ANA
Association of National Advertisers, Inc.

July 17, 2003

Mr. Donald Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Mr. Secretary:

The Association of National Advertisers (ANA) commends the Commission for conducting the workshop on June 18, 2003 entitled "Information Flows: The Cost and Benefits to Consumers and Businesses of the Collection and Use of Consumer Information. There was a considerable body of information presented at the workshop on specific benefits that consumers receive as a result of the free flow of information in our economy. Those benefits are real and substantial.

Consumers have legitimate concerns about how information about them will be collected and used. However, ANA believes that those privacy concerns can be protected without seriously undermining or restricting the free flow of consumer information. I would appreciate it if you would include these comments in the official record for the June 18th workshop.

ANA is the advertising industry's oldest trade association and the only organization exclusively dedicated to serving the interests of corporations that advertise regionally and nationally. The Association's membership is a cross-section of American industry, consisting of manufacturers, retailers and service providers. Representing more than 8,700 separate advertising entities, these member companies market a wide array of products and services to consumers and other businesses.

<u>The Information Conveyed by Advertising has Major Economic Benefits</u>

The Commission has long recognized that advertising is a powerful tool of competition. Advertising and marketing have an enormous economic impact on the economy of the United States. A study conducted for Lexecon, Inc. by Nobel Laureates Kenneth Arrow and George Stigler, concluded that, "In the modern economy, advertising provides information about products and services. By providing information in an efficient (i.e., cost-effective) manner, advertising helps the economy to function smoothly -- it lowers prices and aids new products and even firms to enter the marketplace. In short, advertising is a powerful tool of competition: competition of one product against another and competition of one firm against another." (Lexecon Inc., *Economic Analysis of Proposed Changes in the Tax Treatment of Advertising Expenditures*, August 1999)

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Another study, conducted for the WEFA Group by Nobel Laureate Lawrence Klein, has demonstrated that, "The primary reason why advertising is recognized to be such a positive factor in the economy is that it efficiently provides information about the attributes and prices of products and services. Advertising provides useful information to consumers in households and businesses – a critical role in a market economy" (The WEFA Group, *The Economic Impact of Advertising Expenditures in the United States*, 1997).

The Commission has published studies of several different industries that demonstrate that advertising provides valuable information to consumers. For example, a 1989 study of the cereal market found clear evidence that "producer advertising and labeling added significant amounts of information to the market and reached groups that were not reached well by government and general information sources." Pauline M. Ippolito and Alan D. Mathios, *"Health Claims in Advertising and Labeling: A Study of the Cereal Market,"* Bureau of Economic Staff Report, Federal Trade Commission, August 1989, at page ix.

There is a common thread that runs through all of these studies - the information conveyed in advertising and marketing provides substantial value to consumers, to companies and our economy.

It is also important to note that the information conveyed in advertising has broad First Amendment protection. Marketers have a First Amendment right to speak and consumers have a First Amendment right to receive information. The information provided to consumers through commercial speech is a critical component of our free market economy.

Advertisers Face an Increasingly Fragmented Marketplace

Nevertheless, it has become more and more difficult for companies to reach a mass market through traditional media. Multiple television networks, hundreds of cable channels, thousands of increasingly specialized magazines and the growth of the Internet mean that marketers are often paying more for their ads while reaching a smaller audience.

Further, marketers recognize that their mass media advertising is seen by many consumers who have no interest in their product or service. Reaching the right consumer, at the right time, with the right product, at the right price is critical not only for our members, but for consumers as well. Clearly, it is a huge waste of time and money to advertise about diapers to a family with no children, or to advertise aluminum siding to apartment dwellers. Many consumers already feel they are bombarded with messages they have no interest in receiving. This heightens consumer unhappiness, leading them to withdraw from the marketplace in frustration or to push back at marketers or marketing tools such as telemarketing or commercial e-mail.

Personalized or targeted marketing can substantially reduce costs for marketers. It can provide consumers an array of important benefits, including not receiving information that is of no interest to them.

It is thus essential to marketers and consumers that the free flow of information about consumers remains unimpeded. This information allows businesses to effectively target the right consumers. Without it, marketers will face the worst of both worlds: a severely fragmented marketplace without the information databases to allow them to effectively personalize and target the right consumers. Clearly, in such an environment the economic marketplace itself would become highly inefficient.

Information about Consumers Helps Companies Target Their Marketing

Michael Turner, in his study entitled *The Impact of Data Restrictions on Consumer Distance Shopping,* described the impact of shutting down the flow of consumer information: "Like electricity flowing through power lines, information moves through the New Economy unseen and unheard, its uses so ubiquitous that it is taken for granted. And like electricity, disrupting the flow would have a major impact on consumers. Today's consumers have come to expect the benefits of information flow…as they expect an appliance to function once it is connected to an electrical outlet" (Information Services Executive Council, 2001).

This study is just one of many that highlight the value of this information to the economy. The distance shopping study and several others demonstrating the value of information transfer are available at the website of BBBOnline, located at www.bbbonline.org/UnderstandingPrivacy/library/whitepapers

Businesses must have access to data that allows them to reach those consumers who will be most receptive to their message. Fred H. Cate and Michael E. Staten noted in their study, *The Value of Information-Sharing* that "'Target marketing' allows a business to send an offer to a customer specifically identified as likely to be interested." They also describe what occurs when this information is not available: "In the absence of information that indicates which consumers are likely customers, businesses must choose between marketing randomly, contacting everyone in an entire geographic community, or relying solely on mass media advertising to reach potential customers." (National Retail Federation's Protecting Privacy in the New Millennium Series, July 2000). This is costly for marketers, as they must waste real economic resources disseminating information that the audience does not want to receive. It is also costly for consumers. To survive, businesses must pass the cost of this inefficient marketing along to them.

As a report by Shane Ham and Robert D. Atkinson of the Progressive Policy Institute noted, "By gathering information about individuals, marketers are able to wring the inefficiencies out of the information costs of bringing buyers and sellers together." (*Online Privacy and a Free Internet: Striking a Balance,* April 2001).

In their study on how "opt-in" privacy rules would affect consumers, Staten and Cate provide a concrete example of the benefits of the free flow of information. They use as their case study an examination of MBNA, the second largest credit card issuer in the United States. They note that MBNA has achieved its rapid growth through its "…ability to access and use information about potential and existing customers." MBNA's entry, and the entry of other companies into this marketplace, would not have been possible if this information had not been available. MBNA used consumer data to identify customers, and provided these customers with products and services appropriate to their situation. (The Privacy Leadership Initiative, *The Adverse Impact of Opt-In Privacy Rules on Consumers: A Case Study of Retail Credit,* April 2002).

Consumers have benefited from this increased competition made possible by the availability of information to businesses. As Ham and Atkinson note, "…when sellers compete for a buyer's business, the buyer always wins" (Progressive Policy Institute, *Online Privacy and a Free Internet: Striking a Balance,* April 2001).

Any restrictions on the flow of data could be economically harmful to consumers. As Michael Turner found in his study on distance shopping, restrictions on the use of consumer information by catalog marketers would impose a 3.5 to 11 percent information tax on consumers who buy through catalogs (Information Services Executive Council, *The Impact of Data Restrictions on Consumer Distance Shopping,* 2001). This would have a negative impact on communities currently underserved by traditional retail outlets, such as rural areas and the inner city, by increasing the costs involved in contacting consumers.

Information Sharing Among Businesses is Essential

It is also beneficial to consumers when businesses share information that helps target their marketing with other businesses. Cate and Staten noted that, "Information sharing allows businesses to ascertain customer needs accurately and rapidly. By examining patterns of customer transactions, comparing customer information shared across different institutions, and using that information to better understand customer objectives, businesses can anticipate customer needs and measure the demand for potential products and services" (National Retail Federation's Protecting Privacy in the New Millennium Series, *The Value of Information-Sharing*, July 2000).

A study which examined the benefits of information sharing by financial services companies explained that, "By obtaining information on homeownership for the banking affiliate, for instance, a mortgage lending affiliate can target its home equity loan offers to those most likely to need a home equity loan: homeowners with significant home equity and other debts, rather than renters." This, too, has economic benefits, and not just for business. As the study notes further, "[Financial Service Roundtable] members report that they would send out about three to six times more direct marketing if they could not use information sharing for targeted marketing. Targeted marketing results in real savings for financial institutions, some or all of which will be passed forward to customers in price reductions" (Ernst & Young for The Financial Services Roundtable, *Customer Benefits from Current Information Sharing by Financial Services Companies,* December 2000).

Restrictions on Information Collection Could Raise First Amendment Concerns

The issue of opt-in versus opt-out raises issues that go far beyond policy and economic efficiency. In the case of *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (1999), the U.S. Court of Appeals for the Tenth Circuit ruled that the Federal Communications Commission had violated the First Amendment by imposing an "opt-in" regime regarding customer proprietary network information (CPNI). The FCC had promulgated regulations under the Telecommunications Act of 1996 that restricted the use, disclosure or access to others to CPNI "for the purpose of marketing categories of service to which the customer does not already subscribe" without customer approval. The regulations also prohibited telecommunications carriers from using customer information, without their approval, to market other information services, such as voice mail or Internet access service, to identify or track customers that call competitors, and to regain the business of customers who switched providers. To obtain customer consent, the FCC required an "opt-in" approach, meaning the provider had to obtain express written, oral or electronic approval before using the customer's CPNI. The court found that the FCC had failed to consider another, less restrictive alternative, an "opt-out" method, through which consumer consent is assumed unless the customer indicates otherwise. The FCC's regulations were thus not narrowly tailored, and failed the *Central Hudson* test. This ruling by the Tenth Circuit court has set a precedent by which any attempts to restrict the use of consumer information would be examined.

Conclusion

We believe the Commission can foster a balanced framework that allows consumers to protect their privacy without imposing unreasonable costs or restrictions on information transfer.

As Cate and Staten concluded, "The open flow of information gives consumers real choice in conducting their daily lives" (National Retail Federation's Protecting Privacy in the New Millennium Series, *The Value of Information-Sharing*, July 2000). As the numerous studies cited above show, this flow of information has real value in economic terms, to consumers, to businesses, and to the economic health of the United States in general. Any unreasonable attempts to restrict it would have a negative impact on all three, and could be found to be unconstitutional.

As noted earlier, the fundamental values of advertising to enhance economic efficiency, increase competition, lower prices and provide critical information to consumers concerning a range of products and services, can only be maximized where regulatory regimes do not overly constrict the exchange of information between consumers and the business community.

Thank you for providing us with this opportunity to share our views. We look forward to continuing to work with the Commission to see that the best interests of both consumers and businesses are protected, and the free flow of information is not unreasonably impeded.

Sincerely,

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