

On Being Conspicuous: Changes to the UCC's Definition of Conspicuous – UCC 1-201(b)(10) – Part Two

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The following article is part two of our series on the 2022 Amendments to the UCC. Please read the [first article](#) for context. The discussion below is divided such that the first section discusses the edits made in the 2022 Amendments to the provision, as well as the Official Commentary; the second section provides context for the changes and explores parallel developments in the law surrounding a close, but different, disclosure standard “clear and conspicuous”; and the final section discusses why we decided to highlight this change.

The 2022 Amendment Changes to "Conspicuous"

When the UCC requires a specific disclosure to be given in a contract (or in an offer to make a contract, including in advertisements), often the specific UCC provision will indicate that the disclosure must be “conspicuous” within the document.

For example, as drafters or frequent readers of contracts may recognize, it is common for contracts to exclude or modify certain warranties, such as the implied warranty of merchantability. These warranties were developed through common law, and so Section 2-316 of the UCC provides that any exclusion or modification of such implied warranties is a required term that must be in writing and must be “conspicuous.”

Prior to the 2022 Amendments, the UCC defined “conspicuous” to mean that when a required term is “written, displayed, or presented . . . a reasonable person against which it is to operate ought to have noticed it.” The definition itself provided examples of how to achieve conspicuousness, including setting apart the disclosure in contrasting font, type or color and adjusting the size of the text. The provision also clearly provided that whether a disclosure is conspicuous is a matter of fact for a court to decide. Section 1-201(b)(10). The previous Official Comment on the definition of conspicuous was **one** paragraph long.

In the 2022 Amendments, the revised conspicuous definition provides that a required term, when “written, displayed, or presented” must, as before, be sufficient for a reasonable person to notice it, but added that determining whether a reasonable person would notice the term is to be evaluated “based on the totality of the circumstances” The revised definition then deleted the examples of how to achieve conspicuousness, but affirmed that the matter was still for a court to decide. Meanwhile, the Official Comment on the definition of conspicuous in the 2022 Amendments was expanded to be **14** paragraphs long.

Included in those 14 paragraphs is a new set of “factors relevant to whether a term is conspicuous” which includes, but is not limited to, the following six elements, each of which is intended to guide drafters to ensure that required terms are conspicuous “based on the totality of the circumstances”:

1. Use of headings and text that contrast with surrounding text. (Effectively the same concepts that were part of the previous definition of conspicuous.)
2. The placement of the term within the record (e.g., at the beginning or near an acknowledgment or signature accepting the term).
3. Ensuring that hyperlinks containing required terms are clearly and consistently set apart from surrounding text, and that there is text drawing attention to the hyperlink.
4. Ensuring that the language of a heading or hyperlink is accurate. For example, a paragraph disclaiming implied warranties should be labeled something like “Waiver of Warranties” and not just “Warranties”, which could be misleading.

5. The effort the reasonable person must take to access the term. “For example, a term accessible only by triggering multiple hyperlinks is less likely to be conspicuous than a term accessible from a single hyperlink.”
6. Whether there is a separate assent or signature to the term.

Context for the Changes

In the intervening years between when the definition of conspicuous was last updated, the variety of channels through which contracts can be presented has significantly expanded; think websites, mobile phones, smart watches and even just software installation processes. Because technology has become such a major part of the way we work and live, the number of contracts people encounter on a daily basis, governing the many facets of their interactions with technology, has expanded exponentially.

This means that ensuring that disclosures are conspicuous has become a lot more complex, as we must now attempt to cut through the contractual clutter to highlight significant aspects of those contracts each and every time a contract is presented. The guidance offered in the Official Comment is intended “to be both more protective of consumers and more useful to drafters by providing more clarity and flexibility in the methods that may be used to call attention to a term.”

To date, the concept of “conspicuous” required terms in the UCC has been a lower standard than the so-called “clear and conspicuous” disclosure standard used by federal banking and consumer protection authorities. The “clear and conspicuous” standard near and dear to every advertiser, web designer, privacy specialist, and all of the lawyers working with them, is required for many disclosures that inform consumers of their rights, their rights to choose and of the limitations that may pertain to a product or service. So, while the UCC is focused on required terms for contracts or offers to contract, the “clear and conspicuous” standard applies to communications generally, and not just those involving contracts. Furthermore, the failure to meet the “clear and conspicuous” disclosure standard when required is deemed to be a “deceptive act or practice” that can be redressed by federal agencies and state attorneys general pursuant to Section 5 of the Federal Trade Commission (“FTC”) Act or through the Consumer Financial Protection Act (“CFPA”). The UCC does not have a concept of “deception” that ties into whether a required term is conspicuous or not. And, if a court decides that the term was not conspicuous, the court can either nullify the contract altogether or nullify the actual term of the contract that was not conspicuous to the person against whom the term applies. In this way, the UCC’s conspicuous standard is still a “lower” standard than “clear and conspicuous.”

When we consider the elements captured in the Official Comment, the way the “clear and conspicuous” standard has developed in the last decades informed a lot of what is in there. Just as the last few decades have led to the UCC recognizing that presenting important information in contracts is more complex, the “clear and conspicuous” disclosure standard has changed, as well. For example, consider the so-called “Four P’s” of making “clear and conspicuous” disclosures as discussed in this [2014 FTC blog](#) – prominence, presentation, placement and proximity. Each of these four P’s have been mentioned in the Official Comment. So to the “just in time” requirements that apply to certain privacy and mobile disclosures, as discussed by the FTC in its [2013 Mobile Privacy Disclosures Report](#), are mentioned in the Official Comment. And also, the Official Comment, in referencing “the effort a reasonable person must take to access the required term,” is consistent with the so-called one-click rule for hyperlinked disclosures that is now included in Regulation Z and Regulation DD, and which is discussed by the CFPB [in this 2019 Supervisory Highlights](#).

Why Highlight This Change

The 2022 Amendments have significantly closed the gap between the UCC’s conspicuous standard and the “clear and conspicuous” standard that has been developed by consumer protection authorities. In light of the changes, failure to evaluate the presentation of required terms “based upon the totality of the circumstances” and taking into account the six relevant factors mentioned in the Official Comment for whether a required term is conspicuous could impair a company’s ability to enforce its contracts. Further, while the Official Comment provides an introduction to those six relevant factors, all of the concepts identified have already been developed and expanded in the consumer protection realm.

This means that no more may companies assume that business-to-business agreements in which required terms are documented through huge blocks of capitalized text will be enough to achieve making sure the terms are conspicuous. Companies should now take the time to review their standard agreements and identify required terms that must be conspicuous. It is time to dig them out from contracts that may bury them in voluminous pages or tiny text or in hyperlinks that no one ever clicks on.