantage of the technology, the ability to hyperlink, because you're kind of forcing the hyperlink to be the disclosure as opposed to the content of the subsequent hyperlink.

And from a copy perspective, that could be very difficult to get the right -- I mean, in this example you can do it. To be able to get the right -- the right
breadth of the information contained in such a small piece of information.

I guess the appeal here is for sort of reasonableness and flexibility and recognition that the consumers will respond differently, and that the link itself can contain meaningful information.

MS. KOLISH: Okay. Carla, you were next. Do you still want to talk?

MS. MICHELOTTI: Yeah. A lot of what I was going to say has been covered, so --

MS. KOLISH: Uh, uh, uh.

MS. MICHELOTTI: I'm Carla Michelotti from Leo Burnett, representing --

(Laughter.)

MS. MICHELOTTI: Representing the American Advertising Federation. The legal test has never been avoidable versus unavoidable. And that's something important as we talk about this, because I think we're imposing that standard of unavoidability, and that isn't the standard.

And then the other point that I was going to make is a point that has been probably well made, which is consumer behavior. When they're spending a thousand dollars on the web, consumer behavior would be an exploration of the web site. Once they're interested in
a page and interested in an item -- how deep they go --
they're going to be spending a thousand dollars. And it
would be a very rare consumer that would not start
clicking around and examining all four corners of that
web site.

MS. KOLISH: Even a man who was in a mad rush to
get his wife the anniversary present?
MS. MICHELOTTI: Especially.

(Laughter.)

MS. MICHELOTTI: Especially a man.

MALE SPEAKER: I resent the sexist comment by
the Commission.

(Laughter.)

MS. KOLISH: All right. Strike that from the
record. All right. Kevin, we'll get to you then.

MR. DUKE: Kevin Duke from America Online. I
think it's important to stress, you know, that these
hyper links are very powerful tools and a great way to
provide information. And as others have said, you know,
the whole idea of clicking and using these is inherent to
the nature of this medium.

And in this context, you have to remember our
consumer probably came to this page by, you know,
clicking on a fancy ad while they were cruising Ftc.gov.

(Laughter.)
MR. DUKE: So, I mean, they came here in the first place because they knew to click on something. And then again, in context is the whole question of what is the ad. Is it sort of the four corners of what is displayed currently on the screen and that's where you have to comply with the jewelry advising guides?

I would submit that it's not. This is sort of a multi page advertisement, if you will, that started, you know, when they clicked on your splashy advertisement. And it is, you know, the electronic equivalent of a multi page ad. And, you know, one of the great things about the use of links is that they -- you know, they can provide more information than an advertiser might otherwise provide.

If the advertisers are restricted, you know, to get it all on this page at the top of the page, you know, they may try to cut back on some of the information. Whereas if I can click and go to all the information about the carat weight and other jewelry disclosures, you know, an advertiser might be encouraged to put more information there.

And similarly, you know, we could assume that this isn't the only item in the FTC jewelry store.

MS. KOLISH: It is.

MR. DUKE: And that -- it is. Well, you've got
other problems also.

(Laughter.)

MR. DUKE: Well, you have imitation pearl earrings.

MS. KOLISH: Oh, yes, you're right.

MR. DUKE: So you have two items, although only one set of diamonds. But typically an advertiser or a merchant will have a lot of items and may make the same warranty, for example, on all of them, and it's more efficient for the advertiser to have all of the warranty information in a single place.

And again, sort of the benefits of this medium are rather than try to figure out how to make, you know, the pre-sale availability disclosures of a warranty, in the interactive medium we can say, you know, click here to read our warranty. And if they want to read the whole warranty, they can or not.

MS. KOLISH: Kevin from QVC, I think we overlooked you inadvertently.

MR. ELSE: That's okay.

MS. KOLISH: Do you want to speak? Okay. Because I think I left him out, and then we'll go back to the order. Plus QVC sells jewelry. Maybe you have great insight.

MR. ELSE: We sell an incredible amount of
jewelry.

(Laughter.)

MR. ELSE: Exceptionally high quality jewelry.

(Laughter.)

MR. ELSE: Sorry, I had to do that.

(Laughter.)

MR. ELSE: I think one thing that has come up, and it's a recurring theme with all the comments, is that no particular disclosure mechanism will necessarily be better than other disclosures, depending on the particular advertisement that's being presented.

In this situation of the last disclosure -- the number seven disclosure -- it obviously offers a lot more information. But if, for instance, I was selling a guaranteed three quarter carat, fur and leather lined diamond earrings, I may have a lot of disclosures that have to go up in the front.

(Laughter.)

MR. ELSE: And that's a scary thought.

MS. KOLISH: Yeah. That would be the least of your problems thinking about disclosure.

(Laughter.)

MS. BERNSTEIN: Kevin, don't leave out the care labelling rule.

(Laughter.)
MR. ELSE: So even with a hyper text link that has that kind of -- or that amount of information for each link, you still may have nothing but links before you get to the product if it's up in front. And then when you get to the situation, which I'm sure is not that far away, where you have a television program and you're showing a product, you can instantly bring up on your television screen a page from your Internet site in order to purchase the product immediately.

That little picture may be a tiny picture on your screen and the best disclosure may be that each individual word, if you were to hit it, gives you the information. And if your -- we found that our customers become very sophisticated about our sites very quickly. I think that has to do with the amount of time they spend on the site. Some people will watch 24 hours a day, or be on our Internet continuously, and if they know that individual words will immediately hyper text them to information about that, that may be the best sort of disclosure.

MS. KOLISH: All right. Thank you, Kevin. Now Ron, Eric, Jean Ann and Teresa.

MR. GOLDBRENNER: I think that all of the things we've --

MS. KOLISH: Uh, uh.
MALE SPEAKER: You had better tell who you are.

MR. GOLDBRENNER: Oh, I'm sorry.

(Laughter.)

MR. GOLDBRENNER: I'm Ron Goldbrenner with PMA.

We've been talking about two different things. Whether or not consumers understand and can use scroll bars, hyper links, pop ups and all the rest. It goes to the question of the reasonable Internet consumer. You've got to define first who your consumer is. Who your audience is. And only then can you measure whether these things are adequate.

The second thing we've been talking about is which one of these is the best disclosure. Well, even if you accept that seven is the best, six next and five the least disclosure, what that has to be measured against -- in the abstract that doesn't mean anything, because you have to know the standard for choosing a disclosure.

Do you have to make the best kind of disclosure possible, one that is definitely assimilated by the consumer, or do you have to make one that's a little bit less than that, unavoidable? Although he doesn't have to go through it, he's definitely going to see it. Or is it possible to make a disclosure a level prior to that? It's a good disclosure. It's an adequate disclosure. It's possible for him to see, but it's not going to be
unavoidable. Or perhaps the least adequate on the scale is one that is available in the context of this ad, period. However it's available, it's there. It's available.

You've got to decide where on that spectrum you want to be before you can decide whether these are good. If you are looking for somebody to say that number seven is the best disclosure, then presumptively you are setting up the proposition that one must make in all circumstances the best possible disclosure.

I'm not sure that's the law. I'm not sure it's a good idea for the law to be that. And I think we need to think about those issues and discuss them as well.

MS. KOLISH: The standard for judging the consumer's net impression. Are they going to come away from your ad knowing that it is not exactly 75 points? That's the standard. And these are techniques that can help you get there.

MR. GOLDBRENNER: Well, does clear and conspicuous mean a disclosure which is the best possible disclosure?

MS. KOLISH: It means an effective one. One that succeeds in changing the net impression. I mean, there could be better ways of doing it.

MR. GOLDBRENNER: One that succeeds in changing
the net impression, or one that is capable of succeeding in changing the net impression?

MS. KOLISH: Well, usually if you're going to do a copy test, you're going to look to see what consumers actually came away with. It's going to be looking at performance in a fact based setting.

Okay. Eric, you were next, if you still want to talk?

MR. WENGER: Yes, I do. Eric Wenger from the New York AG's Office. I think with all due respect to David and John, they were talking about information that might be interesting to consumers, and that's not really the standard here. The standard here, as examined by the Commission when they looked at jewelry ads in light of section five, was that they created these guides to say that this is information that should be conveyed to consumers.

And so merely having information available in a way that could be seen by them if they were interested in looking for more information, I don't think meets that standard. If you look at what Carla said, she talked about that unavoidability is not really the standard, because it's not the standard in other forms of media.

I think that the variety of consumer paths and choices that they make on web sites actually does make
unavoidability a factor that should be looked at the Commission in evaluating whether or not a disclaimer is clear and conspicuous, because it goes back to the fact that this is information that the Commission has decided should be conveyed to consumers.

And, therefore, if you look at what Ron was saying, that information should be just placed in a way that consumers can find it if they're interested, I don't think that that's enough.

MS. KOLISH: Okay. Let me just comment on unavoidability. Although we have not used it widely in other contexts, in fact the theory of it is viewed in many other Commission decisions. I mean, Commission decisions about putting something on the first page of a multi page document. It's getting out the notion that consumers are then going to see it. Requiring that important disclosures sometimes appear at the end of an ad, so that the recency effect comes into play, is a way of getting at unavoidability. Requiring in an infomercial that the notion that this is paid advertising you're at be repeated multiple times is a way of getting -- a way of saying it's not avoidable.

So we haven't used those words, but the concept is there in other ways.

MR. WENGER: And also the Commission has decided
that -- or recommended that this language up here be in close proximity to the triggering term. And to have something that doesn't really point the consumers to the direction of exactly what they're going to be told and where they're going to find it, I don't think meets that standard.


MS. FOX: Jean Ann Fox, Consumer Federation of America. A small point. The word disclaimer on ad five, that's lawyer talk. A consumer looking at that --

MS. KOLISH: Is there something wrong with it?

(Laughter.)

MS. FOX: Yes. A consumer looking at just a general phrase, that jewelry disclaimer, they think that that's going to say, buying this set of earrings will not make me slim, beautiful and desirable and get me a date on Saturday night. It doesn't convey the idea of, we're going to give you important information that says you're really not going to get as much as you thought you were getting when you paid your thousand dollars.

MS. KOLISH: Thank you, Jean Ann. We're going to go to Teresa, then Elissa and then Carla.

MS. JENNINGS: My comment was based on what originally Kevin from AOL was saying, but then it kind of
developed with some of the comments and Eric and all of your comments.

I'm Teresa Jennings with the Direct Selling Association. And we have a unique requirement that was placed on our industry by the FTC back in the early 70's. We have a three day cooling off period for all of our sales, because we were selling -- we are selling outside of a fixed retail establishment. It's in the home, usually. And there is specific language that must be on the back of every Direct Selling sales receipt, in duplicate, in ten point type.

As an attorney with the Direct Selling Association, one of my responsibilities is to review the materials of all of our pending and current members to make sure that that requirement is in place and is accurate. And one of the frustrations that many of these new Direct Selling companies weren't aware of is that sometimes they have a warranty or a guaranty that goes much further than a three day cooling off.

It could be a 100 percent forever money back guarantee on anything you ever purchased from our company. But they can't put it on the back of the receipt, or anywhere on the receipt, because the receipt is full of information. It's full of the order that you placed and the amount of money you spent. And then four
paragraphs of ten point information that has to be handed in duplicate to the consumer.

      The attorneys understand that the FTC requires this, but the marketing people frequently do not. And so I think here in the Internet, we're coming up to the same sort of thing in a different medium. There is required information. I think every business around this table understands that it is required information.

      And we do want to convey that to consumers, because ultimately when the consumer is protected and happy, they come back to our businesses. I think we're on the same side here, team, but how do we do it adequately in this new medium. And we're still struggling with that.

      MS. KOLISH: Thank you, Teresa. Elissa?

      MS. MYERS: Teresa, I think that was -- Elissa Myers, Electronic Retailing Association. Teresa, I think that was very well said and an important point to be made. There is a certain skepticism about the retailer and the consumer experience that sort of has pervaded all of our comments today.

      And I was thinking again from my personal experience. Even reading the disclaimer or the click through diamond weights are not exact, click here for weight ranges, as a personal shopper I probably ought to
be a lot more careful in my shopping than I am. But I
don't find that entertaining.

I do expect to find a bunch of legal stuff
underneath it that I'm not really interested in. And I
was thinking -- and you probably won't like this idea.
But I learned something this morning. I never knew that
if I bought a three quarter carat pair of diamond
earrings that I might get a pair of diamond earrings that
were bigger than three quarter carats.

(Laughter.)

MS. MYERS: I never knew that. So I was
thinking that if you really wanted to get me to read the
message, maybe the statement at the top should be: you
might get a bigger diamond than you're expecting.

(Laughter.)

MS. MYERS: And that I would click on.

(Laughter.)

MS. KOLISH: Good point.

MS. MYERS: And I was thinking that on the
testimonials -- I was thinking, now how would I word it
there. And where you have the little thing that's going
to tell me that it's paid, you could have a statement
that said something like you, too, can be paid for a
testimonial, if you would like.

(Laughter.)
MS. MYERS: And I do think -- I do think that if you try to impose a standard on this that is -- that over complicates, that over legaleses the experience, you're going to through the baby out with the bath water. You're going to loose the attention of the consumer.

MS. KOLISH: Thank you, Elissa. Carla? And then we want to move on, because we want to break at 12 for lunch, or as close to it as we can. And there are a few more issues that we would like to cover before lunch.

MS. MICHELOTTI: Okay. Carla Michelotti from Leo Burnett representing the American Advertising Federation. Just a further point on the avoidability and unavoidability. There is no debate that these are very -- it's important material information to be provided to consumers that the FTC is requesting that it be provided to consumers.

But as to the point of whether avoidability is a standard, to the extent that the web is a strip mall of the largest sort, what would be the standard that would be used if one would walk into a jewelry store, or one would walk into a K-Mart, or walk into any retainer -- what would require, you know, that same person going in to spend a thousand dollars -- at what point does the law mandate that the retailer -- the clerk behind the counter -- tell them well, you understand that the weight ranges...
vary, blah, blah, blah, or read this disclaimer.

And that's to my point of whether avoidability and unavoidability has ever been the key pin prior to a purchase decision. Everyone -- all the lawyers around the room know that in every retail store, if you're buying a dishwasher or a television in a major retailer, you can find the three ring binder of the warranty book. But I don't know how many ordinary, reasonable consumers going to the store are directed to the warranty book.

So it's there, but is it unavoidable? No. I don't know how many people think of the label of a can of peas and know that the nutrition information is there, but whether -- or I'll use a better standard. The nutrition information on a pizza box. The nutrition information is there, but how many people really study and read it and make that comparison.

MS. KOLISH: Well, there they don't want to know.

(Laughter.)

MS. MICHELOTTI: Sorry I used pizza.

MS. KOLISH: Good comments, Carla. In terms of jewelry -- I'll just this as an aside -- you'll find that a number of major retailers are making much better and special efforts to ensure that consumers are getting this weight range information, because we think it's important
and we've asked them to beef up their procedures.

Let's now move on to ads seven and eight. It won't take long to do these two ads. So we have seven up already, and we're going to look at eight. Now, the difference between seven and eight is that the hyper link appears at the top of this page on seven, and on eight, if you scroll down -- if you scroll down, and down, you see it down here.

And, you know, we've talked about this a little bit, about the placement of a link and, you know, I've already heard people say maybe not even right there is the best place.

Is there any disagreement that this might not be an optimal place for it there? I mean, do people want to comment on this, or can we move onto some other issues?

All right. Jean Ann is saying she hates it. Does anybody else have any -- and other people hate it, too.

All right. Let's look at ads 13, 16A and 16B. What we want to do here -- this is in the Quick DDRIP context. We want to look at some of the similar issues, but in the context of a different ad with a different disclosure, and see if a different disclosure and different fact pattern changes our analysis here.

And, Phillip, you should be well situated for this, since you kept anticipating this all along. Scroll
down on these ads a little bit so we can see the little endorsement on 13. Okay. Here on ad 13 you see that D. J. Blackhand's name is underlined showing it's a link. And in ad 16A there is a disclaimer button, and in 16B it's paid endorsements.

Do you think, for example, like D. J. Blackhand being underlined here is more effective than three quarter carat? Actually, I heard somebody already say no, they didn't think it was. They mentioned that it wasn't good enough, because you might go to a company name or something.

And then the same thing about the disclaimer. Is the disclaimer better here? Does it look less legalese when it's in bright blue color and it's button? And does paid endorsement help you? Well, somebody actually already said they think it's a way they could become a paid endorser. We all thought that, too.

(Laughter.)

MS. KOLISH: So, anyway, I'll take comments from people. I see Phillip has his hand up. Ron has his hand up and Dave has his hand up.

MR. MCKEE: Phil McKee, National Consumers League. Misgivings about all three. Let's be blunt up front on that. As I said earlier when I made the comment and you referenced it, on ad number 13 it could very well
go to something else. It is convention at this point that an underlining of an individual's name can either go to their personal web site or a mail to function. You click on it and all of a sudden an e-mail window pops up and you can send D. J. Blackhand a letter telling him what you think about his endorsement or something along those lines.

Or let's say instead of having the name of an individual up there, it was a link from someone at a corporation, say, who had installed these in all of their corporate computers, and that link might go to their corporate web site. You're not sure exactly where that one goes.

And 16A, still legalese. I look at that and I have to admit. I'm really not going to want to read it, even though I know I should. It's going to -- if I saw the phrase disclaimer, my guess is that that's the page I want to read right before I go to bed to help me go to sleep.

And on ad number 16B, at least it says paid endorsement up front. At least it gives me an idea that it's related there. And I might want to click a little bit further. I would bicker some on the placement, perhaps making it directly beside D. J. Blackhand, so that it's more obviously related to him, and not as you
just mentioned, a way of becoming a paid endorsement.

But they all have their problems.

MS. KOLISH: Thank you, Phillip. Ron, you wanted to comment?

MR. GOLDBRENNER: Yeah. Ron Goldbrenner of PMA. I don't think it's fair to state the question as which of these is the best, because I don't think that's the question. I think the question is, which is adequate to be clear and conspicuous. Which is good enough to be clear and conspicuous. And that's the question we need to be asking. And then further than that, does it have to be unavoidable or definitely assimilated by the consumer in order for it to be clear and conspicuous.

MS. KOLISH: Okay. Just to go back, we're not talking about best being the standard. We're talking about clear and conspicuous, which means is it an effective communication technique. And obviously, you know, it could be something that's, you know, very effective, or it could be a hundred percent effective.

But we're saying effective so that most consumers are not going to misled. And obviously you could have things that were better than that. So better isn't -- best isn't the standard. It's effective communication. Are consumers likely to be misled or not.

Dave?
MR. CLAUSON: Dave Clauson, IXL, representing the American Association of Advertising Agencies. I find myself echoing Phillip's comments to a degree, and again arguing the need for flexibility in interpretation here. Across all three, you're not sure what any of those three are potentially. So, you know, if you go all the way to what appears to be the most extreme, the paid endorsement, the button if floating on the page, not anchored anywhere. If that were text that finished up the quote that said, you know, D. J. Blackhand is a paid endorser of, that's clearly even more descriptive.

So there are degrees of ranges here that you can -- I think we're all agreeing that it's a spectrum. Which leads me to the point that I'm trying to make, which is, these need to be designed for each experience and they are unique. They're not just -- you cannot make just generic comments about where things should be or how they should look.

Is the blue button more conspicuous? Yes. Actually the blue button, because of its use of color, white on blue, from an art direction standpoint is far more attractive to the eye than paid endorsement. So am I more likely to see the disclaimer by clicking the blue button and then paid endorsement? I don't know.

Which gets me to the final point that probably
the only metric that you can arguably use to say, is the
consumer reading the disclosure, is to look at the click
through rates to the disclosure page and find out what is
the average length of time the consumer is spending on
that page.

And I would argue that most manufacturers and
most brands, if they are clearly -- what they do -- and
I'm to the point that Teresa made. We are on the same
team here. The cost of Dell to fulfill the wrong order
is a number they want to cut. They want to make sure
their customers are getting what they expect. And I
think every good manufacturer does.

But the point being, that you can look at click
through rates and see how long the average person spends
on the disclosure page, and somebody needs to make a
judgment, is that enough. Is 20 percent click through
enough? Fifty percent? What is -- what are you going to
accept? And, you know, it may mean that that paid
endorsement needs to be flashing and spinning around. If
that's what it takes to get to fifty percent, if that's
what the FTC mandates, then maybe that's what we have to
do.

But again, I don't think we're going to make any
hard and fast decisions about what is the best. I think
you need to keep the doors open to the fact that the
consumer will tell you by their behavior what is the best.

MS. KOLISH: Good point. And I always look at click through rates in an investigation. Eric and then Teresa and then we're going to move on.

MR. WENGER: I think one of the interesting things about the disclaimers that appear here is that the last one -- which one is that, 16B?

MS. KOLISH: Yes.

MR. WENGER: Is an example where even without clicking through, perhaps the heart of the endorsement is already conveyed -- I mean, sorry. The heart of the disclaimer is already conveyed to the consumer. And so while looking at the click through rate and which of these links is most likely to entice people to click through is an interesting thing to look at, you also might want to look at do these disclaimers right up front convey the information that the consumer needs to know.

If you look at the first one, again we have the question about whether or not it's clear to people that this is a hyper link. And then assuming that it is --

MS. KOLISH: In ad 13, you mean?

MR. WENGER: Right. In ad 13 and also in 16A, let's assume that in both of those cases you know that there is something that you're going to be clicking

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025
through to. You don't really know, or have any idea without clicking, what that information is likely to be. And so if people don't click through, then the information is not conveyed. And if the Commission's position is that that information must be conveyed, as it appears to be in the endorsement guides, then the question is, would it be overly burdensome. I think one of the factors would be, would it be overly burdensome to put that information right up front in the ad itself. And if you look at the amount of text that is on this particular ad page, it doesn't seem like it's too much to require -- or to say that a paid endorsement is something that should appear there right next to the -- in close proximity to the endorsement itself.

MS. KOLISH: Thank you, Eric. Teresa, and then we'll move on.

MS. JENNINGS: This is Teresa Jennings with the Direct Selling Association. I agree with what David Clauson was just saying about flexibility being key. The example I gave with the required language on the back of our sales receipt is a problem 25 years later, because that standard hasn't changed, but the protection have gotten greater. And so how do you convey that additional information to consumers when there is less space? Now,
on the Internet, we don't have less space, but we're still trying to grapple with how do consumers use the Internet.

And my brother brought up an example last night. When we were at the University of Maryland 16 years ago, he volunteered for a study on computers, and the study was on using a mouse. Will people go up and down to get to where they want to go, or will they go straight across the page? Nowadays that seems utterly logical. Of course you're going to go straight to the place that you want to do.

But now we're looking at what will a hyper link do. What is the best way to communicate the information. Where is the disclaimer adequate and where it is not. It's the same thing that he was describing in the 16 year old study. Will you go straight to it or will you go up and down?

And I think that we're developing that information. We want to get that information and share it. But what I would hesitate to do is create a rigid standard, like maybe what happened in our industry 25 to 30 years ago, that can't grow with the technology. That can't be useful with the technology as it expands and as consumers gain in their knowledge themselves.

MS. KOLISH: Thank you, Teresa. Can I just ask
sort of a summary question. We've talked a lot about this and about D. J. Blackhand and how people could interpret a lot. But just to focus on disclaimer, do I hear any sort of general agreement that that by itself might not be good enough to put people on notice that there is important information? That it is too legalese, that you need a better label?

(Audience: no and yes.)

MS. KOLISH: How about a show of hands? All of those in favor of a disclaimer as an adequate technique under some circumstances and barring other factors, taking them into account, raise their hand.

FEMALE SPEAKER: That it should work, right.

MS. KOLISH: That it should work? And those who don't think a disclaimer is usually not good?

MR. MCKEE: Usually not good or too complicated with legalese?

MS. KOLISH: Too complicated with legalese and may not be good?

FEMALE SPEAKER: Inadequate.

MS. KOLISH: Inadequate. Ineffective.

(Laughter.)

MS. KOLISH: Because I can't get the votes here.

FEMALE SPEAKER: I don't think you can have black and white.
MS. KOLISH: It's too complicated. Never mind. I can't get agreement on that. It's 12:00. We have a couple more issues we were hoping to cover by lunch, but I think that we could probably do them after lunch when we cover some other issues.

So we'll break now and we'll come back at 1:15. Okay? Thank you all.

(Whereupon, a lunch recess was taken.)
MS. KOLISH: We're back. Did everyone have a nice lunch? We're back. I hope you all had a nice lunch and refreshed yourselves so you can be equally passionate this afternoon. Great. That got your attention. If everybody takes their seat, maybe we'll find out that there are some empty seats up here, and if so, some folks from the overflow room might want to meander up. There are still a few empty ones.

So anybody in the overflow room, there are a few more empty seats up here if you want to take a chance that they'll still be here by the time you walk up.

Okay. We're going to turn now -- we're going to continue our hyper linking theme and look at a few more ads with hyper link presentations, although this probably won't take long based on the prior discussion that we've had.

We're going to look at ads 14 and 15. And ads 14 and 15 are for our lovely Quick DDRIP product, and we're going to again scroll down to D. J. Blackhand's endorsement. There you go. Stop. On both of them. And you'll see in ad 14 that there is an asterisk next to D. J. Blackhand's name with an underline, and in the other ad 15 there is a star icon. Both of these are meant to be links here.
One of the questions that we have for you is that since on web sites asterisks and icons are sometimes used simply as a way of attracting attention, can they resemble other graphics on a page as is the case of this ad. If someone scrolls down a little bit, they'll see that that star theme is repeated elsewhere.

There you go. And that star there is just a larger version of the star that you see next to D. J. Blackhand's name. And in light of this, the question we would like to pose for discussion is, are consumers reasonably likely to know that these are links that they should click on, or will they ignore them thinking they just graphics?

Yes, we have comments. Good. We know Phillip wants to talk. Anybody else? Okay. And John. All right, we'll start with you.

MR. MCKEE: Thank you very much, Elaine. Phillip Mc Kee, National Consumers League. And I'll try to take that not as a comment that I always want to talk.

(Laughter.)

MS. KOLISH: I was just observing that you were raising your hand.

MR. MCKEE: First, in regards to -- let's start off with ad number 15. That's the one where I have the most negative comments. Ad number 15, it's not readily
apparent that it is a link, as you said. It's a graphic
that is very similar to a graphic that's used for a
bullet point later on.

And I have to admit, when I first looked at it
-- yes, I do need reading glasses that I'm not wearing
today. But when I first looked at it on the printout, it
did look like a printer's smudge. But I don't think
that's a very effective way of drawing people's
attention. More often than not, when you look at a link
on many well designed web sites, the links are
contextual. That is a comment that applies to both of
them.

The item that is making you want to link is the
link itself. For example, up at the menu, what customers
say would most probably be the link, not the yellow space
on either side of it. So in this case, either the little
star or the asterisk that has been turned into the link,
would be less obvious to the consumer that the link is
there, especially in regards to the red star. And also,

it isn't quite as eye catching as simply having something
larger that is very obvious as the disclaimer, or the
item itself being the link.

MS. KOLISH: Thank you. Well, there are a lot
of people who want to talk, but I want to hear from all
of those people who defended all those links on prior
occasions and see if they want to defend these, too.

Elissa and then John. Oh, you don't want to talk? Okay. John?

MS. MYERS: It's not that I don't want to talk. I don't defend it.

MS. KOLISH: Okay, fine.

(Laughter.)

MR. FRUEHE: John Fruehe from Dell Computer. It's interesting this morning that we talked a lot about gemstones. And gemstones, when you actually grade them, there are four c's that you deal with: the color, the cut, the carat weight and the clarity.

And as we look at some of these -- as we get through some of the real kind of simple semantics on how we're actually identifying links and things like that, it really brings out that there are kind of three c's that we also need to start to think about. Which are, number one, the context, which I think Phillip just hit on. And it's important that we keep in mind that this is a very complex medium and that you're not just dealing with a particular bullet point in time, but you're actually dealing with an entire experience for the customer.

And as it's complex I think that -- I would love to be able to say, you know, we've done the research and Dell has really figured it out. We've got the magic
formula and it's do X, Y and Z and you'll be successful. And we're continually spending a lot of money doing research and doing usability testing and revising our site in kind of an effort to bring ourselves closer to what the consumers are looking for.

And the second thing is really caution. And with the way that everything changes today, looking at these links and saying, you know, these may not be applicable today, that doesn't mean that six months ago or six months from now they may be, or they have been in the past. So we have to kind of think that this is a changing environment, and we've got to keep that in mind instead of focusing in maybe on the details of does this link work.

And the last thing really to focus in on is the consumer, because in my mind, the consumer is my best friend. And I'm not interested in selling a consumer one computer, but I want to sell them ten. I want to make sure that in the year 2050, I'm still selling computers to their family. And so an educated consumer is really the person that we want to be able to market to.

And I think that's the stress that we should have moving forward. How do we educate the customer?

MS. KOLISH: Okay. Well, let me ask -- add another question to the table. Which is, would consumers
reasonably know where to look for that asterisk's reference? I mean, in the off-line world, I think you're pretty familiar with the fact that if you see an asterisk in the headline, you look to the bottom of the page or the bottom of your television screen.

Is that going to be the case here, especially if consumers end of having to -- in this case in ad 15 you would have to scroll through multiple pages -- multiple screens -- to get to the bottom of the page. Is there any concern about -- because sometimes these figures -- these asterisks and icons -- are used as blinks, and sometimes they're just used to mean go elsewhere on the page.

Does anyone have any comments about how consumers are going to react to that, that they might know which is the case? And if they did figure out that they have to scroll, would they know that they had to keep scrolling and keep scrolling?

Okay. David?

MR. CLAUSON: Dave Clauson, IXL, with the American Association of Advertising Agencies. I think these examples point out the fact of just how complex, flexible and differentiating these kinds of links can be. I'll go to the gentleman from Dell's comment earlier this morning. They use a yellow arrow. If I'm a regular user
of dell.com, I know what that yellow arrow means, because my behavior pattern has been educated to know -- to associate that yellow arrow with a link to go to more information.

So again, it depends on where the consumer is in their experience with the site and the information that they can begin to put any of these graphical elements in context. So whether it was a star, whether it was a square, if it was my first time at a site like this, I might not know it. If it was my tenth time, I would absolutely know what it is.

So again, the issue of a graphical mark needs to be held in the context of where it is used, how it's used and how often it's used.

MS. KOLISH: But, Dave, was it you who mentioned earlier that it's useful to have consistency with how you do your hyper links?

MR. CLAUSON: Absolutely.

MS. KOLISH: So that if you use a variety of techniques on a page that might end up being more confusing or distracting?

MR. CLAUSON: Yeah. We call that -- we use the word, blunk, in the design community.

MS. KOLISH: What word?

MR. CLAUSON: Blunk. Blunk is a term -- look it
up. It is in the dictionary.

MS. KOLISH: Oh.

MR. CLAUSON: That which means is confusing, or disorganized. And in fact, if you continually modify your site to change graphical elements all the time for the sake of changing them, you're putting yourself in the way of the consumer's experience with you. And not only that, if I do come back to your site more than once, or I'm a regular visitor, I come with a certain set of expectations, and that is clarity and consistency.

So if we're not meeting those expectations, I'm not as likely to return.

MS. KOLISH: Okay. Ron?

MR. GOLDBRENNER: I'm not going to defend these two particular examples. But again, I think it's a contextual matter. Just as you said before, the asterisk in a newspaper ad, the consumer knows what to do with it. I think it could very well be adequate in an Internet context as well. We don't know from this kind of a limited example. I think one has to take the whole context of how an Internet ad or Internet information is conveyed. And so I think one of the mistakes we can make is to say automatically this is no good and should not be allowed.

The other thing is kind of a twisted view of
these things. Suppose you had one asterisk, as you do, with nothing else on it, and suppose you had another one that said information you must have, and then you had a third that said disclaimers. If you did a test on that, I'm not sure that the blank one wouldn't win in terms of more consumers going to it than the other two. So you have to take those kinds of things into consideration.

MS. KOLISH: Okay. Thank you. Kevin, Else, you had a comment?

MR. ELSE: Yes.

MS. KOLISH: Okay.

MR. ELSE: Kevin Else with QVC. I really hate to be -- or least put my employer at a disadvantage compared to our competitors with the print media. I don't know how many times I've gotten especially a credit card proposal in the mail. And there may be something with a single asterisk, something has two, something has three, and sometimes I can't find the references anywhere.

In this situation the asterisk, as soon as you hit it, it may be a hyper link to another spot on the page. It's actually much better than what I'm getting in print media. And therefore, you know, if we were going to say well, is this adequate, if the print media is
adequate, then this should be adequate.

And as far as whether or not a person that gets on the page would actually click on that spot, at least in my experience, I tend to click on anything that looks like it could be informational as opposed to disregarding things. Just because oh, the hand changed here, boom, you know, and I go and jump to it.

MS. KOLISH: Thank you. Well, actually if you look at past Commission cases, there are a variety of cases where asterisks have not been held to be acceptable. But occasionally, depending on the type of information in a section five case, it may be okay. More typically they're going to have to say where to find the information, like see bottom of page, as opposed to just a general asterisk reference.

We may not go after everybody who uses them, though.

MR. ELSE: Well, I understand.

MS. KOLISH: And then Jeff?

MR. RICHARDS: Jeff Richards, Internet Alliance. Just real quickly. I think it's important to remember here looking at these examples, or some of the discussion we just had, to remember that we're still so early in the web experience that in may cases we do things simply because we can do them, not because they're wise or
informative.

For example, whatever happened to blinking text? Six months ago or a year ago, you know, text blinked all over the place. It's stopped now, thank God.

(Laughter.)

MR. RICHARDS: Why is that? It's because consumers probably hated it, and people figured out pretty quickly that blinking text was not an attention getter. It was just the opposite. It screamed amateur and get out of here.

Similarly, underscored text typically means it's a hyper link. But, of course, we find in many badly designed sites, text that is underscored that's not a link to anything. It's meant to be an underlined like text. And so consumers also make a judgment about the professionalism or trustworthiness of that.

So I think we -- and conventions. Many of us go and look at the bottom of the page if we're looking for copyright, because we're aping the legal style of today. Already that convention is beginning to end, and very important copyright notices are going to where they are effective, not the bottom of the page.

So I'm suggesting that we should be really careful about thinking that conventions are going to last more than three months, that they're anything other than
consumer driver, and that we should be cautious about doing things simply because we can.

MS. KOLISH: Thank you. Next is Jerry Cerasale, then Roy and then Craig.

MR. CERASALE: Yes. Jerry Cerasale with Direct Marketing Association. I wanted to add to David, when he talked about blank and confusing things. I think in ad number 15, if in fact the star -- and I'm not talking about the adequacy of whether you just put a star next to the person's name or whether that meets what you need.

But if the star next to the name is a hyper link, and the star further down the page is just a dot, not a hyper link, that's really very confusing. So, I mean, I think that does the opposite of, for example, what Dell does with the arrow. The yellow arrow means that wherever you see it, it's a hyper link.

So I think that if your ad -- and I don't know whether you meant them to be hyper links or just points. If you meant them not to be hyper links, then I would think that that is very confusing from our perspective, that you've actually switched a symbol to be a hyper link and not a hyper link on the same page.

MS. KOLISH: Thank you. Roy?

MR. GREEN: Yes. Roy Green with AARP.

MS. KOLISH: Do you want to speak into a
microphone?

MR. GREEN: Sorry. All right now?

MS. KOLISH: Yes.

MR. GREEN: Okay, good. It strikes me from a consumer point of view that one of the ways to look at the incredible variation in consumers that you have coming onto the net with different kinds of experience, plus the incredible variety of advertisements are the symbols that we're looking at today.

One of the ways to begin to approach that is a standardized format. For example, a banner heading at the end of every advertisement that has an index of the two or three symbols that are used inside of that advertisement, so people don't have to worry about some kind of official designation of what the various standards or symbols used are.

It seems to me that would help facilitate from the consumer's point of view, regardless of their experience as either computer users or as people who have not necessarily visited your Internet site frequently, to learn your convention and would be a way to standardize access.

MS. KOLISH: Thank you, Roy. Craig?

MR. JORDAN: The comment that Kevin made about the asterisk disclosure and competitive disadvantage --
MS. KOLISH: It's Craig Jordan.

MR. JORDAN: I'm sorry. Craig Jordan from the Texas Attorney General's Office. Raised some thoughts for me that I think they're saying here that we've been talking about context. There are a couple of contexts in which asterisk disclosures can be used. And your comment briefly was that there are some cases where the Commission has said that's fine. There are some cases where the Commission has said that's not fine.

I was going to elaborate on that a little bit. From my point of view, as someone who reviews ads on a daily basis for deciding whether or not this is something we're going to bring an action about or not, if it's important information, the more important it is, the less likely an asterisk is going to be appropriate.

The mere fact that someone in another ad has used an asterisks to make a disclosure doesn't necessarily mean that all other asterisks are going to be fine. The information that they may have been saying in that ad may not have been as important.

Another important distinction that I think can be made here is about what is the function of the disclaimer. There are two kinds of categories of disclaimers. Some disclaimers just add additional helpful information. For example, the Truth in Lending
Act is a fine example of this. If a car dealer
advertises that you can buy X car for $2,000 down and
$199 a month, that's a true statement. There is nothing
misleading about it.

It's helpful from a comparative shopping point
of view to also know what the APR is and some of the
other information you get from the Truth in Lending Act.
But there is no misleading or false statement made in the
body of the ad that the asterisk is trying to correct.

On the other hand, if we look at one of the
Quick DDRIP ads, for example, where you have the customer
testimonials, and the company has chosen testimonials
which substantially exaggerate the typical performance of
the product, at that point the disclosure is now
correcting a false impression. And at that point I would
say an asterisk or a hyper link is never really going to
be acceptable, except in very rare circumstances, for
correcting that kind of interpretation.

MS. KOLISH: Thank you, Craig. Our financial
practices staff, you know, want to disagree about whether
those Truth in Lending advertisements might not be
deceptive on their own because of implied claims that
they may give rise to. And so they don't view it just as
additional helpful information, but imperative
information.
MR. JORDAN: Okay.

MS. KOLISH: So I had to note that for the record so they would be happy. Thanks. Let's move on to ads 27 and 28. Here on ad 27 we're back to our pages of testimonials. And you'll see at the top of the page -- you can read the testimonials.

Okay. If you scroll down a little bit, you'll see scattered throughout this page, order now, order now. And if you clicked on that order now, you would go to page 28, where you see the actual disclosure that the speed improvements are not the ones that -- you know, may not be something that everybody will get to the same degree. And then you have the order form.

And the question that we pose for you is, are consumers going to notice this disclosure prior to purchase? The outfit is right there on the last page where you're going to order. But one question I have is, if you just pressed order now, are you going to go right to this little yellow form and start filling it in and never read this? Is this in fact designed -- you know, set up so that consumers are less likely to notice it?

On the other hand, would tinkering with it, like making it, you know, in color contrasting type as opposed to this black type, boxing it, increasing its type size or moving its location, would that make it work?
And then the final question to keep in mind is, is this close enough to those endorsements to be effective in qualifying them so that people understand that these experiences are not necessarily typical ones?

So that's a whole lot of questions I put out there, but you're a great group and I know you'll be able to keep up with them. So --

MR. GOLDBRENNER: Elaine, could I just ask you to clarify one thing?

MS. KOLISH: Yes.

MR. GOLDBRENNER: Do you mean -- you said if you're taken directly to the order form, are you going to see what's above it. Do you mean that the screen would be lowered --

MS. KOLISH: No.

MR. GOLDBRENNER: -- so you only see the order form?

MS. KOLISH: No.

MR. GOLDBRENNER: Or come up like this?

MS. KOLISH: Just that you go this screen.

MR. GOLDBRENNER: And the screen would look like it does now?

MS. KOLISH: Yes. It would look like it does now. And my question --

FEMALE SPEAKER: Right. And if we click on the
order now button in ad 27, you'll just see what comes up?

Ms. Kolish: Yeah. So the question was, if you
do that, because you've decided to take the action of
ordering, do you go just directly to this page and start
filling it in and avoid other text?

Ron, Bill, Jean Ann.

Mr. Goldbrenner: I find it difficult to
understand how the page here with the order form can be
anything other than the quintessential clear and
conspicuous. It's there. If your standard is not clear
and conspicuous, but the consumer must absorb it and
assimilate it and read it, maybe it's not adequate. But
I don't think that's the standard.

And as far as the endorsements, it being
proximate enough to the endorsements, we're trying to get
information to the consumer before he makes the important
decision of purchasing. Before he makes some important
decision where he commits himself. And I don't think it
matters if it's right next to the endorsement, if it's
right ahead of the order where he's making that important
decision.

The object of the game here is not to get him
the information at the same time you make the trigger
claim. The object of the game is to get him to have a
fair and balanced view of the information conveyed
overall. And certainly in some circumstances, putting it above the order form or next to it or even below it, can be adequate. We just have to look at each one.

And I think it would be a mistake to prescribe a rule that says it must be on top, or it must be on the side, or it can only be proximate to trigger words, etc. We have to look at the context of each ad.

MS. KOLISH: We agree that's what net impression is all about, and what we're trying to identify are factors that are going to be more or less helpful in ensuring that something is clear and conspicuous.

Anyway, Bill, did you have comments?

MR. MACLEOD: Bill MacLeod with the Grocery's Manufacturers of America. I think this is a good example, Elaine, of what we were talking about this morning in talking about how the Internet really adds a separate dimension to this thing.

Proximity -- if you want to look at it simply in terms of the definitions and the guidelines, proximity is not just left, right, up or down. Now, proximity can be a separate dimension away, and it may well be that that is more proximate to these particular testimonials than anything anywhere on the page where the testimonials appear, because it is in between those testimonials.

And if I have just read one -- maybe I quickly
scroll down to a particular testimonial that is neither
at the top of the page nor the bottom of the page. And
unless I had something that was qualifying it running all
along the page or constantly there, that might be the
most proximate thing of all.

And that is what I was talking about earlier
this morning in saying that proximity is kind of a design
standard. There are -- you can look at that as
proximate. But you can also look at it in the context
that John was describing a couple of minutes ago, in that
you are doing perhaps better than the old proximity
standard -- what that proximity standard intended to do.

MS. KOLISH: Okay. Jean Ann and then Carla and
then Craig.

MS. FOX: Jean Ann Fox, Consumer Federation of
America. I still think it's better to have the
disclosure on the page with the testimonials. Even
though you haven't finally committed yourself to purchase
it when you click on the order now, your decision making
process has already moved one step beyond evaluating the
testimonial claims you've already decided you're going to
act on whatever information that you've accumulated.

On the format for ad number 28, the fact that
there is no white space between the colored bar and the
please note makes it less likely that you're going to
catch it. It just all sort of globs together. That's not like blunking, but we say it in Virginia. Globs together.

(Laughter.)

MS. KOLISH: Great. Carla?

MS. MICHELOTTI: It's really just following up on Bill's about the cyber space environment, and it's worth repeating because it's so important as we apply the standards and we apply our historical perspective of proximate, close, conspicuous, immediate adjacent to. We have all these terms of art legally that are in a measurable, physical environment. And cyber space is not a measurable, physical environment.

So we are in a third dimension or a fourth dimension, but it's not a dimension that's measurable. And what's important is the consumer behavior, in that the consumer involves himself and engages himself in this environment and what is reasonable and understandable for the consumer to have access to and make available to him. It is not an environment that is any longer measured in inches or distance, which is what I was trying to say this morning when I talked about geography not being important.

MS. KOLISH: Thank you, Carla. Craig?

MR. JORDAN: Craig Jordan with the Texas
Attorney General's Office. I think Bill made a good point that on the Internet, at least in the context of the web as we use it today, a disclosure on another page might be in some sense more proximate to the term that modifies a disclosure elsewhere on the page where the trigger term is.

A caution there and a real concern I would have is if you put them on different pages, you now have to start anticipating what a user's click track is going to be through the web site. I might not be one to buy Quick DDRIP today. I might just be shopping around. I might -- if Quick DDRIP costs $2,000 and sold by someone like Dell, I might come to that site four or five times before I decide I want to buy Quick DDRIP.

If I don't find out until I get to the last step of the process, the order form, I may no longer be interested in reading disclosures. I may have already made up my mind, or I might be quite disappointed and might have wasted a lot of my time that I could have spent going to another manufacturer who is going to tell me about the product up front.

MS. KOLISH: Well, Craig, let me vary your hypothetical a little bit, because it goes to a point we wanted to ask about. Which is, say a person is reading some of these endorsements, and they decide, well, you
know, now I'm going to go click on how Quick D works.
I'm going to go read their privacy policy, an intriguing
notion, or see what experts say, and then they decide to
buy it. It's not their fourth or fifth visit, but it's
the same visit, but they've gone to lots of different
pages and then they go here and then they see this.

Now, this may be not, you know, many inches
away, but it could be many different plains away. I
can't remember the type of geographical terms you used,
Bill. But anyway it's now separated, you know, probably
a fair bit in time, as well as textually, from the claims
that they started reading before deciding to click
around.

Does that make a difference in people's
analyses? And I know, Roy, that you had your hand up, so
if you want to go ahead.

MR. GREEN: Again, Roy Green with AARP. I'm
always interested in the characterizations of consumers
from the standpoint of the seller. One of the options
here might be to set up your format in any number of
these combinations, but to have as a default at the end,
particularly if someone hasn't gone through the
disclaimers, automatically -- I would think in this
context proximity might mean proximity to the
transaction. That is, to the decision to transact. Buy
something.

And that if they haven't done it before -- they haven't done so before, that one would automatically be directed -- or in fact the software would automatically take you to a disclaimer and that you would have to, in fact, opt out of that decision. So at least there would be one mandatory look at the disclaimers, if they hadn't chosen to do so individually as they're working through the web page.

MS. KOLISH: Okay. Are there any other comments?

MR. FRUEHE: There are two things. One is I think that we need to think about the consumer expectation. When a consumer clicks on the order now button, I think their expectation is, I'm going to place an order now. So the next thing they're going to do is go to the next page, and they're going to zero in on, the first thing I need to do when I give somebody an order is I have to give my name. So I go from the order now. I'm starting to fill in the form. And I think of the expectation of where a customer is going is extremely important when you talk about proximity.

And the other piece is that if this company sells more than just Quick DDRIP, if they're selling a multitude of products, now you've either got the
situation that Kevin brought up earlier where you have multiple disclaimers at the top, possibly obscuring the order form and making the customer think I've gone to the wrong place. Because I've clicked order form and all I'm seeing is legalese, so I go back.

So you've confused the customer. You've made it harder for them to make that purchase. Or you've got to do some programming to look at what the customer is buying and put the appropriate disclaimer up. Now, for a large company like Dell to do that type of programming is a relatively expensive task, but we can do it. We've got the resources. But that may disadvantage a lot of the smaller businesses who rely on less complex electronic commerce applications.

MS. KOLISH: So, John, what would you do to make certain -- to have an effective disclosure for these endorsements?

MR. FRUEHE: There are a variety of different things you could do. One of the things I think that may have been beneficial was actually handling it on the page prior. But that's not to say that this may not necessarily work. Again, a lot of it goes back to we need to sit down and test it and understand can consumers really pick up on it.

You know, there is a lot of conjecture here.
Everybody seems to believe that we know what the consumer wants and how the consumer acts. And I, as one, who deals with, you know, 1.6 million consumers a week, can tell you that we're not really all that clear on exactly what they do and how they act. And it changes. So to kind of make a blanket statement that, you know, all consumers would see this and it would be conspicuous is kind of difficult to do.

MS. KOLISH: We agree. I mean, I don't think we can ever project that all consumers are going to act in any particular way. We're just trying to say other factors that are going to make it more or less likely that people will look at it. I mean, we understand the difficulty that that engendered.

Craig and then Jeff.

MR. JORDAN: Just a quick point about the earlier point I made about where the click track might lead. I just want to point out that the click track might lead off line. That is, someone might decide, I can get a better deal on this at Best Buy than I can going to the company. So I'm going to go and get my car. I'm going to go down to Best Buy and I'm going to buy this product.

They may never see the disclosure. Who knows what is at the store -- at Best Buy. If there's not an
endorsement on the box, there's probably not a disclosure on the box. Or they might never ever even go to the order form, depending upon, you know, what their perceptions of the product, where they can get it and what their best opportunity to buy it is.

MS. KOLISH: Good point. Thank you. Jeff and then Dave.

MR. RICHARDS: Jeff Richards, Internet Alliance. We should look carefully at this order form, because this is one of the last times we'll see an order form like this. Order forms are no longer order forms. In fact, interestingly enough, one way -- there are many ways around the conundrum of how to ensure customer satisfactory and disclosure and all of that -- is to build it right into the order form.

You know, what are the factors that affect the speed and quality, and you build it into the order form. So as you're testing it out, in other words. Before you're finally buying it, you're putting in -- I don't know -- maybe that you know you're within ten miles of the central office -- telephone central office. Or, you know, the basic things that people could really do.

That's why this fill out the handwritten form is going away real fast, and why we want to give every encouragement into building in these disclosures. I
can't agree -- Internet Alliance members have strong experience with consumers who get to this point in the purchase process and then get this ah ha, they'll turn away and say well, this is perhaps not a reliable vendor. So it's in the merchant's strong interest to integrate this information in very, very early.

MS. KOLISH: Okay. I think Jerry was first, and then we'll go to Dave.

MR. CERASALE: Jerry Cerasale, Direct Marketing Association. I wanted to make a comment -- two comments. One is that especially in this context here on the Internet, it may be that you will only see ads for items that can work on your computer. That you can set this thing up so that they know what your equipment is, and so that you have to take a look at the whole ad in the whole context of what is happening.

For example, you could have -- if I had one computer, I might see a different set of ads at a web page, or a different set of text at a web page, than if I had another computer with other capabilities, or different products. Some products wouldn't work on my slow computer I won't even see.

So there are a lot of things that the Internet can offer us, and that's why I think that -- reiterate again that you really have to look -- and I think you've
said it, Elaine -- on a case by case basis.

The other thing I wanted to raise was a comment that was raised, I think, by Roy, of the mandatory pop up screen that you have to then click through to go out. That creates from our -- what we've seen, and of course we would need more study on it, I'm sure. That creates a disincentive to go on the net and go through here. That's an annoyance and people don't want to do that.

And I think that it also places the Internet at a disadvantage compared to other media, because you're mandating you have to go through this. It's not -- and I think that what we would like to see here is that the Internet not receive any favored treatment, but also not disfavored treatment. That you just apply things in relationship to the technology, but not create any special advantage or disadvantage for the net.

MR. GREEN: Could I respond to that?

MS. KOLISH: Sure, Roy.

MR. GREEN: Thanks. Well, again, the Internet has many rights -- many opportunities for seniors, but consumers of all kinds. And I understand the point that you're talking about there. But the issue here is that it is a default. That is, if people have not taken the opportunity to look at a disclaimer beforehand, that it pop up and that it be made efficient so that they can opt
out if they don't want to read it. It doesn't require
that they read it. It just requires that they be
confronted with that information momentarily. I think
that might be an important principle.

On the other hand, in the way we're talking
about, so far in most of the advertisements and ways for
presenting disclosures, all of the responsibility falls
on the consumer. And you're talking about a variety of
techniques and strategies here for different web sites
over different time periods involving lots of
advertisements and lots of companies, and with lots of
people coming online with the tremendous variation in
experience.

So again, from the consumers' point of view, it
seems to me that one might consider the trade off here,
that there needs to be at least some formal presentation
of the disclaimer somewhere in the process. If they
choose to do it voluntarily -- that is, when they're
working through an advertisement up front -- then the pop
up doesn't appear, because they've already explored a
piece of information or chose to interfere with it -- to
interact with it, rather.

But if they haven't, the question is, should
they be required to at least be exposed to the fact that
there are disclaimers present in that advertisement.

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It's not meant to put the Internet at a disadvantage, but rather if you're talking about a new environment -- that is, an electronic environment -- in which there is this tremendous variation of inexperienced people online, providing some basis protection to them.

MS. KOLISH: Thank you, Roy. All right. We'll go back to Dave and then Elissa, and then we'll wrap this up, because we have some final points about hyper links. Then we're going to go to a different topic.

MR. CLAUSON: I'll go very quickly. Dave Clauson with IXL. You asked a point earlier, Elaine, about should the disclaimer print on the order form and what happens. It was Jeff's point earlier. That order form should be filled out for me if I've been to dell.com. I wouldn't even have to do that in many cases, so that's going to change.

A couple of quick points. Again, this gets back to the issue of information design. The objective is to permeate to the consumer as much relative information on the consumer's terms. If we don't accept the fact that the Internet is not like traditional -- it is not television. It is not print. It is not -- it is not media, okay.

It is a community of interests. It is an environment where I am in control. The minute we begin
to start down the path of words like mandatory, words like forced, must view this before you're allowed to purchase, (1) you're fighting the whole context on which the Internet was created, and (2) you will engender -- I guarantee you if you had that policy up today there would be about 10,000 programmers who would be out trying to find a way around that immediately.

The truth is, the consumer will tell you. And I think, again, what the best marketers on the web understand, is empowering the consumer with information. You asked where should disclosure information go. I would argue it should be in many different places in many different forms, Because you want the consumer to understand and appreciate as much information as they possibly can.

But to say that all our disclosure information belongs in this one place, I believe is a mistake, and I think the consumer would tell you so very quickly.

MS. KOLISH: Elissa and then Dan, and then we're going to move on.

MS. MYERS: As I was looking at page 28, the order form of the ad, the thought process that ran through my mind was that -- although we're not taking the position that it should or shouldn't be on this page. It occurred to me that this is a useful place for this
message, because the content of the message in that paragraph modifies not only the testimonials, but in fact the description of the product.

Which led to me to a train of thought in which I went back to the -- Elissa Myers, Electronic Retailing Association.

(Laughter.)

MS. MYERS: And we've just published online marketing guidelines. And in the online marketing guidelines, one small paragraph that we require our members to adhere to is that testimonials and endorsements in online advertisements may not make representations that would be deceptive or could not be substantiated if the advertiser made them directly.

And the nature of a disclaimer, as I was sitting here thinking about, what does that word mean, and do I really understand it. It implies that a misstatement or a misunderstanding has been generated which has to be disclaimed. So there is something -- we believe at the Electronic Retailing Association -- call me Pollyanna. But we believe, and we're asking our members as a matter of contract with the organization, to tell the whole truth -- tell the truth, the whole truth and nothing but the truth to consumers.

And if you're doing that, perhaps this whole
issue of where the disclaimer appears and how we treat disclaimers becomes an issue of slightly less critical importance.

MS. KOLISH: Thank you, Elissa. Thank you also for noticing that we wrote such a good disclosure, that it does give you a lot of information even if you're not looking at the endorsement. We thought that was one of its flaws for this purpose, actually.

Dan?

MR. JAFFE: Well, this discussion brings me back to a point I made earlier, but I think it has more point here, which is that if you start having forced pop ups -- first of all, I'm Dan Jaffe with the Association of National Advertisers.

MS. KOLISH: Actually the court reporter has said she's actually getting us now.

MR. JAFFE: But in these ads, again, you could have multiple disclosures. You would have to have multiple pop ups. You would have to have multiple agreements for the consumer to go through them whether they read them or not. It's going to become a very cumbersome way to do things.

So I would really like to associate with what Mr. Clauson said, which is that you have to let the consumer be sovereign here. We have the goal of making
sure that these things are noticed. But I really believe it's going to be very tricky at this point for the most knowledgeable people the most expert in this area to really predict what we're going to be facing six, nine or 12 months from now, because we really don't have the richness of consumer experience that we've had in many other areas.

Maybe there will come a time -- I'm not sure there will. But there may come a time when we really can know enough so that we can set up some rules. I'm pretty positive that if we set up rules now, we'll get them wrong. This is a moving target where we're going to shoot at, and it's going to be past us and we're going to miss and actual damage the selling efforts.

So I think we've got to be very careful, because these ads -- well, I think they're excellent for the discussion. I really do. I think they bring up a lot of the key points. They are very simple as to what is already out there, and what is going to come soon is going to be so much more complex, because we keep getting more and more sophisticated every day.

MS. KOLISH: Thank you, Dan. Thank you everybody. We'll move on. We're going to look at ads 19, 22 and 23, and we're still talking about hyper links. And what we want to get out here is repetition. We
raised in a Federal Register notice and many of your
commented on a possible need for repetition. We're not
saying it's mandated. We're just raising a question
about this. And it's going back to our seven screens of
endorsements, which is the equivalent of four printed
pages, as you'll see from your printouts.

And the question is -- we're talking about
effectiveness and communication, and what is going to be
communicated, and what's still going to be communicated
at the end of the scrolling. And so in ad 19 you see
that the lovely clear and conspicuous -- ha, ha,
laughing; just kidding -- blue, color contrasting
disclosure is at the top. And in ad 22 you see there is
a disclaimer button after every single endorsement. And
in ad 23 you see that there is a hyper link, your
experience may vary.

And we thought, well, let's look at it in this
case. Do we think that this disclosure at the top of
the page, you know, is effective. I mean, a lot of
people said yes, it could be good. Maybe it should be
when you're really further into it.

Assuming it's good here, is it still good in
terms of a communication technique? When consumers go
down to the bottom of the page, will it still have the
effect of qualifying the impression that people take
away? And what about this disclosure -- well, let's talk about that first, and see if anybody has views shortly. Ron and Kevin, okay.

MR. GOLDBRENNER: Ron Goldbrenner. Again, I would measure it against the inadequate test. I think all three are adequate. I think one may be better than another. One may be better than another in a particular context. But they're all adequate for clear and conspicuous disclosure, and that's what we want.

MS. KOLISH: Okay. Kevin?

MR. ELSE: Kevin Else with QVC. I think in looking at these, one of the things that QVC tried to do more than anything else is to make sure we don't have returns. And we sell a lot of products. And I think you would find that if we were designing a site like this, we would be more likely to do the your experience may vary, just because the other limited disclaimers really don't give our customers enough information so that we won't get the returns from the product.

I think that the marketplace will actually lean toward the more inclusive, your experience may vary kind of disclosure.

MS. KOLISH: Thank you. Well, it's interesting. And would you put it each time -- after each endorsement? You can be honest.
MR. ELSE: Well, I think -- not to say that, you know, it would be absolutely necessary in every circumstance. It may be that some of these testimonials really are proper for any consumer. So it really does depend when you look at the disclaimer whether or not, you know, there is some general statement in there that says, you know, in an affirmative statement that it will work for everything. And then I think you absolutely have to put it a disclaimer.

And if there was just some oblique reference that perhaps really what you're looking at are four -- you know, four statements that are very similar and they just sort of well, it may work, you know, with things, it may be appropriate to then just simply have one, you know, your experience may vary button.

MS. KOLISH: Okay. Carla, did you want to say something?

MS. MICHELOTTI: Well, you were asking how it would be incorporated in -- Carla Michelotti representing AAF from Leo Burnett. You asked how it would be incorporated in the real world. Number one, as far as this being signed, legally approved, is this good enough, I would say all of these three -- as Ron said, all of these three are adequate and it's disclosed.

In the real world, I don't think anyone would
really design a web site like this. And the testimonials would be reviewed, and probably the creatives would come up with some kind of introduction, and maybe they would call the whole area, fan mail. You know, read our fan mail. You know, your experience may not be exactly like this. They could come up with some way of disclosing that. You know, you don't know how creatively the same concept may be conveyed, which all speaks to -- it's hard to interpret a strict application of the rules, which I know is what you all are saying.

MS. KOLISH: Right. And in fact, you know, one of the reasons we did this is it's not uncommon to go on web sites to see consumer experiences and to see quite a few screens worth of information. We didn't sort of just make this up out of whole cloth.

We were wondering -- we knew in terms of creativity that this was probably not ideal. I mean, I think the text of the endorsement is very cute. It amuses me to no end.

MALE SPEAKER: It's well written.

MS. KOLISH: Thank you. Bev and Dean deserve all the credit for that, I think. We thought that having disclaimer, disclaimer, disclaimer after everyone might be overkill, and in fact might detract from its effectiveness, even though it's a use of a hyper link to
be able to repeat the information.

But does it end up being over used and so less effective? John?

MR. FRUEHE: Yeah. I was going to bring up that exact point. A year ago when we designed our web site, we designed a left hand column that was dark blue. And in the first few months that we worked with it, it was very well received. Customers always said, you know, I know that that's where I go to get that information.

And over time over testing as the medium changes, as customers tastes change, and the Internet changes, suddenly now we find out that people start to zone that out. So now that left hand column, which is where sometimes there is important information, can be ignored.

So the repetition is good. But repetition to the point on this particular page, you may be at the point where you're actually doing more harm than good, because people start to say, well, if everything has a disclaimer, it probably isn't that much of a disclaimer.

So it may actually have a negative effect in some cases.

MS. KOLISH: Okay. Mark, did you have your hand up?

MR. UNCAPHER: Well, I was going to comment. I
mean, obviously the issue that you're getting at is this kind of gray line that develops between the clear rules on disclaimer and where you provide an open forum for consumers to provide information about products.

And where you have kind of a log, if you will, in which consumers are able to comment and it can be a valuable source of information, there is probably a continuum there between the clear example of a paid endorser, where that is part of the copy which has to be disclosed, and one where you really are providing an open mic that allows for consumers, say, to provide book reviews. And really there is no particular vested interest in the marketer to -- you know, the person is going to buy one thing or another.

But clearly what we don't want to do is to inhibit that kind of exchange of information. I think Jeff made the point very eloquently before. We should not look at this medium as simply, you know, consumer and marketer as separate, but where there is an interaction between consumers and marketers in an exchange of information that can be quite useful for all concerned.

MS. KOLISH: Okay. One tiny final remark, Ron, and then we'll move on.

MR. GOLDBRENNER: I think John has made a couple of very critical remarks. The doctors have an important
part of their ethics that says first do no harm. And I think that that has to be a paramount principle for regulating the Internet. And I think you have to measure anything you want to do against that test.

Secondly -- and that's the technological freezing -- occasion technological freezing. That's perhaps a greater harm than not making full disclosure. And I think John's point about this development in the blue line on the side is very important in that manner. We don't know yet what technological freezing is and what it's going to do -- its impact.

Another point that John made before is that there are a lot of small businesses engaged in this Internet game. There are fewer barriers to entry in the Internet than anything else. The more we create in the way of rules and the way you must do things, the more the guy has got to have a lawyer by his side when he creates his web. So that's another harm that you've got to consider and measure against the good that you're going to do with full disclosure.

And finally, John said the other one was overkill. If you repeat it and repeat it and repeat it, you're going to turn the visitor off. He's not going to go to that site. And the information will all be there -- the greatest information in the world -- and nobody is
going to visit the site.

MS. KOLISH: Thank you. Roy and then we'll move on.

MR. GREEN: Looking at the end point and actually turning it around, there is, as we say, a great variation of people who come online to shop. But there is also, as you were just pointing out, a tremendous variety of skills and talents that are putting advertisements on the web. You have some of the best brains around the country represented by the table here in terms of the state of the art.

There are an awful lot of people coming on and putting advertisements on the web that aren't state of the art. And the question in developing standards is what the minimum has to be for everyone. Because the best usually are the best, and probably need less guidance than anyone else.

But the question we're looking at here overall is what kinds of standards have to be required, not only of the burden on the consumer to know what they're doing, but on the minimum level of anyone who decides to in fact hang out their shingle on the net and to do business.

So I think there is an aspect of that that needs to be considered here as well in terms of the minimum standard that we're talking about.
MS. KOLISH: Thank you, Roy. Final comment, Jean, and then we're going to definitely move on.

MS. FOX: Jean Ann Fox, Consumer Federation. Since all of these rules and guides already are legally binding on Internet commerce, correct, and since certainty is a term I keep hearing -- when you talk to a business, they want certainty. They want to know what they're supposed to do.

I think you would be less likely to have to have a lawyer at your elbow if the Commission issued a general policy statement on how you plan to apply these rules to this venue than if you didn't.

MS. KOLISH: I know all the lawyers in town might not like that, Jean Ann.

(Laughter.)

MS. KOLISH: We're not going to go to these questions. But as you think about post-workshop comments, if you're inclined to write one, if you think about other issues or factors that could affect -- you know, that are great ideas about hyper links or things like, oh, you know, this is something that is hardly ever going to be effective, or is likely to be ineffective, please put that in your comment. And if you have research, we would love to see it. And we would love to hear more of your views about this.
But we're going to switch gears now, and we're going to go to the link to page from the hyperlink. And Laura DeMartino is going to take over and lead this part of the discussion, because I'm sure you're sick of my voice by now. I know I am.

MS. DEMARTINO: So far we've talked about the hyperlink itself, and now we would like to continue on and discuss what is seen on the link to or the click through page. As you recall, for the diamond weight ads -- and if we could pull up ads seven and eight, please? For the diamond weight ads, there needs to be a disclosure that diamond weights are not exact, and a disclosure of the range of weights that are used for the three quarter carat.

And on seven and eight we have two links. On eight you have to scroll down to get to it. And if we could click on those links and see where they take us, they take us to two different pages. On number nine the link to page has information about diamond weights. And imagining that an advertiser might put links on all of its diamond product home pages, there is a lengthy chart of weight ranges for each fraction.

Page 10, on the other hand, contains information about colored gemstones and pearls and also diamonds. Assuming we thought that the hyperlink that took us here
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was adequate -- it was effective -- we would like to hear your views on whether our analysis ends there. Or if not, what considerations need to be taken into account when we're looking at this link to page.

Phillip McKee?

MR. MCKEE: Phillip McKee, National Consumers League. The analysis can't end there. It has to keep on going. It has to look at what kind of information is provided on the disclosure page, if you're going to make a disclosure page.

In this case the disclosures that we're talking about refer to the weight ranges. Page nine very directly takes you to a page that discusses the weight ranges, what could possibly be there in a three quarter carat ring. Ad number 10 takes you to a page with lots of general information. Yes, there are interior links that allow you to go down to where the diamond section is, but it's rather buried. You have to look for that information. It makes it more difficult for the consumer to find the required disclosure.

If the FTC is looking at a site that has to make a required disclosure, but then when it makes the disclosure hides it among all sorts of other useful, but not necessary information at that point, the disclosure becomes ineffective.
MS. DEMARTINO: Does anyone else have any other views? David Clauson?

MR. CLAUSON: Dave Clauson, IXL. I just want to be careful when we use terms like hide and buried. If you were a consumer, I would argue that, again, if you're a diamond jeweler expert, you don't need to be told what a carat was.

If you're a novice -- if it's your first time that you've bought a diamond, a lot of the information that is on -- and by the way, I would not call this an advertisement. But on this page is very useful information. It begins to -- this is what consumers who are uneducated need to know.

MR. MCKEE: If I may respond?

MR. CLAUSON: Just let me finish, please.

MR. MCKEE: Okay.

MR. CLAUSON: And when you go through that information and the fact that yes, you can find what a carat is -- and again, I'm not doing a legal interpretation here. But in terms of again what I can speak to, which is the information architecture, this is a very useful way of conveying even more information than just what I would get in the disclosure.

And as a consumer, I am going to feel more empowered to make a better purchase, because the provider
of this information has made sure that I'm more expert by reading this page than when I was before.

MR. MCKEE: If I may respond to that? The reason I said hidden or buried is that the information concerning diamonds is exactly the same on both pages. So if you linked the diamonds only page, you're going to get all the useful information, such as the carat, definition, etc.

The problem that I have with page 10 is not a lack of information on diamonds. It's that you're linking -- you're trying to make a disclosure concerning diamond weight, and you're putting it several screens down behind information on the cleaning instructions for colored gemstones and the way in which cultured pearls are made.

That information is not material to a purchase of diamonds, and it's not material to the description of the method of stating a diamond's weight. That's the information that might not necessarily need to be on this particular page. Instead, have this page and a link to further information on other gemstones. That way you're not over powering the consumer with information at one spot.

MS. DEMARTINO: Okay. We'll go to Carla, then to Wendy and then John.
MS. MICHELOTTI: Carla Michelotti representing the American Advertising Federation. Both of these pages are fine as jump to pages, and there are dozens of other ways -- probably hundreds of other ways to convey this information. And yet again, and I'm probably repeating things that have been said all day. But they're so important.

There is no way to limit the creativity of how information can be conveyed in this medium, which is going to be designed to enhance an invitational environment for the consumer. Because unless the web pages are invitational, they're not going to work and the consumer is not going to engage himself in the web pages. And it's not a mandated force communication. It is in fact a communication that the consumer is going to invite into his home and get deeper into.

So this is not a world where we can mandate. It is not a world where we can mandate specific language, specific locations and specific type size. Because also we have to remember that there are a lot of people on the web. There are many, many people on the web.

And if we think we are going to create a baseline that this is the minimum standard, if in fact -- and the FTC has never said this. And they have been very solid in encouraging a pro -- you know, a
nondiscouraging, now don't stifle the creativity, now
don't stifle the economy, don't stifle the marketing
opportunity of the Internet. And that's been very
positive, yet do this in a nondeceptive environment. And
that's been very positive.

If, in fact, we had the ability -- if we could
say okay, here is the minimum standards, everybody must
comply with these standards, this is the minimum
language, and this is how you have to do it, what that
really would do is force the advertisers with integrity
and the honest, ethical, huge corporations that are out
there doing the right thing and trying to comply with the
rules of the road, they would just give it up.

And the web would be still there. You would
still have people noncomplying with the minimum the FTC
would establish, and the web would become graffiti. It
would become graffiti without advertisers of integrity.
So it's important to maintain not to stifle creativity,
not to stifle the technological development, and not to
stifle future opportunity.

And I haven't heard anything from the FTC
inconsistent with this.

MS. DEMARTINO: Right. Exactly right. And that
is all good points. If I could just, you know, follow up
with you. For page number 10, then, I mean, is it your
view that the message that diamond weights are not exact
and that a three quarter carat diamond could range from
.70 to .80 -- I mean, is it your view that that message
doesn't get lost in this page?

MS. MICHELOTTI: It's fine. It's fine.

MS. DEMARTINO: Even though a consumer might
need to scroll down to get it, or sees colored gemstone
information first? Just to clarify?

MS. MICHELOTTI: Yes.

MS. DEMARTINO: Okay. We were going to go to
Wendy.

MR. SKILES: Wait. Carla, could I ask a follow
up question? Would you have that same position if this
was an ad for a 900 number, and down at the bottom it
said it was a $3.75 per minute charge?

MS. MICHELOTTI: Well, how would it work,
because what would be the page? You would have a 900
number --

MR. SKILES: Just envision an ad for a 900
number. It says call this 900 number for information
about jewelry.

MS. MICHELOTTI: Okay. And then you go to the
other -- then what are the three items that you're
clicking to on the 900 number?

MR. SKILES: Just an ad for fashion jewelry.
Call this number for information about our jewelry sale, 
50 percent off. And then at the bottom of the page it 
says, $3.75 per minute.

MS. MICHELOTTI: But it would --

MR. SKILES: All the way at the bottom of the 
page. Scroll down to where the diamond weights are.

MS. MICHELOTTI: That kind of speaks to what we 
were talking about this morning, whether important 
information -- whether the location of important 
information, where it's located on the page and the 
reasonableness of whether somebody would understand that 
they should scroll down the page, and how long the bar 
is. It kind of goes back to what we were talking about 
this morning.

MR. SKILES: Right. But would you say that's 
okay down there?

MS. MICHELOTTI: I'm not -- if in fact -- if 
the consumer -- I'm not understanding your example. I 
really am not. I'm not trying to be tricky. I'm not 
understanding the example, because in what we're looking 
at here, you're talking about diamonds. I clicked on 
diamonds and I go over. I'm talking about the weight, 
and I get to a weight and diamond information and I go to 
diamonds.

MR. SKILES: And I'm leaving the weight example
and substituting for that a 900 hundred number example.

MS. MICHELOTTI: But I don't understand.

MS. DEMARTINO: David?

MR. CLAUSON: I've got it. Do you want me to try?

MS. DEMARTINO: Yeah. Let David respond.

MS. MICHELOTTI: The gentlewoman from Illinois passes to the gentleman from Atlanta.

(Laughter.)

MR. CLAUSON: I think I can take a whack at that. The screen on the right -- I believe it's ad number ten. Could we just scroll up a bit? I just want to make, again, a point -- right there, that's great. A point about the architecture.

It is very common practice on a jump page to come to an indexing. Remember, look at the title. It says Jewelry Information. This would assume that this is in a site in the FTC jewelry site that the FTC also has colored gemstones and pearls and diamonds that it is offering. It is not inconsistent that I would find diamond information along with pearl information and colored gemstone information.

In fact, if it was well designed, I could click on diamonds -- click -- and come right to this page, okay, which is common navigational practice. Will every
consumer click on the diamonds on that page? No, not sure. Will many of them do it? Yes, especially the more educated. The more time they spend on the web, the more natural environment of click. Because I can actually get to that information very, very quickly by click, click, click.

To answer the gentleman's question about if it were a 900 number, again, the first question I would ask is, if I'm moving to the information about the call, am I giving you clear conveyance in that architecture at the top what you will be charged. If there were -- instead of diamonds it had what you'll be charged, that's a very quick information -- it's a quick way -- rather than scrolling through that text to find it, it's actually designed to be a more effective way of getting to the information that I'm most concerned about, which is what are you going to charge me by minute for taking that 900 call.

So the answer to your question, I think this could absolutely be just as effective, if it was designed properly.

MS. DEMARTINO: Well, if I can just jump in to continue for this page and for, you know, the 900 number rule hypothetical, we've just clicked on a link to come here. Is there any reason not when you click -- is there
any reason that when you click on the first link it
doesn't take you directly to the middle of this page?

MR. CLAUSON: None at all. And that's the way
you can design the link to take you to specific areas on
the page. Again, the information architecture matters.
So if the link is designed to take you to the cost
information about the call, it can take you right to the
sentence that says you will be charged X per minute. If
that's the way it's designed.

I'm not a frequent user of 900 number web sites,
so I can't --

(Laughter.)

MR. CLAUSON: -- comment on that, and I'll defer
to someone else on that one. But I think the point,
again, that I just want to reiterate, is how you design
does matter. And you need to design in terms of the
experience that the consumer wants. And if I want
information about what you're going to charge me, I'm
very smart to design it so you get that information fast,
or I'll go some place else.

MS. DEMARTINO: We got a little sidetracked. I
think, Wendy, you had some comments?

MS. SCHMIDT: I would like to say -- and this
sort of emphasizes why it's important to keep flexibility
and keep context in mind. I mean, many diamonds come
with gemstones. So you might send someone to this page so that they can get a variety of information on one piece of jewelry. And in fact it's easier.

And from a web site perspective, each of us is at a different technical level. I can tell you when we started our web site, we couldn't jump around that much. And as we get more sophisticated, we can. But you don't want to take the smaller marketers or the newer web sites out of the picture, and for them doing something like this satisfies the requirements. It meets the baseline test, and they may not be able to meet a higher standard.

I think, again, we're trying to figure out will prevent deception and what will a reasonable consumer be able to look at and find information on. And I have to say that if you go into most jewelry stores, the information on gemstones, diamonds and pearls is all going to be in one booklet that they have to look through.

So I don't think it's unreasonable to say that someone should be looking -- paging down a little bit on a web site.

MS. DEMARTINO: John Fruehe from Dell. You had your hand up a while back.

MR. FRUEHE: Yes. Actually David stole one of my points, which was an anchor link, which as you said
from the other page, would take you directly to that
diamonds piece is a very common occurrence, actually.
That would be the proper way to code it. Not to say that
whoever did this didn't do it right, but that is
generally how we would do it at Dell, and I think how
most of the people on the Internet would do that. So
you're taking the person directly to that relevant
information.

The other piece, though, that I wanted to touch
on is that in this particular case, you've taken the
colored gemstones, the pearls and the diamonds and you've
put it all on one page with the anchor links. And while
some people may say it would be better to split that all
off on separate pages, having a single consistent page
that you can consistently across your site link to is
very important.

And in addition, I've got 150 web designers that
I've got at my company that I can have them go off and
drive all the different pages, create them and manage
them. But for a lot of smaller companies -- smaller
businesses -- they don't have the ability to create large
sites with lots of pages. And the ability to consolidate
will help a small business to be able to compete in the
Internet.


For The Record, Inc.
Waldorf, Maryland
(301) 870-8025
MS. EASON: Thank you. Beth-Ann Eason from DoubleClick. We spoke about this earlier, but I think it's important to keep in context that the decisions that are made and the rules that are put into effect are broad enough to think about the changing technologies. A lot of assumptions are being made about this. But a web site actually exists. And the technology today allows you to actually transact within a banner, never having to leave that space.

So it's important to keep in mind that the changing technology and evolution is that this is a good format to start with and it addresses one aspect of it. But it's a constantly evolving medium, and the broader we can make the regulations, the more effective they will be today and moving forward.

MS. DEMARTINO: Phillip?

MR. MCKEE: One thing I would like to say about page number 10, so I don't use the word ad. David and John have both made really great points about the page and the use of anchor links. As it is designed now when you link to it from the original jewelry page, it just takes you straight up to the top. And that doesn't do justice to showing the disclosure.

If you're using the anchor links properly, as both of them have stated, it will take you directly to
the diamond section. And in that way making sure that
the first thing you see is the disclosures and not
information on one of the other topics, it is a perfectly
acceptable way of making sure that people see it.

And anchor links are very easy to do. They're
very easy to create. And so it's not something that is
overly burdensome at that point. So you're quite
correct, David, in saying that the properly designed site
will be able to use a single page and provide the
information.

The biggest problem with the particular site was
that it didn't take you directly to diamonds. It showed
you something else and there was the possibility of a
consumer looking at it and saying oh, it's just general
information. Whereas if they get jumped directly to
diamonds, they'll know that it's not just general
information. It's something that was directly related to
what they clicked on a few seconds before.

MS. DEMARTINO: Okay. Greg Jordan, I think you
had some comments?

MR. JORDAN: I would just say that the anchor
point is a good point. I think it brings up a different
consideration, one that I think about when I'm making
decisions about what's prosecutable and what should be
prosecuted. And it has to do with kind of a real world
analysis. There are lots of different ways to communicate things. Some are better and some are worse. And this, I think, goes perhaps to the PMA point about what's adequate as opposed to what's best.

It may well be better to do this with a link -- a direct link to the anchor point. Excuse me. And I might think about as a prosecutor, do I want to require that or not. And when I think about that, I'm going to think about why didn't they do that. Is there some good reason for them not doing that. Is there some consumer benefit. Is there some resource restriction that the company faced.

For example, is it very common in a television ad. That question comes up all the time. How much time do they have to communicate important information in the ad. Is the information accurate. We have all those kinds of concerns all the time.

In this particular instance, I would have to say that I don't see any resource restriction or other good reason for not going to the anchor link. So the implication from my point of view would be that there was an intentional element, or at least a lack of consideration for people who are not going to get closure. And I would lean towards prosecuting as opposed to away from prosecuting.
MS. DEMARTINO: Okay. We're going to actually look at this issue, but in another context, and then maybe I'll get to you once we pull up these next ads.

For our Quick DDRIP product that was ad 16B, which is lost.

(Laughter.)

MS. DEMARTINO: For 16B remember D. J. Blackhand, and D. J. Blackhand was paid for his endorsement. And if we clicked on a link that was on the page, it would take us to 17, which, you know, sets out the disclosure quite clearly, or it could take us to 18. And if we could maybe just go straight to page 18?

All right. If you click on the link on 16B, it will take us straight to page 18. Maybe. Okay. We didn't purchase Quick DDRIP. This is why it's taking so long. Okay. So 17 sets forth the disclosure. It's not really controversial, so I would like to focus our attention on ad number 18.

There is a lot of information here about Quick DDRIP. And if we could scroll down a little bit, there is a lot of fun information here. Is it likely -- or would it be reasonable for consumers to find --

(Laughter.)

MS. DEMARTINO: In fact, would a consumer find the disclosure on this page? And we could, of course,
have a little test here, you know, to see who finds the disclosure first.

Jean Ann, I think you really want to comment.

MS. FOX:  Jean Ann Fox, CFA. No. It took me a while to find it hidden here down in the first box under hot, hot, hot, that you had paid Mr. Blackhand for his glowing endorsement.

If I were looking at that, I would say that was an obvious effort to hide that information. And when you print it off, it doesn't even come out on the first page. On my poky computer it comes out on the second page.

MS. DEMARTINO:  Bob Goldberg, did you still -- did you have a comment?

MR. GOLDBERG:  Well, the only comment I had on the last series was I thought those disclosures were good. But are we missing some of the very basic points? I hope our prosecutors over here might look at the jewelry ads. I still haven't determined if it's three carats for each or both together.

(Laughter.)

MR. GOLDBERG:  And what is the FTC going to do about this retail price on an Internet market that's nationwide? Whose retail price are they comparing it to?

MS. DEMARTINO:  We're not doing deceptive pricing today. Sorry.
(Laughter.)

MS. DEMARTINO: Or maybe ever. Didn't we say total carat weight there? I can't remember. Well, focussing on the page number 18, there is a lot of fun features on this page. There is a lot of animation. There is a lot of vivid information that, you know, Quick DDRIP is 129.95. And this is, at least in my view, one of the benefits of the Internet. There is a lot of fun graphics and things that can catch your eye.

But we would like to hear your views about how we should evaluate these graphics and animations in the context of when a disclosure is being made.

Roy Green?

MR. GREEN: Roy Green with AARP. One of the things that fascinates me, if you have a machine that can handle this kind of animation, is it important that -- getting back to Jean Ann's comment a moment ago -- that it be printable out? Whatever you see can be printed, and particularly if you have maybe a color monitor, but you have a black and white printer.

Because I've had the experience, for example, with being unable to see a fair amount of what was on the screen. I couldn't reproduce it on a printer. And it seems to me that might be an important feature as well for disclosures in particular. You want them to put them
in the file after a purchase.

MS. DEMARTINO: Phillip? Phillip McKee?

MR. MCKEE: I would think another important thing that one should look at is what is the purpose of the page you're linking to. When you've got a link here on 16B where it says paid endorsement, and your purpose is to provide the disclosure, and you then move over to a page that has a disclosure on it, but then a lot of nondisclosure information, you should look at what the purpose of that nondisclosure information is.

If the disclosure is done in very drab print in the middle of the page that you might not notice or you might skim over, and you've got all these other flashy things taunting the benefits of it, you might to say that this really isn't a disclosure any more. You've lost the force of the disclosure, especially if it's impossible to find.

It's a little different on this page than on the jewelry information page, where the information was still interesting and might even be considered part of your necessary information for the other products, be they colored gemstones or pearls. In this case, the other information on this page doesn't seem to serve much, aside from continuing the advertising and possibly even hiding the disclosure, to use the phrase that I'm not
supposed to use.

MS. DEMARTINO: Okay. While we're on the topic of fun, unique Internet features, let's shift gears a little bit and take a look at some examples we have prepared using unique features online to see if they can be used to make disclosures clearly and conspicuously.

And if we could pull up ads 25, 26 and 16C? I'll go backwards as we're waiting to load. Ad 16C on the right hand screen demonstrates the use of a marquee or scrolling text bar to make the disclosure that Quick DDRIP has paid D. J. Blackhand. Ad 26 demonstrates the use of a pop up to make the disclosure. And 25, which we're still waiting to load, demonstrates the use of frames.

We would like to hear your views about whether any or all of these are effective in making the disclosure clearly and conspicuously, and particularly keeping in mind what are the benefits of anyone of these techniques, or any drawbacks or concerns. Or whether they're even practical.

And John? John Fruehe?

MR. FRUEHE: John Fruehe, Dell Computer. On the first, the scrolling marquee, that is something that is browser dependent. So depending on which browser you have, it will display differently. So that probably is
not a good use for that.

On the second, the pop up, as the gentleman that pointed it out before, why don't we have a pop up that can, you know, ask me these questions or give me this information. One of the real drawbacks with that is that with this pop up technology, generally the consumer tends to click and immediately gets rid of anything that pops up in front of them.

If they were to actually read it, can anyone in the room tell me how you print that?

MS. DEMARTINO: No.

MALE SPEAKER: No.

MR. FRUEHE: I think if you write, click your mouse on that screen -- on the pop up -- it may actually -- no. It doesn't even give you an option to print. So there is absolutely no way to send that to the printer. So there is my important disclaimer, and there is no way for me to actually save that and archive it somewhere.

The third, which is frames, and I think we're seeing a great example of why frames on a web site may not be the best strategy.

(Laughter.)

MR. FRUEHE: One of the real problems we have with frames, also, is that in older browsers, which a lot of times you feel, you know, consumers and education
people that aren't onto the latest technology, they may not be able to adequately print within the frame. It's real tricky. Even the later version browsers, the four and five version browsers, can print frames now, but it's much more difficult. It's still not a one click process. So you really may just confuse your customer.

MS. DEMARTINO: Well, even with frames -- if I could just follow up. You know, are there any other considerations about browsers that don't support frames? Or, you know, computer -- you know, if you have older computer equipment that doesn't support frames, are there any concerns that the consumer will miss the disclosure altogether?

MR. FRUEHE: Generally from what we see -- and I'll just say that this may be Dell specific information and maybe we skew a little more of a technical crowd. We're at about somewhere between 75 and 80 percent of the people who come to the site can actually use frames. They've got a browser level that allows them to do that. But that still leaves out, you know, ten to 15 percent of the population.

MS. DEMARTINO: Okay. Maybe Jean Ann Fox and then Philip and then Carla.

MS. FOX: Jean Ann Fox, CFA. I'm one of those people in the 25 percent. I couldn't even look at that
mock ad, because the frames didn't even come up. It was just a blank page. I would think you would write your -- and I need to take one of these technical people home with me to help me.

(Laughter.)

MS. FOX: But it would seem to me that for the purposes of providing minimum standards, you would write your rules to the basic level of what's out there, knowing that some folks can do better with better technology.

But this is a matter of trying to provide basic fundamental protection to all consumers who are able to shop on the Internet. So you need sort of a threshold rather than the optimum.

MS. DEMARTINO: Okay. We'll go to Phillip.

MR. MCKEE: As we were seeing a little while ago and as Jean mentioned, one of the biggest problems with frames is not all browsers can handle them. Yes, it's an ever dwindling share of the Internet community that cannot handle frames. But they're still there. And there are some people who still have a deep seated hatred of frames, and so they've altered the browsers. I know very few people alter their browser settings, but there are some who do turn off frames.

The biggest problem, then, is that when you make
a frames enabled site, as a web master you give it the option to display a different page, if you cannot view frames. Some web masters put a page up that says if you can't view frames, download a browser that can. Other web masters just decide to simply put up a non-frames version of their site.

That would put the advertiser in the position where they either had to have two completely separate versions of their site: one that was frames enabled and would show the disclosure in a side bar, and another that had the disclosure inside the main site itself so that it could be viewed by both. Or in a situation where when you don't see frames, they just pop up the other main page and you never see the disclosure. Either you eliminate the disclosure for the non-frames people, or you make the manufacturer have to create double the number of pages.

MS. DEMARTINO: Okay. Carla, did you have a comment?

MS. MICHELOTTI: Just real quick. I think they are all from a legal standpoint -- the information is being conveyed in all three. So I would have a problem legally telling somebody any one of these is illegal. But from a technological standpoint listening to these guys, I don't know if any of them would be chosen because
of how effective they are in the real world whether they work.

MS. DEMARTINO: Okay. Roy?

MR. GREEN: A different issue here actually about these advertisements is how long the advertisement is valid for. By that I mean, what about what's being sold that might change, particularly the price. So it seems to me that an additional feature that one would have to consider is if you were making a transaction and were trying to not print it out, put it on a disk or whatever in terms of having a record of what the disclosure was at the time you purchased it, it would seem that there would have to be some kind of dating and timing mechanism that matched up the advertisement to when the transaction occurred.

Because some of these -- or some of the products would change over time. I'm sure even the price of diamonds was up.

MS. DEMARTINO: Kevin. Kevin Duke?

MR. DUKE: Kevin Duke with America Online. I agree with the comment that at least as displayed these all, you know, convey the information. I think that's the important point. Obviously if technological limitations prevented people from even seeing it, that would be a separate issue.
There is going to be a discussion, I guess, about, you know, whether something is written or in writing and whether it's printable. But I don't think -- I mean, if the information is displayed on the screen with the rest of the ad, whether it's printable or not I don't know is an issue as to whether it was clear and conspicuous.

MS. DEMARTINO: All right. Well, just to follow up, then, for the pop up, are there any concerns? I mean putting aside the printing issue, are there any concerns that if you click some place else on the ad -- and I tend to do that, because I tend to click very quickly going through ads -- that you minimize the pop up and a consumer might miss the disclosure and in some cases may not be able to return to it?

MR. DUKE: That's possible. But you could also minimize your whole screen and go do something else.

MS. DEMARTINO: Right. I'm just talking in the context in thinking about making pop ups to -- or using pop ups to make the disclosure and that's the one time a consumer is going to be exposed to the disclosure. You know, I've gone to the Quick DDRIP home page and clicked on what consumers might say. And I come here and the pop up comes up, and I'm clicking so quickly that I miss -- the pop up disappears. I miss it.
Is that a valid concern regarding the use of pop ups? Well, I know some people have comments, so we'll come back to you, if you want. Maybe go to Ron and to John?

MR. GOLDBRENNER: I think the question you just asked has to do with is it adequate rather than is it the best. If your standard is I want the best, then you worry about pop ups in the manner you described. If your standard is I want it adequate, then you don't worry about pop ups.

And I think that one of the things we've seen from the discussion just now, particularly Phillip's remarks, is that if we're going to try and implement a series of minimum standards as has just been talked about, not only will you need a lawyer. You're need a technological expert as well.

MS. DEMARTINO: Okay. Bill next.

MR. MACLEOD: Bill MacLeod, GMA. I think your question points up a very important distinction that we need to keep in mind here. When we're talking about disclosures, we're talking about disclosing information. We're not talking about indoctrinating the consumer.

I thought the pop up was kind of a slap in the face and something that was very hard to ignore, and it may well be that that is starting to point up some of the
complexities and some of the traps in the inter-activity of this medium. If you make a disclosure so in your face that the first thing the consumer is going to do is to push it away, then you have started to make the perfect the enemy of the good.

And that's why I think Ron's standard is a very good standard to follow here. Adequacy is what you're looking for.

MS. DEMARTINO: Okay. Roy, I think you had a comment over there?

MR. GREEN: Just a follow up to the business of printing out. If there is no way to reproduce the disclaimers relevant to even the positioning of the location or proximity of buttons or the pop up with the text, it seems to be that if there is in fact disagreement about what that disclaimer said, or whether in fact it comports with the law, how will there be evidence. It will just disappear into space, will it not?

MS. DEMARTINO: Well, we'll go to Phillip next and then back over to this side.

MR. MCKEE: Normally to get the pop up back, you just need to kind of -- if you're in a Windows environment, just keep alt tabbing and sooner or later your pop up should some back. But not everyone realizes
to do that.

And you're quite right. Frequently when you get a pop up, you -- there you go. Frequently when you get -- I deal with these things all the time. When you get a pop up, it is the first thing that comes up, and a lot of times you're clicking at other points. Especially if you see that there is a large amount of stuff coming up, you're maybe already down to the scroll bar. You're kind of seeing whatever graphics are coming up.

If you're doing it -- if you do have part of the pleasurable experience in mind, you're moving around the web site a lot. You don't wait patiently for everything to come up, and then you interact, and then you wait patiently, and then you interact. That's not how a lot of people do it.

And so the pop up can very easily get lost. And as we've seen, it's very -- not everyone realizes how to bring it back up onto the screen. That's a little bit of an unfortunate point to that type of technology.

MS. DEMARTINO: Okay. We'll go to Elissa.

MS. MYERS: Just as a point of clarification -- a question -- all of the points that are being made about the pop ups, I think we're dealing with some complex issues. I think we've agreed on that today.

I noticed that in a consent decree that is
currently pending but drafted, I believe, by the staff here that there is a section of definitions that was issued this month. And in it it says, in addition to the foregoing, in interactive media the disclosure shall also be unavoidable and shall be presented prior to the consumer occurring any financial obligation.

So although we're discussing this generically and how we feel about this, am I mistaken, or how am I to interpret how the FTC is -- where the FTC is on this issue?

MS. KOLISH: Okay. You know, in consent decrees we often, you know, are more prescriptive to remedy pass violations. And as you noted, it said in addition to the foregoing. That foregoing said it has to be clear and conspicuous.

And the unavoidability part is added in to make certain that you don't have a great vivid, wonderful disclosure, but a consumer could go and buy the item without ever seeing it because of the way the click through pattern would be.

And because that was an important disclosure that we wanted consumers to see, that was put in as part of the remedy. And also there has to be --

MS. MYERS: So this definition applies to this particular situation?
MS. KOLISH: Yes. Those are in cases.

MS. MYERS: Okay.

MS. KOLISH: And, you know, they can be instructive for people. And you'll notice they'll say prior to purchase. Because you could have an unavoidable and you could say after you submitted your purchase information, when the screen pops up and says thank you, and by the way, we want to disclaim the following facts, that wouldn't be good enough.

So that's why they put all of those elements together. But we've actually been sort of talking about unavoidability in this context as part of the clear and its inconspicuousness. This is just hammering it home in those orders.

MS. MYERS: Thank you.

MR. PEELER: And, Elaine, there is a difference between what is charged in the complaint, which sets out what the Commission found to be the violation of law, and as Elaine said, what's in the order, which is often remedies to fence in future conduct.

MS. MYERS: Okay, thank you.

MR. DEMARTINO: I think we had a couple of more comments. John and then we'll go to Beth-Ann and Randi. So John first.

MR. FRUEHE: Two quick comments. One is that
we've just spent ten minutes here trying to understand
how we grabble with the idea of using technology to solve
what really is an education problem.

And as we start to look at this, we start to
realize that we've got a lot of technologies and things
are changing, and there are a lot of things that you're
able to do today that you weren't able to do in the past.
And that will continue to change.

So trying to come up with solutions that wrap
themselves around particular technologies, maybe advanced
technologies like pop ups, that, again, you know, you're
back to this issue of now I may require additional -- I
may put an undue burden on some businesses that can't
afford to have not only a web master, but also somebody
who can do java script programming to make the pop ups
work.

So we want to make sure that as we go through
these tactics that we look at really what are
technologies that are going to be conducive to the
customer as well as the business, because not everybody
has a lot of resources.

MS. DEMARTINO: Right. Beth-Ann?

MS. EASON: Beth-Ann Eason from DoubleClick.

Well, clear and conspicuous is the goal. Invasive isn't.
And putting the pop up window -- or even taking a third
of the page is the equivalent in traditional media of putting the equivalent of a post-it size over a four color print ad, or asking to take instead of the full page for that ad, one third of it for the disclaimers. And that seems extreme, and does put undue pressure on the advertiser and the message that they're trying to convey, and have the right to convey.

MS. DEMARTINO: Randi, you had a point?

MS. ALBERT: Randi Albert representing the Center for Media Education. My problem with the pop up was not that I closed it, but that once I just scrolled down it disappears, right, and then that's when I already -- that's when I need that information, because I started reading all the things that the disclosure actually applies to. And I didn't know I was supposed to alt tab to go back to it.

So I couldn't ever find it again. So it just wasn't -- it wasn't in the right place. I just wanted to -- someone had raised the point that consumers are just trying to get rid of these pop ups because they're so annoying. And it wasn't that. It was just that I -- it's not like I tried to get rid of it.

(Laughter.)

MS. DEMARTINO: Okay. Dan Jaffe, we'll give you the last word before we move on.
MR. JAFFE: Dan Jaffe from the Association of National Advertisers. Just in this discussion today, I had always thought of the inter-activity aspect as a positive thing to the consumer. But you can have a tremendous disclosure wear out if you start training the consumer that the disclosure is coming at them all the time. That could very well happen if you were going through a lot of material. You know, when you start bringing catalogs online, etc., etc.

And if most of that information is when they pop to it and it's really not something that they can get very interested in, you will find out that they're not going to be looking.

So I think that as a regulatory matter, it may become even more important in this area to give people the ability to put this in ways that are going to be consumer friendly, or you're going to get the situation where Dell wanted people to see the information. They did see the information for a while, and then they got tired of it.

And then you have to have Dell then figure out a new way to make sure that people see the most critical information. And it's going to be very hard for any of us, to repeat what I said earlier, to guess that now. Because just when you think you've figured it out, the
consumer surprises you and shows you you've got it wrong
and then you have to redo it.

MR. DEMARTINO: Okay. Ron, we'll give you the
final word before we move on.

MR. GOLDBRENNER: I would be very interested in
a survey done by the FTC or anybody which asks consumers
does clear and conspicuous mean the same things -- the
same thing as you can't miss it.

And then the next question I would put in that
survey is, do you want information that is clear and
conspicuous and you can find if you want it, or do you
want something that you must read because somebody told
you to do it.

MS. KOLISH: Okay. Well, this will conclude our
session on links. We're going to move to an entirely
different web technique. I just want to note, we had
planned initially on breaking at 3:30, but I think we've
run on a little bit here, because we started a little
late with some stuff from the morning that went over.

So I thought we would go from 3:00 until 3:45
and then we'll take a break, come back at 4:00, and then
we'll go into our last session of the day on printed or
written. Is that all right with everybody? If you need
to run out, that's fine.

Okay. So we're going to move on, and we're
going to talk about banner and badge ads. And Dana Rosenfeld, one of Jodie's Assistant Directors in her office is going to lead this part of our discussion.

MS. ROSENFELD: Thank you, Elaine. Can we put up ad number 29, please? This discussion will involve a disclosure required under the Commission's guides concerning the use of the word free and similar representations. For the purposes of our discussion, the relevant provision in the guides requires that any terms or conditions of any free offer be set forth clearly and conspicuously at the outset or in close conjunction to the offer.

Before we get started, I wanted to thank DoubleClick for creating this ad for our use today. We've made some minor changes to suit our discussion. And we've also based the next ad, ad 30, that we'll take a look at soon, on the original submission. So we really appreciate that help.

Before we discuss it, I want to just describe the ad a little bit, as soon as it comes up. There we go. As you can see, the ad is for free flowers. And both ads are really identical, the badge ad and the banner ad, but if we click on the banner -- we click on the banner. If we could display it on another computer, too.
MS. KOLISH: Yeah, maybe that would be a good idea.

MS. ROSENFIELD: Okay. We find out that indeed the bouquet is free, but the consumer must pay a 5.95 shipping and handling fee to receive the flowers. And this is explained right there in the first linked page. And it also explains that following the delivery of the free flowers, the consumer will then have the opportunity to sign up for the bouquet of the month club and then receive flowers on a monthly basis.

But if we could go back to -- there we go -- to the banner and badge ads? The question here -- I think the overriding question is how should banner advertisements be analyzed. Should they be considered as a separate ad, or as part of the web site that they link to?

And in discussing that, I would like us to think about whether it's desirable to place a button or a disclosure in the banner ads. Any -- would anyone like to comment? Ron?

MR. GOLDBRENNER: I think you need to ask yourself, where do you get to from the banner. If you have nothing on the banner but free flowers, how is the consumer harmed?

MS. ROSENFIELD: Does anyone want to respond to
that? Renee?

MS. BARUCH: I think there is more here than consumer harm. I mean, if we talk about, you know, simple advertising where the consumer doesn't actually purchase something -- we can't look at this in terms of consumer harm. We just can't.

But what you can say is that I think that there is a completely different expectation of banner advertising than any other advertising that we've ever seen to date, because nobody really expects the whole story there. I mean, that is -- that is the current expectation of every Internet user and every Internet advertiser.

MS. ROSENFELD: Roy?

MR. GREEN: Building on your comment earlier, what's the harm in getting free flowers? Nothing, if they're genuinely free. Nothing if they're free and there's nothing associated with it, like the collection of information about the person who is responding -- I mean, clicking on the banner.

Then you have something -- then you have an exchange occurring. You're having the free flowers for information collected on the individual, whether that's done voluntarily or not.

MS. ROSENFELD: Okay. I think we want to stick
to the factual situation that we have here. Carla?

MS. MICHELOTTI: The question is whether the
free banner ad -- the free ad with the click here,
whether that complies with the free rule and whether
there is an adequate disclosure.

And I would reinforce what Ron said, which is
when someone looks at the web page and they have a banner
ad, either -- and DoubleClick knows this better than I
do. Either the banner ad is going to be totally ignored,
or somebody is going to get engaged in the banner ad.
And if they say, okay, free flowers, let me figure this
out.

It's like a flyer on your car window shield or
something, you know. And it's like, okay, I'm interested
in that. And then they go in and they're interested in
it, and they'll learn whether -- you know what the
conditions of that free flower bouquet are.

MS. ROSENFELD: Teresa?

MS. JENNINGS: I would agree with Carla that a
banner ad is a much different type of an ad than the ones
we've seen previously today. If you do go on the
Internet -- I frequently go on the Internet and the
banner ad is the last thing to come up, because it
usually has the most graphics. And I'm very impatient
with them. But if it is something that strikes me for
some reason, I'll click on it and go in and that's where I expect to find more information.

I think because of the nature of what a banner ad is, I don't think any consumer -- at least any who have been on the Internet more than once -- expects to see everything in that ad immediately. They expect to get more information the moment they click into it.

MS. ROSENFIELD: Phillip?

MR. MCKEE: Teresa and the others are right.

The banner ads are something different. But something else that we need to take into account is that not only are the banner ads different from other forms of advertising, the button ads themselves are different from banner ads.

They use the same technology. But something that was mentioned before -- I believe it was by Ron and by several others -- a part of it is also the creativity involved. Banner ads -- as she said, they're very elaborate. They do take a really long time to come down. They're packing in a large amount of information.

The statement was made by Ron just now, what is the harm in not putting it in. If they're already going to almost over clutter that section of screen with moving graphics and little bits of sound -- some of them now also play sounds at you. There's also no harm for the
full banner ad, such as in 30, to in an empty space that it's not really using aside from the redundant click here on 29, to say shipping and handling not included.

If it doesn't destroy the ad, if it doesn't harm the creativity of the ad, and it doesn't harm the company, there is nothing which shouldn't -- there is nothing that -- there is no reason why it shouldn't also say shipping and handling not included, as well as simply click here. That doesn't destroy the ad in any way, shape or form.

Now, to mandate that all of that information show up on that little itty bitsy button ad, that would be a little overly burdensome. At the same time, you have to take into account the type of ad and the way it's being used on the Internet.

MS. ROSENFELD: Thank you, Phillip. We're going to get to ad 30 in a minute. But Renee?

MS. BARUCH: I think there is a kind of advertising to which a banner ad is analogous that is currently in existence, and that is to an outer envelope on direct mail. And I think that they serve the same purpose. And to the extent that this would be deceptive were it on an outer envelope, then you have to use the same standard, I think.

MS. ROSENFELD: Jean Ann?
MS. FOX: Jean Ann Fox, CFA. I think consumers look at banner ads -- besides the fact that they're aggravating, that they take so long to load up. If you can get the material disclosure that says it's not really free, give me a break, that that helps keep down people being grumpy with you.

But part of the problem on 29 is, you do the click here. You get over to this two inches of text that all looks alike, and the 5.95 got you is buried in the middle of it. No highlighting. No nothing. So even if you agree that you can just have the click here on the banner, the actual disclosure is deficient within the link.

MS. ROSENFELD: So the 5.95 should perhaps be more prominent. Okay. Elissa?

MS. MYERS: How do they get the money? How do you get the money?

MS. ROSENFELD: Oh, cash on delivery. No. The order form provides for credit card information, I believe. I thought it did.

MALE SPEAKER: No.

MS. ROSENFELD: No?

MALE SPEAKER: No.

MS. ROSENFELD: COD.

MS. MYERS: The reason I asked the question is
because most -- I mean, if the truth was that the guy arrived at the door and you had somebody collecting it forever. But otherwise you don't have free flowers, and you haven't accepted them until you get to the place where you acknowledge somehow that you're going to pay. And it seems obvious than that you know that there is some kind of a fee associated with them.

MS. ROSENFELD: I think we would want to include a line for credit card information. That was probably just an omission. Carla?

MS. MICHELOTTI: A couple different things. One, I want to again go back to the concept of a banner ad not really saying much, because it doesn't say much. You can't do anything as a result of it.

If you had free flowers and take away the click here -- just free flowers -- that's really what the banner ad would look like. And you would have to -- people would either understand they could click on it or not click on it. And there is no -- there is little information that is conveyed in banner advertising, and the content of the offer is being made in the jump page. And I think that's important.

And I think it is distinguishable from the outside of an envelope, which is, again, back in the print/paper world. I think it's dangerous when we get to
the hard copy print/paper world when we're in this
twilight zone of cyber space of, you know, neither time
nor space. You know, another dimension. We're in the
twilight zone.

So I don't think there are any standards that
are mandated in a banner ad because the offer, to the
extent there is any offer in the ad, isn't until you
reach the jump page.

And to an extent, I agree with the Consumer
Federation of America. I think that, you know, this jump
page -- there are better ways to have written this jump
page.

MS. ROSENFELD: Craig?

MS. MICHELOTTI: And it goes to the question of
whether it's adequate.

MS. ROSENFELD: Yeah. Craig?

MR. JORDAN: Craig Jordan from the Texas
Attorney General's Office. I think that it's valid to
say that there are ads like banner ads which are teasers.
That is, they don't give necessarily the full picture.
They want to get you to a place where they can give you
the full picture. I don't see anything necessarily wrong
with that.

I have a problem with this banner. And that is,
the flowers aren't free. They're 5.95. And I think this
is probably outside the scope of the hypothetical. The hypothetical here is that the 5.95 is not the price of the flowers. It's somehow a term and condition.

As a practical matter, I think for the ad to be truthful, it ought to say 5.95 flowers. Cheap flowers.

(Laughter.)

MR. JORDAN: Cheap is probably not a good marketing term.

(Laughter.)

MALE SPEAKER: Inexpensive.

MR. JORDAN: But the point that I want to make, and it may be outside the scope of this hypothetical, is that teasers cannot misrepresent fundamentally in and of themselves. From my point of view, I think a teaser that affirmatively misrepresents what the offer is going to be when you get to the main offer page should not be permitted.

I think that's a different case from a teaser that doesn't tell you the whole story and then you get it later. I think we ought to be careful about that. It's something that certainly --

(Laughter.)

MS. ROSENFIELD: Okay. John, you had your hand up?

MR. FRUEHE: I think that in context --
(Laughter.)

MR. FRUEHE: In context I think that also something that you have to consider when you look at an advertising banner is that yes, it does say free flowers. Now, when we get to that other page, what is the expectation. Is there going to be paper flowers? Is it going to be a graphic of flowers and here, download this? So I think that, you know, we haven't set up really that this is a free set of tulips that will be delivered. And so we really haven't gotten into actually what the deal is. You know, it's just the teaser. So I think that we have to think about things in context again, as we do on just about everything that we look at.

And one other piece is that as you get into the animations and the click heres, those tend to increase the size of the graphic, which makes it longer to download, which means that, you know, again, consumers are dealing with longer pages to download and slower Internet surfing.

MS. ROSENFELD: The point that you raised about you don't really know what you're getting, you know, one of the things that we thought free flowers could also mean was that you were going to get a coupon to take to the store and get your flowers there. Or maybe show up at your local Safeway and be one of the first, you know,
100 people to receive flowers, so that the free flowers
doesn't tell you all that much.

Who was next? Jeff?

MR. RICHARDS: Jeff Richards, Internet Alliance.
This is one of those great examples where we're assuming,
number one, that banner ads are forever -- in fact,
they're changing extremely fast -- and two, that's
because consumers are merciless. And that includes all
of us in this room.

How many of us have clicked on a banner ad which
was less than what it appeared to represent, and what is
our judgment about that. And, again, we all -- I think
one theme I've heard here today is we all need to
understand consumer behavior much better than we do.

But this is one of the few times that I'm going
to volunteer my own personal experience -- which I think
that it's similar to everyone in the room -- which is
that our tolerance here is low for enjoying
misrepresentation, and our ability to do something about
it is unprecedented. It takes about a second to get out
of a bad place, and places that host bad banner ads are
places we don't go after a while.

So there is an incredible learning curve that's
never been possible in any medium before, and the
punishment by the consumer is swift and merciless.
(Laughter.)

MS. ROSENFIELD: Ron, did you want to make a comment?

MR. GOLDBRENNER: No.

MS. ROSENFIELD: No. Okay, Kevin?

MR. DUKE: Kevin Duke, America Online. I think somebody said that there is a lot of information -- yeah, I think they said there was a lot of information in banner ads. I wanted to correct that. Space is extremely limited. It's at a premium. You know, people have described this as really just a teaser.

And the context of the ad is what comes next. You know, again, that concept of proximity in terms of, you know, physically or at least on the flat screen it's not next to it, but it is the next -- can be the next thing I see when I click on it. And again, that's the context of a banner ad, not, you know, the four corners of that button or banner.

MS. ROSENFIELD: This might be a good lead into ad number 30, if we could put that up. As you can see, the ad has changed a little bit, and the offer is now free flowers delivered to your door. And then we have some rotating text in the corner, indicating that shipping and handling is not included.

So the offer here now has gotten a little bit
more specific. You know that they're going to be delivered. And again, the second page hasn't -- the jump to page has not changed. So you've got the same disclosures on the second page, which indicate the 5.95 charge, the exact fee of the shipping and handling.

So does the analysis change about whether the banner is just a teaser when you have a more specific offer, such as free flowers delivered to your door?

Anyone? Ron?

MR. GOLDBRENNER: With respect to that claim, and with respect to the claim before about free, you have to measure it against what's delivered. Is it free? Well, if shipping and handling is truly a cost just for shipping and handling, it is free. If the 5.95 includes enough money to cover the seller's cost of the flowers, then it's not free.

And so I don't think you need any limitation on the word free in the beginning. We have to see what the offer has to say. I don't think because you have some kind of charge in there the offer is automatically illegal or automatically unfair.

It's a very interesting point about delivered to your door. I think that is offering flowers plus. It's offering two dozen tulips or five dozen roses. It's offering something very specific. So then when you go
and read it, you have to see, am I getting that specific thing for free.

    MS. ROSENFELD: Teresa?

    MS. JENNINGS: Teresa Jennings with the Direct Selling Association. I wouldn't necessarily say that ad number 30 is better than ad number 29. Ad number 30 is different, in that as you just pointed out, you're now specifying that they're delivered to your door, but you're also specifying that the shipping and handling is a part of what you're getting at. Ad 29 just said, free flowers. Click here if you want more information, basically, and you can go there.

    I think that we've all discussed what type of an ad these banner ads are. I don't think either one of these are per se misleading. And I think it goes back to what we've been saying all day long: flexibility here. The ability to change with the technology, with what we learn about what the consumers are doing and not doing based on what we do, and, you know, a minimum standard of truthfulness and not misleading, but also not a concrete mandate of it must look this way in order to be correct.

    I think they're both correct.

    MS. ROSENFELD: There was someone else?

    Phillip?

    MR. MCKEE: The banner ad number 30, one thing
when you said free, delivered to your door, it's not necessarily that that changes anything on the face of the ad. But if you're going to say something like delivered to your door on the ad, at that point I would think it would become absolutely necessary that you make the statement that shipping and handling is not included.

You're offering not just the free flowers, but you're also implying a delivery service. And you may -- there are people who may imply that the free modifies both. Now, that's not a logical assumption from my perspective, or maybe even from a grammatical perspective. But there may be some people who might misinterpret it that way and not see it in this.

One last point. This is slightly different. From our perspective from the types of reports that we get at the National Consumers League's National Fraud Information Center, we have in mail solicitations and in phone solicitations oftentimes the offer for a free service or a free good. And they may even cover the initial shipping and handling to get it to you.

And people think wonderful, that's great. I'm getting something for free. What they're not realizing is at that point that they are enrolling in a negative option situation.

That's not the case here. Here you actually
have to positively state you wish to join the club. But that is a problem which needs to then be addressed overall on the banner ads, because there will be the situation. It's not a maybe. Let's face it. There will be the situation where people, who would not themselves wish to be sitting at this table discussing anything and wish they wouldn't be sitting in a room with the FTC, who are going to create negative option ads with banners that look very similar to a legitimate company's promotional offer, but that are instead used as lures into negative options that do not offer easy cancellations.

MS. ROSENFELD: That's a good point, but we just felt that we ought to limit our analysis to one set of rules at a time.

(Laughter.)

MS. ROSENFELD: So we purposely avoided the negative option plan, as you can tell. Beth-Ann?

MS. EASON: Beth-Ann Eason from DoubleClick.

The advertisers purchased an ad such as that to be able to communicate their message to the customer. And that dialogue is an ongoing dialogue that begins with the banner and continues into the site that they're clicked through on.

So 29 does convey effectively all of the information before the individual is going to transact.
When you're trying to fit all of the information to 30 -- and again we're talking about trying to come up with broad rules that will apply to multiple advertisers with different types of stipulations.

This is a relatively simple one. There are four things that you need to fit into that little segment, yet that alone is taking up about 15 percent of the banner. You really couldn't get it any smaller. So it's prohibitive to the advertiser to take up that much of their creative space to put a disclosure in that they are in fact communicating in the next phase of that discussion.

And, again, to keep it broad so that it does apply and is applicable for advertisers, who have to take into consideration people that will have more information than just shipping and handling not included to communicate in that space.

MS. ROSENFELD: I think Carla and then Wendy.

MS. MICHELOTTI: Carla Michelotti representing American Advertising Federation. I think it's important to think about the intent of the banner ad, consistent with what DoubleClick just said.

And the intent of a banner ad here is not to provide an offer for free flowers. It's an offer to go to a web page where you learn about what the advertiser
is talking about. It's an invitation to go some place
where the consumer can learn a lot more information. And
toward that point, you don't need the S & H not included,
and whether you say delivered to your door or not,
because it is just -- it's an invitation to go further.

Now, what would make the banner ad deceptive, in
my opinion, written as it is, is if I would click on the
banner ad and then go to a page -- a pornography page. A
completely -- you know, all of a sudden it sends me into
Afghanistan or something. Then that banner ad has been
misleading to me, because all the banner ad did is invite
me to learn about an offer regarding free flowers.

MS. ROSENFELD: Okay. Wendy?

MS. SCHMIDT: Wendy Schmidt, Federated
Department Stores. My understanding of the free rule and
some of the others is that you don't want to just have a
free offer without details, because you're asking someone
to go into a store, or make a phone call, or send it to
the post office. In this case, all they have to do is
click and then they can click right back. So it's
appropriate to have fewer restrictions here.

And I think the same would be true with
something like an interstitial where you are -- my
understanding of that is you can show a picture of a
product on someone else's site. You click on that
picture and it takes you to the web page, directly to the part of your site that displays that picture.

And I think similarly if we’re talking about the jewelry guides, in the interstitial on someone else’s web site, it’s going to be smaller. You can't get in a lot of detail. You're counting on the fact that the consumer has to come to your web site to get additional detail, and I think you have to treat those very differently. They are truly teasers, and you're not causing the consumer to do something that costs them money or time, because it's so easy to click back and forth.

MS. ROSENFELD: Actually, let me just say, that raises a good point. Which is, suppose that instead of clicking on the banner ad to get to the order form, instead it asks you to call an 800 number to take advantage of the offer.

It changes the analysis a little bit, but I'm wondering what people think, since you can't click back and forth, and indeed perhaps some consumers have to actually go off line to make a phone call because they only have one phone line in their house.

On that point, Dave and then Ron.

MR. CLAUSON: Dave Clauson, IXL. I don't understand what the difference would be between this and an outdoor billboard with an 800 number on it. This is
on a screen. That is on the freeway. There is a message
call the number. And if that's what you have to do to
get fulfilled or place your order, there's very little
difference there.

Again, I think the point is that we're
disrespecting the consumer's right to choose. If they
don't like what they see, they will back away quickly.
And in particular, if you're going to try to cramp --
first of all, think about, again, the benefit to the
consumer and in that small space trying to convey that
much information. You may be confusing the consumer by
throwing all that stuff in there, rather than making a
simple message and having an appropriate area, perhaps in
the middle screen here, where the offer is clear,
consistent and easily understandable. Or whatever the
DMA's comments were: easy to read, easy to view, etc.

MS. MYERS: Easy to find, easy to read and easy
to understand.

MR. CLAUSON: Thank you.

MS. ROSENFIELD: Ron, I think you had a comment?

MR. GOLDBRENNER: Yeah. I thought that Wendy
Schmidt raised a really terrific point that we haven't
focussed much on today. And that is, in what ways does
the Internet bring information to the consumer, both in
quantity and accessibility, that obviates the need for
some of the rules we already have. Do we need to do
things in the same way we have with respect to free and
clear and conspicuous and a lot of other things.

There are, I think, many ways that the Internet
gives a consumer information that may obviate the need
for some of the things we've been doing.

MS. ROSENFIELD: Space constraints obviously is a
big issue that a number of you have raised. And as we
see in ad number 30, we have here the rotating text that
has S & H not included, and in 29, of course, we have
click here.

Are there any other techniques or other kinds of
technology that can be used to include a disclosure or
other important information in the banner ad? I think
DoubleClick had raised earlier on the fact that some
banners -- there is a new form of banner technology where
you can -- you don't have to leave the web page that
you're on.

Is that something that would be significant to
our analysis or help to make information more effective?

MS. EASON: I think it's consistent with
everything that we're saying here, which is it's an
ongoing communication process. And if you were to
continue to just transact in the banner, that you didn't
click on the banner and go some place else, you can start
to interact in the banner if it's an HTML based program. 

And that will enable you to then go to the next
bit of information. They're still communicating in the
same space, but I think what is important, what are they
communicating. And you can take the information you have
on the second page and condense that and break it up into
sound bites that flows and communicates the same
information -- the same important information -- that
makes the customer aware of what they are going to be
entering into the transaction for.

So it's just taking what would be on the jump
page and then making it the next banner that appeared,
and then the next banner, so that it all happened within
that space, instead of going some place else. So the
same rules apply.

MS. ROSENFIELD: Could you complete your order on
the banner then?

MS. EASON: Um-hum.

MS. ROSENFIELD: Okay. Jeff?

MR. RICHARDS: Very quickly. Dave Clauson keeps
making a point that we all need to hear about -- design.
This is a pristine example of one to a page. Of course,
we've all seen banner ads 20 and 30 to a page. We have
human limitations of information ban width, flashing and
rotating and flipping and whirling.
And I'm reminded of the Times Square of old. The new one -- the new Times Squares actually is a lot more coherent. But the old Times Square had flashing and beeping and everything else all at once, and in fact, was very hard to see what was going on for lots of people. And so I think another theme I keep hearing today is we're talking about tools, some of which are already developing very rapidly; some of which are very primitive. We're talking about fascinating concepts and we're doing so very much in the abstract.

And this is a lovely example. I've learned a lot from this discussion. But then I think about this times 30 on a page and I know my eyeballs would cross.

MS. ROSENFELD: I'm sorry. Bill?

MR. MACLEOD: Bill MacLeod from the Grocery Manufacturers. Dana, i think you have found one of the rare instances of virtual consensus in the room on one thing.

(Laughter.)

MR. MACLEOD: And that was, people were pretty happy with 29. And what we are talking about now is how we might be able to improve 29 as a creative execution, but not necessarily as an execution that better satisfies the requirements, or at least the suggestions of the FTC guides.
MS. ROSENFIELD: Thank you, Bill. Anyone else? Elissa?

MS. MYERS: In addition to tagging onto Jeff's point, in addition to the multiplicity of -- the problem of multiplicity banner ads on a single page, earlier the point was made that often there are many disclosures. And the example that you've used asks for a single disclosure.

But let's say that this was a banner ad for free Viagra and there were a whole series of disclosures that would have to be made. And you probably physically couldn't fit in all of those -- all of that information on the banner. And it's probably more typical than this. Most offers are probably more complex.

MS. ROSENFIELD: Phillip?

MR. MCKEE: One thing that I would like to say about banner number 29, DoubleClick did do a very good job of designing a simple, easy to see banner ad. It's not just a problem of having 30 some odd banner ads on a single page. Half of the time it's only one or two banner ads, but each one takes minutes upon minutes to download and is incredibly complex in and of itself.

There are large amounts of animation and graphics. Almost all information is lost within it, and I personally tend to tune them completely out. And if we
do -- something that did occur to me right now is that if we do decide -- if you do decide to have some form of disclosures within the banner ad, then it will become more difficult to find them in these very complex ads.

At the same time, if the industry says that well, you can't enforce us to make a disclosure because it will clutter up the ad, my response to that statement is, why have you cluttered up most of the ads in the first place to make them almost unintelligible.

MS. ROSENFIELD: I guess one point I sort of touched on, but, you know, the click here -- I guess the simple click here on 29 as opposed to the rotating text, I think there is some literature out there -- I've read a little bit -- that suggests that click here makes people click here and will increase click rates. I'm not sure, you know, whether there is conflicting evidence about that. There may well be.

But if that's the case and advertisers are putting click here in the banner, is there any real difference than including the rotating text, or is that less accessible to consumers, or too distracting?

Dave?

MR. CLAUSON: Yeah, a quick response. Dave Clauson, IXL and the four A's. The issue about the rotating text, I think we've been staring at it now for
quite a bit.

MS. ROSENFIELD: Right.

(Laughter.)

MR. CLAUSON: One of the problems of rotating text is distraction. If you look at most of the Internet research out there, speed is an issue in all things on the Internet. Purposeful sourcing of information is the primary use of the web. If you have to wait for things to rotate, click, spin, etc., it's a distraction and an annoyance.

That's way everyday marketers wrestle with the issue, how much information. I won't go into the technical issues of file size and things like that. But those are real concerns about delivering information in a clear, concise, compact, efficient manner, which is what most consumers on the web want. Give me what I want, when I want it, quickly, efficiently, effectively.

And so if you start to play around with animation a little bit too much, especially in small size, it becomes almost a distraction and an annoyance, much like Jeff's point about blinking text and why it's gone away.

MS. ROSENFIELD: Jill?

MS. PHILLIPS: Yes, I do have a voice. I'm thinking that it depends on -- Jill Phillips from Ford
Motor Company. To me it would depend on how much you
need to say. Here it is pretty simple, because there is
-- shipping and handling is the only thing that really
makes it not free.

But what if it said win an Austin Martin, you
know, and there are all these sweepstakes rules. There
is no possible way you could fit them in there, and they
would have to take an affirmative action to go see what
all those rules were.

MS. ROSENFIELD: One of the last issues I just
want to cover with these banners is, if the disclosures
aren't made directly in the banner but in a link to page,
where should they be made in the web site that follows?
Should it appear on the first screen that the consumer
sees, as here, and does the disclosure become less
conspicuous if the consumer needs to scroll through the
link to page, or yet on another link to get there? Could
a disclosure that appears, say, on the second or third
page be effective under these circumstances?

Does anyone think so? Okay, consensus?

MR. RICHARDS: I'll just say I think it depends
on the context of the web site. If the next page of the
web site is some sort of -- how shall we put it. The
technical term is a splash page, that shows a flower
blooming that has nothing to do with the offer, I don't
see any reason they would have a disclosure there.

But if the next page is the offer, the
disclosure ought to be on that offer page.

MS. ROSENFIELD: Thank you.

MR. RICHARDS: And subject to all the things
that we've already said today.

MS. ROSENFIELD: Anyone else? Okay. Now, we're
just going to move onto one other issue quickly before we
break. And that is, claims that are made through audio
and video means. Some comments objected to the proposal
that the disclosure be made in the same medium as the
claim. And others objected to the proposal that the
disclosure be made in both the audio and video portions
of an ad, because this would be expensive or take up
greater ban width.

And I guess typically the requirement is that
the disclosure be made in the same medium as the claim
that it's modifying. And I wanted to see what comments
anyone has about that, if any.

Ron and then Bill.

(Comments of Mr. Goldbrenner were not picked
up.)

MS. ROSENFIELD: Bill, did you have a comment?

MR. MACLEOD: Yes. Bill MacLeod from GMA. I
was going to make about the same point that Ron did. And
that is, there is a perfect example of a design standard, and it's there for a good reason. So you don't have to spend millions of dollars litigating with the advertiser. Every time you say that ain't good enough, the advertiser says it is.

But the fundamental question, or the ultimate question, is indeed what Ron said. It doesn't necessarily have to be that way, but it's obviously a little harder to tell sometimes whether it is effective if it is not that way.

MS. ROSENFELD: Phillip and then Roy.

MR. MCKEE: For problems with the concept of an audio disclosure, one goes back to something Roy had mentioned several times on the pop ups. For many consumers it would be absolutely impossible for them to create a copy of it for themselves. They will not realize how to grab that wave file and store it on their own hard drive.

So they have no way of duplicating the disclosure and verifying that it was even made to them. They have no way to listen to it again later. They are not able to do those kinds of things.

Secondly, from personal experience I've gotten incredibly tired of going to web sites and having beeps, whistles, songs, jingles and all this other stuff playing...
at me out of my speakers. I just turned the speakers off on my computer forever. Just turned them off. I don't bother any more.

If you have a situation where it's dependent solely on the audio, you will get some people who decide either (a) they can't -- they don't remember what it was and they can't get it to play again, or (b) they never heard it anyway, because they got rid of the speakers, or their computer doesn't have a good enough sound card to play it, depending on what type of file they've used.

If you're going to use something like an audio disclosure, it should be supplemental to a written disclosure on the web site, not in replacement of, but it should also not be required. There are going to be those smaller businesses that can't afford to create those kinds of audio files, that can't afford to hire technical people, and you're going to put an undue burden on them.

It's fine to get additional information, but I don't think it should be required or the only source.

MS. ROSENFELD: Roy was next.

MR. GREEN: One of those remarkable times when I actually don't have anything to add to what I've heard.

MS. ROSENFELD: Oh, all right. Kevin?

MR. ELSE: Just a point. If someone chooses to make an audio claim and then an audio disclosure, the
fact that, you know, the computer user isn't able to 
record it and store it is no different than the person 
driving their car isn't able to stop and record the radio 
advertisement.

So that in and of itself, you know, does not 
make it deficient.

MS. ROSEN Feld: Well, now we'll go to Roy and 
then go over, since he had his hand up before.

MR. GREEN: Well, that did elicit a comment.

MS. ROSEN Feld: Okay.

MR. GREEN: And that is that if there is no way 
to verify -- if the advertisement itself is audio or 
visual or a combination thereof, that would mean then for 
consistency sake that disclaimers would be in that same 
format, and you still have the same record keeping 
responsibility.

If there is a disagreement about what the 
disclaimer involved, the burden then falls on the 
consumer to figure out a way to maintain it. It seems to 
me it's not deficient, but there has to be an 
extraordinary effort to be sure that people are 
forewarned that they're going to have to keep some kind 
of record in case there is a disagreement about what the 
disclaimer and the advertisement said.

Otherwise, once again, the evidence goes to
ether space, and you have no way -- unlike television
where in fact the networks keep a record of what has been
broadcast over the air and it's retrievable. Here it's
between -- unless you have some other notion, it's
between the marketer and the individual consumer based on
an advertisement that's audio visual and a disclaimer
that also may be audio visual.

MS. ROSENFELD: Randi?

MS. ALBERT: Randi Albert, representing the
Center for Media Education. As FTC knows, we have been
working mostly on behalf of children in these issues, and
children are subject to a reasonable child standard. And
we think that for children having written and audio would
be useful.

MS. ROSENFELD: Carla?

(Comments of Ms. Michelotti were not picked up.)

MS. ROSENFELD: Are you going to repeat what you
said or do you have a new point?

MR. MCKEE: No. I'm going to comment on what
she just said.

MS. ROSENFELD: All right.

(Laughter.)

MR. MCKEE: Just to reinforce and to comment on
yours. The reason why you need to print out the online
ad is when you get into a dispute with the company. What
we see in consumers who complain to us is, they then go back to say, hey, wait a second. You didn't tell me that this could be a problem. And the company says, oh, yes, we did, and all of a sudden there is it on the web site. And when they then go to a government agency, they can say, see, there it was. Well, there's no proof that it wasn't there in the past. And from the consumer's perspective they never saw it, or they saw a disclaimer that said something substantially different.

On the radio, the radio station has copies. On the TV, the TV station has copies. The newspaper, it's on microfiche and God only knows how many places. The web is different. And it's not there because they have to be able to print it out. It's not there because they have to print it out. It's there because if they get -- it's an option, because if they get into a situation where they're in a dispute with the company, it's their only means of showing exactly what that company promised.

MS. ROSENFIELD: I think we'll go to Dan.

MR. JAFFE: Dan Jaffe, Association of National Advertisers. I just want to at least associate with this side of the room.

(Laughter.)

MR. JAFFE: And some people on this side of the room. I believe this would be an extremely dangerous
idea to demand both audio and visual. I think you not only would go against small business, you would have some real technological problems, even for, you know, mid size people, and lots of consumers who are just coming on, because people do listen in different ways. And so if they're listening to other things and that was required, that could be very annoying to them.

I don't see much good coming from it. I think it would in fact raise -- I didn't want to bring the Constitution in here, but I think this is --

(Laughter.)

MR. JAFFE: This is where I think you really would start running into some serious questions about whether you meet the constitutional test, that you're doing a narrowly tailored restriction.

MS. ROSENFELD: Carla, did you have an answer to the evidentiary point that Phillip was making?

MS. MICHELOTTI: Yeah.

MS. ROSENFELD: Because I was wondering whether it -- wouldn't you have like text or code?


MS. MICHELOTTI: The idea that you need to print out the computer ad in order to prove what the claim is, it would not be necessary. One, it's a burden on the
consumer to be buying printers. Two, if there is a
controversy over a commercial offer, or over a TV
commercial or a radio commercial, you secure a copy of
that commercial the same way you would secure a copy of a
banner ad from the advertiser. And that is, you would
ask them for a copy of the commercial. If brought to
court, you would subpoena for a copy of the commercial.
You do not need to be able to print out the ad.

MR. MCKEE: It's the contradictor, once again.

(Laughter.)

MS. ROSENFELD: All right, Phillip.

MR. MCKEE: I know it seems like I'm hammering
away the point. It's the type of people that we get
referred to us, ma'am. I'm very sorry. It's just the
type of complaints we get. They are not people who would
be members of the American Advertising Federation. These
are not the companies that would want to be members of
the Promotion Marketing Association.

These are the type of people who are out there
to cause harm and to make ill gotten gains. And these
rules don't just limit legitimate companies. Legitimate
companies should not be doing that in the first place,
and as you've said, they're not going to be intentionally
trying to defraud a consumer in the first place.

A part of these rules also keeps in check those
people who want to. And we have plenty of people who
call us, who write us, who have problems, and it's simply
because there is no independent third party that they can
go to, such as a TV network that has a copy of the
broadcast, or a radio station that has a copy of the
broadcast.

They're having to go directly to the person that
they're suing. And while a legitimate company will have
the original, the illegitimate companies, the crooks out
there, won't. That's the problem.

MS. ROSENFELD: All right. We're going to --
I'll just wrap that up to say, you know, of course there
are legitimate and less legitimate companies and fraud ad
owners out there. And the fraud ad owners are probably
going to be making lots of claims that violate lots of
things, and whether there is an issue of a disappearing
disclosure is probably going to be the least of their
worries.

(Laughter.)

MS. ROSENFELD: And we'll be nailing them on
many other grounds, period. So with that, let's take a
break until 4:00, and then we'll come back and have our
final session on use of the terms written and printed.

(Whereupon, a brief recess was taken.)

MS. KOLISH: If there's anybody in the overflow
Welcome back everybody. Okay. Everybody is at the table who's going to be at the table? Okay, everybody, we'll get started now. And if we get through everything, perhaps we'll leave early, and you can have an early start on your weekend or your weekend work.

This session on written and printed and what those terms may mean as used in our rules and guides is going to be an interesting, but shorter session than we've had before. And leading the session are going to be two new moderators to give you a break from the rest of us.

Mary Engle, to my right, who is an Assistant Director in the Division of Enforcement, and Alice Saker Hrdy, who is one of Jodie's Legal Advisors, are going to moderate this session. And they have some power point slides -- a few -- that they're going to use with their presentation and with this dialogue.

MS. ENGLE: Good afternoon. We're going to shift our focus for this session to using electronic media to comply with our rule or guide, in particular when a rule or guide refers to something that's written, or in writing, or printed, how that applies to advertising on the Internet.
In other words, if a rule says provide a consumer with a disclosure in writing, or refers to a printed catalog, how does that apply to advertising or catalogs on the Internet?

The two main points that we will discuss this afternoon are the use of electronic media, mainly e-mail and web sites, to provide consumers with information required by an FTC rule or guide, and second, application of the terms written, writing and printed in the rules and guides. Those terms have been traditionally associated with text on paper, but it seems that with the use of computers, it could also apply to electronic information.

So we would like to discuss how that application could occur. And I think now we want to go back to one of the examples that we used earlier this morning with the Quick DDRIP product.

MS. HRDY: Yeah. We thought to illustrate this concept of complying with the rule or guide -- generally we mean via e-mail when we say electronically -- we do two case studies. The first of which we'll go back to the Quick DDRIP product, and we'll take a look at the order form.

And in this case study, we would like just to throw out a few facts that we'll presume for the purpose
of the case study, and then open it up for discussion. And let's assume that after being featured at our workshop, Quick DDRIP starts accepting quite a number of online orders.

And let's say that a consumer decides to fill out this order form. And although if you'll scroll down you'll notice there isn't a space for the consumer to enter his or her e-mail address, let's just presume that there is, and that the consumer fills out the order form and puts in the e-mail address.

And let's go ahead and submit the order form, and you'll see that Quick DDRIP thanks us for the order and indicates that all orders will be processed and mailed within two business days.

And let's also just assume that Quick DDRIP realizes quickly that they are experiencing a high volume of orders, and they realize they're not going to be able to ship it within two days as promised.

And as you all know, under the Mail and Telephone Order rule, if sellers can't ship within the promised time period, they need to offer the consumer an option either to consent to the delay or to cancel the order and to get a refund. And as you also might know, the rule now no longer specifies that this notice has to be done by first class mail, so other means can be used.
So with that background in mind, we would like to throw out a few issues. As a starting point, given that the consumer in our case study did provide the e-mail address when they fulfilled the order online, do you all think it would be reasonable for Quick DDRIP to provide a notice of delay of shipment via e-mail, given the fact that the consumer provided an e-mail address when ordering?

Yes? Is it a consensus, yes?

MALE SPEAKER: Yes.

MS. HRDY: Anyone feel maybe ambivalent? Jo Reed?

MS. REED: Jo Reed from AARP. Just my experience with how often our system goes down -- is this on -- makes me a little worried about relying entirely on e-mail for that use.

MS. KOLISH: Do you mean as the business recipient that you would be concerned that you wouldn't?

MS. REED: As the consumer who has ordered something. If I understand the case correctly, the consumer has ordered something by e-mail. The question is, if the product can't be delivered as planned, notifying them that it's going to be delayed?

MALE SPEAKER: Right.

MS. KOLISH: Correct.
MS. REED: I mean, on the face of it, it seems logical and reasonable. I'm just suggesting there is some concern I would feel about relying on that exclusively.

MS. HRDY: And maybe that brings us to the next point. You know, to the extent there is -- I think we generally agree that, you know -- in fact, I think this is a common business practice of using e-mail to notify consumers who have ordered online, obviously when the consumer has provided the e-mail address.

Should Quick DDRIP -- maybe this gets to your point, Jo. Should Quick DDRIP notify the consumer -- if we could go back to the order page? Notify the consumer at the time that the consumer is inputing the e-mail address that Quick DDRIP wants to be able to contact the consumer by e-mail.

Is that a reasonable thing for Quick DDRIP to do? Is there any reason why they shouldn't do it? Go ahead.

MR. CERASALE: Why are they asking for the e-mail address, then, is the first question I have, if that's the notice. The other is that if in fact the statement -- or how you had it here and at least the setup is that the two day notice and they're not going to make the two days came through the electronic medium, so
if the trigger isn't electronic medium, I don't see any reason why to discriminate against electronic medium for the notice that's required.

If the trigger for the notice is electronic, then if it's physically possible, an e-mail response would make some sense. I'm not sure -- you have a -- I'm not sure you need to have the notice, if we're looking at it just from our perspective of getting back and saying -- giving notice on whether or not you can make it on time.

Whether you have to give a separate notice that we can contact you by e-mail if we get your e-mail address, I mean, you're not asking them can we -- it's not a privacy problem, because you're not asking, can I contact you by first class mail to tell you that I've delayed, because it's required. So you can still contact them. Or can I contact you by phone, because I have your home phone number and the FTC is requiring a notice. And I don't think unless you're going to require -- and you have never done it. That we will contact you by first class -- is it okay to contact you by first class mail. What if they say no.

(Laughter.)

MR. CERASALE: Then you can't meet the rules.

So I think that that kind of notice doesn't seem to make
any sense. You're not looking at it from a privacy perspective, but you're looking at it from a notice perspective.

MS. HRDY: Right. I guess maybe one issue might be that if the consumer isn't -- you know, with the phone call or a piece of mail, you know, we generally accept those. And this is information the consumer wants.

But if the consumer doesn't know to expect the e-mail, is it sort of a reasonable -- is the consensus that it's reasonable to expect that the consumer will go back and check the e-mail for this important information? Particularly, you know, two days go by and no receipt of the package, maybe they will go back, because they want to contact the company and find out why they don't have it.

But I guess that was a point.

MR. CERASALE: Okay.

MS. HRDY: I'm sorry. I was going to go to --

MR. CERASALE: Let somebody else go first, since I've already had the floor. I'm sorry.

MS. HRDY: All right. Kaye, I think, had her hand up.

MS. CALDWELL: Kaye Caldwell with CommerceNet. I think one of the other things you need to take into consideration here is that the consumer does have the
option of not providing their e-mail address as part of filling this out. So that if you are concerned that you don't want to be communicated with by e-mail, there is that ability.

And also, the seller has the option of checking to see if that e-mail address is there. And if they don't want to deal with people who they can't communicate with by e-mail, then they may have the ability -- they may have the option of building into their web site something that says we need your e-mail address. We need you to fill this in. And somehow deal with, you know, what happens when they don't provide their e-mail address.

MS. HRDY: Jeff?

MR. RICHARDS: Quickly, I agree with that. Real world practices have all been really fast here. And smart merchants tell consumers what they're up to, and they're saying -- for example, they're saying give us your real e-mail address versus the one you might use for Spam or annoying relatives.

(Laughter.)

MR. RICHARDS: Because if we have a delay, we would like to get in touch with you. In other words, right now we're seeing the real world evolution of this relationship. And so software companies with whom I
deal, I give my real e-mail address for real, because they're going to tell me about patches or flows or, you know, important consumer notices. And they tell me they're going to do that and it becomes a very, very clear transaction.

So I think the day of where -- this is absolutely right, and consumers and companies both will prize developing this efficient relationship.

MS. HRDY: Elissa and then back to Kaye.

MS. MYERS: I think also, piggy backing on Jerry's argument, you know, when I go home tonight my mailbox is going to be full of wonderful advertisements through direct mail.

(Laughter.)

MS. MYERS: Some of whom -- some of which I will scrutinize carefully and some of which I'll put in my to read later pile. And it wouldn't be unusual to get --

FEMALE SPEAKER: The round one?

MS. MYERS: The round one, right. And it wouldn't be unusual to get a communication through the mail that I didn't open, just as I didn't open -- just as I might not open the e-mail message.

If the postal service or another carrier fails to deliver the postcard that the merchant that I was doing business with me -- boy, is that a convoluted
sentence. If I don't get that postcard the merchant sent because the carrier didn't deliver it, nobody knows. I would eventually figure out that I didn't hear something I should have heard.

But on the e-mail message, if your server is down, a message is going to go back to the sender of the e-mail saying this message didn't go through. It doesn't assure that you'll open the envelope, but you can't be sure I'm going to open the print envelope.

So I would second what Jerry has said.

MS. HRDY: Okay. Back to Kaye.

MS. CALDWELL: I also think there is an expectation on the part of the consumer that they are going to be receiving notices by e-mail. I know when I order something over the Internet, I expect to get something before a notice that I'm not going to get delivery. And that is, I expect to get an invoice or a confirmation or something back in my e-mail immediately.

So, you know, I've given that e-mail address because I expect those kinds of communications.

MS. HRDY: And Dan and then Phillip.

MR. JAFFE: So just to summarize, I think that there is -- I don't see the downside, in other words, as compared to the mail. The e-mail may be as effective and in some ways more effective as to record keeping and as
to speed. And therefore I think it's in the consumer's interest to allow that, and therefore in the FTC's interest to facilitate it.

MS. HRDY: Okay. Phillip?

MR. MCKEE: From my experience as a very prolific online shopper, much to the detriment of my credit card bill, I very commonly buy things online. The sites that I enjoy using the most and that I use the most frequently do communicate with me by e-mail.

They make it very obvious within the order form and during the order process that they're going to -- that's why they're collecting the e-mail address -- and what kinds of things I can expect to be receiving, such as the confirmation of my order, statements about shipping and any delays that are going to be occurring. I get that information much quicker.

And with one company, they sent me a notice that the item I had ordered was going to be delayed. And instead of having to wait for it to get to me and then make the decision based on the options they had offered, do I still want it, or do I want to order something else, or do I wish to just cancel the order, if it had been done by mail, a few weeks would have passed quite possibly before I found this out, concerning the way the mail is delivered in my neighborhood.
By e-mail it was there the next day. I knew immediately that I wanted to change what I wanted to order. And if handled properly, it can be a much more effective way of communicating with the consumer.

MS. HRDY: Jerry?

MR. CERASALE: Yeah. You asked one question about the reaction of consumers. And our members are starting to find that e-mail responses back to customers have the greatest increase in customer satisfaction of anything they have ever done.

They send out notices, thank you for the order and confirms the order. They send out -- let's say everything is going fine. They send out a notice your order was shipped today, so that people know when to look for it. And the customer service response has been fantastic.

So the customers who purchase on the web tend to be looking for e-mail as a response back.

MS. HRDY: Jean Ann?

MS. FOX: Jean Ann Fox, CFA. But to also go with this request for all this information, it underscores the importance of each of these commercial sites having a clear privacy policy and abiding by all the elements of Fair Information Practices.

Once consumers are comfortable and confident
that that is going to be done, then they will be much
more likely to give that information accurately and
smooth the way for this good customer service.

MS. HRDY: And, Kaye, did you have a comment?

MS. CALDWELL: I just wanted to follow up on
something that was said a little earlier about the
ability of the e-mail message to perhaps offer more
benefits to the consumer in terms of what they're
communicating.

If you get a postcard in the mail, you're being
asked to make a decision. Do you want to cancel this
order. Do you want to wait. Do you want to order
something else. You need to go find a telephone, or you
need to go remember what the web site was, or whatever.

If you get this in an e-mail message, it's very,
very easy for the consumer to immediately respond, either
by a reply message or clicking on maybe a web site that
they've set up to let them know what you want if you need
to make some sort of an affirmative action there.

So you're really offering a lot more to the
consumer in terms of the ease of their response than you
would be in a mail message.

MS. HRDY: Okay. Well, seeing as there is
consensus, we'll move on to the next case study -- the
next slide. And we'll go back and revisit Sandy's
Bouquet of the Month Club. And let's go ahead and go to the order form on Sandy's Bouquet of the Month Club.

And let's assume that you went ahead and you got the free bouquet. You paid the shipping and handling. And you liked it so much that you decided to enroll in the Bouquet of the Month Club, which is described on the order form.

And let's assume that Sandy's Bouquet of the Month Club sends the negative option notice each month describing the monthly bouquet and giving you the option to accept or decline. And they send this by e-mail to consumers who provide their e-mail addresses on the order form.

And so this is a little bit different than the Quick DDRIP, in that we're going to have successive e-mail messages every month, and there is sort of an immediate, you know, cost to the consumer if they don't respond and actually would have preferred not to have gotten the bouquet that month.

I wonder, does this raise any different issues or, you know, the same issues as the Quick DDRIP, to order online? Jerry?

MR. CERASALE: Yeah. I think it raises one different issue. I think that in this context with a negative option, you have to ensure that you inform the
 consumer how the consumer is going to receive that
negative option.

I mean, you should be required to tell them if
you're going to send it through e-mail that it in fact is
coming in e-mail, to know where to look for it. Or if
it's going to come through -- just as current negative
option rules, every month you're going to receive
something in the mail. You're informed of that. That
should be a requirement.

But I think that if it's informed that way, you
send it e-mail and then you're set to roll with it.

MS. HRDY:  Okay.  Jean Ann?

MS. FOX: Because it is so easy to communicate
with people by e-mail, it really makes you wonder why
there is any justification from the consumer's point of
view of having a negative option. If you have agreed to
join the club, and they can send you the notice every
month and say, this month it's tulips, would you like
some, you can do a positive thing so it's an opt in
rather than an opt out.

I know that's off the subject.

(Laughter.)

MS. HRDY:  Then Phillip?

MR. MCKEE: I want to say that I completely
concur with what Jean Ann said about turning it into a
positive option instead of a negative option.

But from a more practice perspective, in case anyone else out there is thinking of such a thing, if you are going to use a negative option -- since you do have an automatic bounce back for e-mails that are not functioning for any particular reason -- that would be the perfect location to make that an automatic negative, that you do not want it if it gets bounced back.

MS. HRDY: I guess just to pick up on what Jerry was saying that the Bouquet of the Month Club should definitely inform the consumer when they're signing up that they're going to send it via e-mail, should the Bouquet of the Month Club get an express consent? An e-mail coming back from the consumer agreeing to this? Or if they notify them that's enough?

MS. FOX: Consent is better.

MS. HRDY: Consent is better.

MR. MCKEE: It's so easy, why not?

FEMALE SPEAKER: What is the law in other areas?

MR. CERASALE: Yeah, the law -- if you sign up for it -- here are the rules of the sign up and you sign up for it. I don't think we want to start -- if you want to look to new rule making for Internet, that's fine. But if you're looking to try and set the current rule into a modern day, this medium, context, I don't think
you add different disclosures.

You have the situation set up. By the way, I'm Jerry Cerasale, DMA. I'm sorry I didn't say that. It's set up. You tell people what it is and how you're going to be notified. And then I'm submitting. So I've done it, so that's in a sense the contract and agreement that you have.

And I don't think that's any different from an negative option here. I don't think you want to -- I think we're going beyond things of what you set this up for if you're looking to set new requirements on any kind of rule.

MS. HRDY: And I don't think we are. I think we're just trying -- I think the purpose of these case studies is to sort of set it up for what Mary is going to talk about. It's just to find out what is the consensus about generally -- what is the general usage right now of e-mail. What's reasonable and what's actually going on right now.

That's really the purpose of our discussion. Elissa -- well, Jeff and then Elissa.

MR. RICHARDS: Real quickly. Jeff Richards. The why not that we just talked about for a second is because -- you know, I'm concerned that the initial transactions with consumers and providers is really clear
and that all parties understand it and do it.

But once that is set up, I might have 20 or 50 transactions going on a month myself as I move into an Internet life. You know, when I was growing up we had milk delivered three mornings a week to our front door. Isn't that remarkable? And that was not -- that was something that gosh, we didn't really want to fool around with that. You know, we were grateful that it came regularly without change and without requiring consent every other morning.

(Laughter.)

MR. RICHARDS: And I think in the future what we want to do is have this clear relationship and then make use of the technology to keep it simple, and ask people in a bewildering way to have to constantly reaffirm their relationships, when they're not yet demanding to do so. They'll tell us if they want us to require that.

MS. HRDY: Okay. Elissa and then Kaye.

MS. MYERS: I'm in complete agreement with what Jeff has said and what Jerry said. But, Jerry, I don't know how I feel about this. You raised -- you caused a thought to pop in my mind, which I have to revisit and think about.

I remember about a year ago I had a computer account set up at home -- an Internet account set up at
home -- and I have a lap top, and I just kind of stopped checking the Internet account at home. And my daughter signed me up for this month -- this daily quilters newsletter. Why she thought I would want a quilters newsletter, I have no idea.

(Laughter.)

MS. MYERS: But there it was. And I finally remembered after a couple of months to go check my account. And my mailbox -- in between a few dedicated messages, my mailbox was full of incredibly copious, lengthy messages from these quilters.

And the question that Jerry raised that I thought was interesting, I'm in complete agreement on the notification. But the product could actually be delivered with the negative option out. For example, the book of the month club could deliver the book of the month to you, and there it would be online for ever and ever.

And I don't know how I feel about that. I think it does raise another set of questions to be thought about.

MS. HRDY: Okay. Kaye?

MS. CALDWELL: Kaye Caldwell with CommerceNet. I would be considered -- getting back to something you said a little earlier -- if you were going to try to make
different rules for one kind of communication to the
other. And just to use this example, as a consumer that
occasionally participates in these negative option
arrangements, it would be very confusing to me to try to
remember, okay, I got this in the mail, so I don't have
to do anything. But I got this one in e-mail, so I do
have to do something.

I think that would just get very confusing.

MS. HRDY: Okay. Phillip?

MR. MCKEE: I just wanted to assure Jerry that I
was in no way, shape or form suggesting that the FTC
abandon negative option entirely for the Internet and
force a positive option. But it would be a nice practice
on the part of some businesses.

I know that I was in a negative option situation
once, and I have to admit, I kind of would have enjoyed
having the ability of simply telling them send this,
instead of constantly having to say don't send this.

Not necessarily forcing a company, but if it
were -- since it's not so burdensome, it would be nice to
just sometimes have that option as a business model.

MS. KOLISH: Jerry, isn't it true that some
negative option clubs are actually moving to a positive
option basis for people who are away a lot. The negative
option people are working on it?
MR. CERASALE: They're working on it, you know, as part of trying to keep customers. That's right. Trying to meet the needs of the customers is something that they're doing. That's true.

MS. KOLISH: So you may get your wish, Phillip.

MS. HRDY: Dan, did you have a comment?

MR. JAFFE: Just a short one, which is while your example is one that I think would rightfully worry all of us, I think the same problem would come with mail. It's just not clear to me that one is going to get you more on notice than the other.

Lots of stuff comes pouring into people's -- through people's mailboxes. Often it gets circular filed. So I think this is as good and there is no reason to distinguish the two.

MS. CALDWELL: I agree, Dan.

MR. JAFFE: And that you do have some advantages with record keeping, that you know that someone actually received it.

MS. CALDWELL: I agree.

MS. ENGLE: So no one is concerned about -- because an issue had been raised, well, it's customary for consumers to check their mailboxes. I mean, that's pretty frequently or every day that the mail comes.

And you had talked about, well, what if, you
know, there is an account that you're no longer using, or
you change your e-mail address and maybe you don't get
it, but people don't seem to be too concerned about that
as a barrier to the Commission -- to the consumer
receiving the notice?

Teresa?

MS. JENNINGS: Teresa Jennings with the Direct
Selling Association. Somehow you are still paying for
it. You're getting your credit card receipt or some
monies are being taken from you. So even if you have two
e-mail accounts -- you know, three somewhere -- and you
start seeing these bills that gosh, I haven't used that
in a while, there is still a means to figure it out, just
as there would be if the product was being delivered to
you through another means.

MS. ENGLE: Okay. Kevin?

MR. ELSE: Just, you know, as Jerry said, if the
contract is clear up front, we're going to send your
notices to the e-mail address you give us. Now, that's
maybe adequate disclosure. If a customer moves to
another e-mail address, change the address and notify the
company.

MS. ENGLE: Right.

MR. ELSE: It's very similar to off line.

MS. ENGLE: But some people seem to think that
in the case of a negative option plan it was important
for the company to get the -- to inform the consumer and
get their consent to receiving these monthly notices by
e-mail, versus the one time Quick DDRIP situation where
if you give your e-mail address, no notification or
consent was necessary.

We wanted to use the negative option rule and
the situation that was set out with the Bouquet of the
Month ad for a further discussion of some of the other
requirements in the negative option rule.

And you can see up there on the slide that the
negative option rule provides that it is an unfair,
deceptive act or practice for the seller to refuse to
credit a consumer if the seller has received, quote,
written notice of cancellation of membership by
identifying the subscriber prior to the return date for
the shipment, and also to fail to terminate a membership
promptly upon written request.

And we just wanted to explore whether anyone
thinks there is any reason why this written notice could
not also be done through e-mail?

Teresa?

MS. JENNINGS: Teresa Jennings with the Direct
Selling Association. You all might recall earlier today
when I described the requirement that the direct selling
industry has with a cooling off notice that must be on all of our sales receipts.

We have a conference once a year where we grapple with the issues that our companies are dealing with. And this year we had a panel on the Internet. Some of our distributors may set up a web site, where along with making face to face interactions with consumers, those consumers could, after having bought from them once face to face, go to the distributor's web site and order their product directly, have it shipped directly from the company, and still have the same product that was originally offered to them in a face to face means.

Our companies are trying to understand whether the receipt that is given to the customer after going online must be identical to the one that is given after a face to face transaction. And we're just beginning to try to figure out what that means for our industry.

But what the summation of a lot of discussion was at this meeting, is that notice is notice. And if you inform people at the time they're making their purchase how you can cancel it, that should be sufficient.

MS. ENGLE: Kevin Else?

MR. ELSE: Kevin Else, QVC. I'm not really
speaking for QVC at this point, but just -- I have to qualify that, because we don't do anything like this. I have no idea what we would be doing.

But it occurs to me that if you're signing up for a particular service, and you're doing it in writing or through an e-mail, and then the company then requires you to do some entirely other -- you know, to make a telephone call in order to shut the service off and they don't give you the option to e-mail back to shut it off, that's a problem.

MS. ENGLE: Not without precedent.

MR. ELSE: I know, it's not. No, it's not.

MS. ENGLE: Phillip?

MR. MCKEE: It just seems quite simple to me that if an e-mail is sufficient for the business to put the consumer on notice of some aspect or change in the shipping arrangements or the like, that it should also be sufficient for the consumer to be able to put the business on notice of the desire to close the account.

MS. ENGLE: Okay. Jerry?

MR. CERASALE: I agree with Phillip a hundred -- I agree with Phillip a hundred percent on that. If it's good enough that I can make the order and so forth and give you notice through the e-mail, the response back from the consumer to the company, the company should be
required to accept the e-mail notification back to the company.

MS. ENGLE: Does it make a difference if the consumer signed up on paper?

MR. CERASALE: That potentially could. I think that could make a difference in the sense of is the company set to work with this customer on paper or on the web. I mean, that looks -- internally they may have some different process. I don't know about that. I mean, I think you have to look at that case by case, but I don't know if you force a company that way.

I think that the key is don't distinguish between -- don't discriminate against any particular medium. If the consumer -- everything the consumer did was on electronic to sign up, the notices back from the company were electronic, then the consumer should have the right to put any other notice back to the company electronically.

But if it initially came up through mail, you can create a problem on the company side if you switched to allow them to go to e-mail. I think. That doesn't mean the company can't accept that, but I don't think you should require them to accept that.

MS. ENGLE: Okay. Any other comments on this issue?
MS. TORTORICE: Mary? Mary Tortorice, National Retail Federation. And I would agree with Jerry that you can't mandate that if a business has entered into a relationship with a consumer either through the mail or through the phone that the business then accept the consumer to respond through e-mail.

Because there would be a number of businesses that just don't have that capability. They may have different business units separate, and it could very well be that the e-mails would never get to the appropriate business unit.

MS. ENGLE: Just because they have an e-mail address doesn't mean it's okay for consumers to notify them through that?

MS. TORTORICE: Yes.

MS. ENGLE: Okay. Anybody else? Okay. Then we wanted to move onto an example of a different rule in the use of the term written, and that rule would be the appliance labelling rule. That's my favorite -- my personal favorite. I still have it, I think, on my air conditioning thing that's been outside for ten years. But those yellow and black energy guides, for those of you who don't know what the appliance labelling refers to.

The appliance -- well, first of all, it does
seem that there is general agreement that when a rule or
guide refers to the term in writing, there is no inherent
reason why we just can't go and apply that to writings on
the Internet as opposed to on paper. Right? Okay.

And the appliance labelling rule specifically
says that it is unfair or deceptive to make any
representation in writing, including a representation on
a label or in any broadcast advertisement, with respect
to energy used or efficiency of certain products, unless
the product has been tested in accordance with the rule.

Neither the rule nor the enabling statute
defines in writing, and we're just wanting to know if
there is any reason why in this context we shouldn't just
assume that this requirement would also apply to
representations made in advertising on the Internet.

Kaye?

MS. CALDWELL: Kaye Caldwell with CommerceNet.
I don't know if this is the appropriate point to bring
this up, but it may be the best point that we'll get.

(Laughter.)

MS. CALDWELL: I understand that the FTC
generally does not use -- does not have requirements that
notices or particular things be communicated to the
consumer in specific sizes of type.

But I would like to encourage you that if there
are any of those particular requirements anywhere, that you will have a problem there, because I don't think that you can adequately ensure that something that you design in 12 point type as a seller will end up being viewed in 12 point type as a consumer.

So I would encourage you to make sure that those kinds of requirements just don't exist anywhere any more, and if you could possibly encourage the states to get rid of them, too.

(Laughter.)

MS. ENGLE: We had some discussion about that issue this morning, how difficult or impossible it is to transfer a point size requirement to the Internet.

Phil?

MR. MCKEE: To give an example of how the actual appliance labelling can be done -- I guess you're going to tell by this statement that I am the quintessential online shopper. I was researching some information to buy a replacement washer/dryer stacking unit for my condominium. And I went looking around, and I was looking at these units online to check on prices and to see how they compared with the local dealers that I could simply purchase from and have them delivered through as well.

And one of the sites that I went to online
actually had this little graphic on their screen, which
you could tell was a very, very miniaturized version of
the label, and it said below it, click here to enlarge.
I clicked on it. All of a sudden my entire browser was
filled with a huge version of the label that I could very
easily scroll through and look.

It's quite possible to provide this information,
to do so easily, and at the same time to engender a lot
of consumer loyalty, because I, as a consumer, feel that
the site is trying to be helpful to me.

MS. ENGLE: Um-hum.

MR. MCKEE: And I did buy it.

(Laughter.)

MS. ENGLE: Okay. Kevin?

MR. DUKE: Kevin Duke, America Online. I guess
the difficulty here is figuring out whether the Internet
advertisement is in writing. You know, there seems to be
a consensus that e-mails are the sort of electronic
records that people intend to be writing to meet the
requirement.

This rule, you know, is a little bit tricky,
because it says in writing or any broadcast, which was
probably for the time when the rule was written. So that
should cover all advertising. I guess the more difficult
question would be is it if it applied to any
representation in writing. The question is, is text on a computer screen paramount to writing.

MS. ENGLE: Right.

MR. DUKE: Or is it now like text on a television screen.

MS. ENGLE: That's a question.

MR. DUKE: And I don't know the answer.

(Laughter.)

MR. DUKE: That's a hard question.

MS. ENGLE: Carla?

MS. MICHELOTTI: Carla Michelotti, representing the American Advertising Federation. I think we're all being very quiet, Mary, at this point, because I think there would be consensus that -- I think there would be consensus that in writing could be easily transferable to an Internet advertising textual use.

MS. ENGLE: Bill?

MR. MACLEOD: Well, we ought to have a little controversy here.

(Laughter.)

MS. ENGLE: We can count on you.

MR. MACLEOD: This is an example of where the nature of a web site might call into question the applicability of this rule. Is the web site being an advertisement where this writing is taking place, and are
you simply engaging in some debate about the proper level
or the proper method of measuring energy efficiency.

And if you are not careful in confining the
regulation in connection with a commercial transaction,
then you will have a problem, and a web site doesn't
always define itself that way.

MS. ENGLE: Yeah. I mean, I think that would --
that's an underlying assumption that this is actually an
advertisement. It's a commercial speech. It's trying to
get consumers -- to influence consumers to buy or
purchase, not, you know, an energy efficiency group
comparing energy efficiency of different appliances.

Or I know there can be harder cases, but I think
we're just talking about something that's pretty clearly
an advertisement.

MS. KOLISH: And right below this screen there
would be an order now the stackable dishwasher unit.

(Laughter.)

MS. ENGLE: Moving on to the -- oh, I'm sorry,
Phillip.

MR. MCKEE: Well, no. I was just going to say
to go back to my stackable washer. When I was at the
dealers, they have the energy unit posted on the front of
thing, right when I was sitting there at the web site.
If they hadn't taken the extra step of scanning in the
energy use certificate, I could have very easily ordered
it without ever seeing it. But they didn't make the
effort to show it to me, since I do not have the physical
unit sitting in front of me, as I would at a regular
store.

MS. ENGLE: Okay. Moving on to the next slide,
the appliance labelling rule also requires that certain
disclosures be made in catalogs. And the rule defines
them as printed material which contains the terms of
sale, retail price and instructions for ordering, from
which a retail consumer can order a covered product.

So here we have the use of the word printed --
printed material. And we were just wondering if there
was any issue about assuming that an Internet site
contained this information and a consumer could order,
that it shouldn't be considered a catalog for purposes of
the rule.

MS. FOX: Jean Ann Fox. This seems like a no
brainer.

(Laughter.)

MS. FOX: It's just an online catalog.

MS. ENGLE: Good. We saved the easiest stuff
for later in the day, now that everyone is tired.

(Laughter.)

MS. ENGLE: Okay. Did someone have their hand
up? Jeff, did you?

MR. RICHARDS: Briefly, and this is probably my fatigue speaking. Sorry. Jeff Richards. On the face of it, of course this makes sense. But I caution us again that a catalog may be a new kind of compilation brought together on the fly to meet my -- me, the consumer -- my particular conditions at that particular moment, and that we're again, I think, thinking of a catalog in a static sense with static warnings that can be predicted.

And what we really need to do here is understand how consumers themselves in fact will need to pull together information that is current as of the moment that they asked for it, and swiftly uses its currency thereafter. And that's my caution.

MS. ENGLE: Carla?

MS. MICHELOTTI: You know, all these rules -- the FTC rules and guidelines of advertising are things that we read and we apply, but they're all tactics. And they're specific tactics to accomplish a goal. And if we think about the overall goal with the rules of whether in this case a consumer has a right to know certain energy information before they're buying the appliance, that's the goal.

And the way that -- the defined way in which the tactic has prescribed that goal to be reached may be
modified because of the medium. Here I think it's -- you
know, in what my limited mind right now sees as the
Internet, I think it's pretty clear, but tomorrow I don't
know, you know, and maybe it's going to have the computer
talking to me or something. You know, it's not going to
be printed at all. Who knows what's going to happen.

MR. RICHARDS: Give an example of what you're
saying.

MS. MICHELOTTI: But it's a goal. Do you
understand my point, a goal versus a tactic? I mean,
these are tactics, but the goal is whether there is
appliance energy information made available to consumers.

MR. RICHARDS: I just moved into a new home with
a heat pump, so clearly I was interested in this
information. But it turns out that on the web -- right
now the rule, of course, originally assumes showroom and
static media and so forth.

But in fact on the worldwide web what I was able
to do -- and actually maybe automobiles are even a better
example. Instead of getting even a pop up of a label,
the same one that I had seen in the showroom, is suddenly
a comparison chart that shows competitors side by side
with actual rankings and ratings, including this rule.

So what I'm saying, this is my kind of example
to your point. Let's be really careful, in fact, that

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we're not holding back the next evolution of comparative
information by insisting on the literal application of
what we got today.

    MS. ENGLE: Okay. Are there any other -- oh,
    I'm sorry. Kaye?
    
    MS. CALDWELL: Kaye Caldwell with Commerce Net.
    I would just caution you that this is an example where
    the definition of catalog makes it very clear that in
    this case it would work, because of the additional
    conditions you have for it to be a catalog in this
    particular example.
    
    I'm a little concerned that there might be other
    areas where the word printed is used, but it's not quite
    so clear that it would work so well. So I think you do
    have to be careful and look at what happens in each
    particular situation where you do use that word,
    unfortunately.
    
    MS. ENGLE: Okay. Well, were there any other
    concerns or points people wanted to raise about the
    application of the terms written, writing, printing and
    so forth as they are used in our rules and guides to
    advertising on the Internet?
    
    It seems a little bit easier than the clear and
    conspicuous issue, fortunately.
    
    *(Laughter.)*
MS. ENGLE: And we will keep in mind, of course, the points that have been raised about the need to, you know, maintain flexibility and be open to changes in technology. And hopefully this workshop is really one example of how, you know, we are trying to do that and not just be an old mind set.

MR. DUKE: I have a question.

MS. ENGLE: Sure, Kevin.

MR. DUKE: Maybe Kevin Else can answer it. Does this rule apply to, you know, a television commercial from which it advertises the terms of sale, the retail price, instructions for ordering and gives an 800 number from which the consumer can order? Does this rule apply?

MS. ENGLE: I'm sorry. Would we interpret a TV ad as printed material?

FEMALE SPEAKER: That's broadcast.

MS. ENGLE: I don't think so.

MR. DUKE: Well, I mean, from the point that, you know, the rest of the stuff in the definition of printed material sort of leads us to the conclusion that an Internet ad is closer to the printed material than not. You can have all these other elements, you know, in an infomerical or just a regular television commercial, yet because it's clearly not printed material, the rule wouldn't apply.
Now, as technology evolves, you can have streaming technology and somebody clicks on a web site and they are presented with what is in essence a video television commercial, and maybe the rule shouldn't apply. You know, it points up the difficulty of hard and fast rules to a single medium.

MS. ENGLE: Yeah. Well, one thing is, we often make a distinction between printed ads and TV ads, because it's much harder to make disclosures in TV ads. The cost is much higher. You don't generally have the time now. An infomercial might be different. And I think probably when we wrote the rule we never imagined someone selling a refrigerator through an infomercial. So what I hear you suggesting is maybe we need to amend our rule to make it apply to infomercials in this way.

(Laughter.)

MS. ENGLE: Phillip?

MR. MCKEE: Something I knew that I would want to say at some point over the course of the day, and Kevin has provided a perfect opportunity for it. And I don't want this to sound like I'm just looking for an excuse for a more wonderful breakfast at the expense of the Grocery Manufacturers of America and our other hosts. But because the information and the technology
is changing so rapidly, as has been said many times, this is the kind of situation where we would want to come back to the table. Frequently, not constantly. But on a regular basis, so that as technology changes, the FTC can hear the views of industry and regulators and consumer groups on these new circumstances affect the rules.

And it's something where we all, I think in the back of our heads, have kept in our mind that anything that was said today is really not going to apply tomorrow. But it's a wonderful thing that the FTC has at least allowed us a chance to express these views and hopefully we're have more opportunities again in the future on this topic.

MS. HRDY: Well, Laura has just told me she would really like to do this all over again.

(Laughter.)

MS. ENGLE: Yes, is it Ron?

MR. GOLDBRENNER: Yes.

MS. ENGLE: Yes.

MR. GOLDBRENNER: I wasn't scheduled to say anything here, but --

(Laughter.)

FEMALE SPEAKER: Go ahead.

MR. GOLDBRENNER: I wanted to thank the FTC for doing a really terrific job in approaching the whole
issue of Internet advertising and commerce. I think the
mix of enforcement of browsing the Internet for various
ne'er do wells, of taking enforcement actions on a large
scale against a group of them, of having these kind of
workshops to consider regulations, guides, enforcement
policies, etc., to learn about how the Internet works,
etc., is absolutely the best way of dealing with this
situation that I've seen.

And the agency, I think, is doing a terrific job
of taking the initiative, but also being very cautious
with the new medium. And I want to thank you for the
opportunity, because not only is this a good idea, but
you executed it so well. We had to do our homework, and
when we showed up, you gave everybody a really fair and
honest hearing. And we appreciate it very much.

MALE SPEAKER: Here, here.

(Applause.)

MS. KOLISH: Well, that seems like a good place
to end.

(Laughter.)

MS. KOLISH: Let's end on a high note. I think
Jodie wanted to make a few closing remarks.

MS. BERNSTEIN: I did, but I'm not sure that I
can exceed what Ron already said about us. And I won't
try to. I did want to thank all of you for both doing
your homework, coming with us today and spending the
entire day with really open and honest discussions.
Because our principal purpose here for us is to educate
ourselves, and to see to it that we do remain current.

Phillip, I had written down also, will they come
back again. Because despite the fact that I expect all
these people down here will probably resign if I told
them they had to do this again, I think that our -- the
Bureau's, anyway -- way of proceeding regularly is to
continue to have this kind of dialogue with the people at
this time and others who have been so generous with their
time. We will continue to do that as we can.

I do think that there were a couple of things
more that I wanted to say. First of all, I think there
was an admission today -- and I've been saving this one
up. I heard Jerry Cerasale, on behalf of DMA --

(Laughter.)

MS. BERNSTEIN: -- say that his --

(Laughter.)

MS. BERNSTEIN: Here's what I heard Jerry say.
That the fact that DMA's contribution was listed above
the GMA's meant it was clearer and more conspicuous.

(Laughter.)

MS. BERNSTEIN: Well, hey, you know, we'll just
apply that across the board. That's an admission. And
I've ruled out telling you about my first and maybe only foray onto the net to attempt to buy a year's supply of panty hose.

(Laughter.)

MS. BERNSTEIN: Because the reason I was buying a year's supply was the offer was so terrific that the more I bought, the cheaper it got, and I expected that a year or two they would be free.

(Laughter.)

MS. BERNSTEIN: That didn't turn out to be the case. And if I could have figured out how to say, how soon, buddy, would you like this site to be banned by the FTC, I would have done it. But I couldn't figure out how to do it.

(Laughter.)

MS. BERNSTEIN: So I'm going to stay with the net a little time longer so that I can figure all those things out. In the meantime, again, my thanks to you and to our wonderful staff that's done this.

We're going to keep this record open until the 1st of July. We would like to encourage your comments -- follow up comments -- as much as possible, and among those comments for any of you who have ideas for either stimulating research or undertaking research on what the theme of this has been, as none of us know enough about
what a consumer's behavior is like in this new medium.

We would certainly be grateful for that if there
is existing research. There are also academics who, of
course, are salving to have somebody sponsor research,
who would love to hear about it. That's probably longer
term, but to the extent that we are all learning, I think
that would be a very valuable thing to do.

We are keeping a transcript. It will be
available. And in terms of what we will do in the end, I
think in all likelihood it will not -- certainly will not
be a set of new rules or guides. To the extent that we
can continue what we have committed to in the past, and
that is, performance standards and not design standards.
I heard that all day long. And I think the Commission
has had a history of doing that, both in guidance and in
rules and in case law as well. I am confident that we
will continue that process.

The creativity that comes from the commercial
sector in advertising and in promotion is something that
we cherish. We know that the creativity is a way to
communicate with consumers. And there is one consensus
here today that we all believe in, and that is, the
consumer really is sovereign here, and the kind of
information that the consumer wants, needs and has
expectations for, is what we're all after.
So, again, our thanks. I am going to release you now from your purgatory of having to work with us all day. Again, our thanks. And I'll give you a round of applause, if we may, for your contributions today.

(Applause.)

(Whereupon, the foregoing workshop was concluded at 5:03 p.m.)
CERTIFICATION OF REPORTER

DOCKET/FILE NUMBER: P974102

CASE TITLE: Internet Legal Issues Task Force

DATE: May 14, 1999

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED:

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SONIA GONZALEZ

CERTIFICATION OF PROOFREADER

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

______________________________
JACKY KARNCHANAPHATI