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Remarks to Direct Marketing Association
December 6, 2007

Good morning. I always am happy to have the opportunity to speak with the DMA. Last week, I traveled with Chairman Majoras to meet with competition and consumer protection officials in Brazil and Chile. Earlier this year, I accompanied the Chairman to Eastern Europe, and last year, we visited Japan, China, and Korea. Why am I telling you about this trips? They underscore what we all understand about consumer protection - it's a global enterprise. We had the chance to share information about our approach, and to hear about the consumer protection priorities of foreign officials. Perhaps most interesting, we have witnessed some of the philosophical struggles of newer consumer protection agencies, like those in China, Korea, and Romania, particularly in terms of their relationship with businesses in their country.

Throughout all of these trips, it has struck me how lucky and proud I am to be part of the U.S. consumer protection system, where there is a true partnership among consumers, industry, and government. Industry is not the enemy; to the contrary, it is an engine of innovation that can enhance consumers' welfare. We don't view consumer protection as a zero-sum game where either businesses or consumers are losers or winners; rather, we look for the win-win. We recognize that robust dialogue among businesses, consumers, and governments makes policymaking better. And all of these things are true of the relationship between the FTC and DMA, whether the issue is Do Not Call, spam, or mobile marketing. So I thank you for your partnership, your leadership, and your valuable input. This Association and the FTC have had a solid working relationship for years. I am proud of our many collaborative initiatives, and I know that our hard work will continue.

As you know, the FTC's Bureau of Consumer Protection wears many hats. First and foremost, wearing the white ten-gallon hat, we pride ourselves as a civil law enforcement agency. In recent years, we have sharpened our focus on serious fraudulent conduct that causes significant economic injury or injury to health. But, we also have, and will continue to have, a sustained commitment to enforcing the laws against essentially legitimate marketers which, for whatever reasons, we believe run afoul of the law.

The Bureau of Consumer Protection also wears a regulatory hat – the visual image associated with this role is a bit more challenging to conjure up, and no doubt some of you are envisioning a pirate's hat. A construction worker's hard hat may fit the bill more aptly from my perspective. We all know, only too well, that notice and comment rule making is hard work, and it can get messy. But, the FTC prides itself on getting it right.

Lastly, the Bureau of Consumer Protection is an educator – seeking to provide businesses with the information they need to comply with the rules of the road and to provide consumers with the necessary tools to engage in commerce intelligently. The hat worn here is similar to the one worn by Professor McGonagall in "Harry Potter," with the fine feather in it.

Today, I would like to wear this professorial hat to discuss some lessons from Do Not Call. I'll start with some philosophical lessons about the Do Not Call experience and what it can teach us about policymaking. Then, I'd like to touch upon some practical lessons from our Do Not Call enforcement activities. Finally, I would like to give you a preview of coming attractions at the FTC.

I. Philosophical Lessons

Next month marks the five-year anniversary of the Commission's adoption of the final

Do Not Call Amendments to the Telemarketing Sales Rule.[1] So I thought today would be an appropriate opportunity to step back and discuss some of the lessons we've learned from the Do Not Call regulatory experience.

The first lesson: just as Malcolm Gladwell's book describes the concept of a "tipping point" in emerging social phenomena or trends, there can be a tipping point in the marketplace that gives rise to consumer protection regulation. In the early 2000s, we reached such a tipping point with respect to outbound telemarketing. As we described in our Notice of Proposed Rulemaking in 2002, consumer frustration over unwanted telephone calls was not a new phenomenon; what was new was the strength of the response to that frustration.[2] A number of states had passed or were considering legislation to establish statewide do not call lists. Indeed, states reported that consumers were responding in such overwhelming numbers, that some state telephone systems crashed. DMA's Telephone Preference Service had grown to 4 million, up 1 million in the previous two years.

Consumers strongly expressed their desire for an effective way to be free of unwanted telemarketing calls. Not a single consumer comment in our rulemaking proceeding championed telemarketing. Consumers were changing their living habits to avoid telemarketing calls by not answering the telephone, getting Caller ID, and screening calls. Studies also showed that consumers felt angry about the number of telemarketing calls they received.

Consumers also complained that existing mechanisms for them to exercise choice were not working. Their requests to be placed on company-specific do-not-call lists were often

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[1] 68 Fed. Reg. 4580 (Jan. 29, 2003).

[2] 67 Fed. Reg. 4492 (Jan. 30, 2002).

ignored. Many consumers complained that they could not assert these rights because telemarketers did not identify themselves or hung up. In addition, consumers had no way to verify that their names had been taken off a company's list.

In short, consumers had gone beyond their tipping point. Existing regulations were not working. Self-regulation, which we always view as the best first approach, was similarly not working to address consumer concerns. State do not call registries were proliferating. From all of this, the National Do Not Call Registry was born, and consumers signed up in droves.

Looking back at that experience, I think we would all agree that the industry failed to anticipate the tipping point until regulation was inevitable. I know that the DMA has been the keenest student of the Do Not Call experience, and has shown tremendous leadership and initiative by reorganizing its priorities to place consumer confidence at the center of the direct marketing value proposition.

The second lesson we have learned is that success has a thousand fathers. Back in 2003, when a district court struck down the Registry, Congress acted within hours on a bipartisan basis to pass legislation authorizing it.[3] Currently, several pending Congressional bills would eliminate the five-year re-registration requirement.[4] And indeed, at a recent hearing, Congressman Chip Pickering mentioned that Do Not Call was "one of the most successful pieces of legislation" passed in his eleven-year tenure as a Member of Congress.[5]

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[3] 5 U.S.C. § 6101 (2003).

[4] *See, e.g.*, H.R. 3451, 110th Cong. (2007); S. 2096, 110th Cong. (2007).

[5] *Enhancing FTC Consumer Protection in Financial Dealings With Telemarketers and the Internet: Hearing on H.R. 3526, H.R. 2601, and H.R. 3461 Before the Subcomm. on*

Outside the telemarketing area, the public has clamored for an improved ability to opt-out of receiving advertising and marketing materials. The Fair and Accurate Credit Transactions Act, passed in 2003, improved consumers' ability to opt out of receiving prescreened offers of credit.[6] Several Members of Congress introduced the idea of a Do-Not-Email list.[7] And now, some have proposed a Do Not Track list, through which consumers could exercise more choice in whether to receive targeted marketing messages online.[8]

Some of these ideas may work; some may not. But the point is that Do Not Call is being touted as a model of consumer choice, with the hope that its success can be replicated in other areas as well.

And, of course, we are looking ahead to see how we can promote consumer welfare when it comes to new kinds of marketing. Last year, we held hearings entitled "Protecting Consumers in the Next Tech-Ade" to learn more about the many technological developments that are changing the marketplace – and to assess their impact on consumers and our consumer

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Commerce, Trade and Consumer Protection of the H. Comm. on Energy and Commerce, 110th Cong. (2007) (statement of Charles Pickering, Member, House Comm. on Energy and Commerce) (hearing webcast Oct. 23, 2007) (*available at* http://energycommerce.house.gov/cmte_mtgs/110-ctcp-hrg.102307.FTC-consumer-protection.shtml).

[6] 15 U.S.C. § 1601 (2003).

[7] 15 U.S.C. § 7708 (2003).

[8] *See, e.g.,* Catherine Rampell*, 'Do Not Track' Registry Proposed for Web Use*, Washington Post, Nov. 1, 2007, at D1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/10/31/AR2007103101000.html; Louise Story, *Consumer Advocates Seek a 'Do-Not-Track' List*, N.Y. Times, Oct. 31, 2007, http://www.nytimes.com/2007/10/31/technology/31cnd-privacy.html; WorldPrivacyForum.org*, Consensus Document* (Oct. 30, 2007), http://www.worldprivacyforum.org/permalink/ConsumerProtectionsOct2007.html

protection agenda.[9] We learned about a number of new and planned marketing techniques.

First, word-of-mouth marketing. The shift from the traditional advertiser-to-consumer marketing model, to the advertiser-to-consumer-*to-consumer* marketing model presents powerful new opportunities for consumers as well as marketers and, not surprisingly, raises questions about the application of traditional advertising laws, such as the FTC Act. The fact is that traditional advertising laws *still* apply to product promotion in these new settings, and we have reaffirmed that message by issuing a staff opinion letter on word-of-mouth marketing.[10] The principles set out in that letter are really basic advertising 101: Consumers are likely to evaluate a "consumer" endorsement differently if they believe it is independent as opposed to being sponsored in some way. Therefore, unless the relationship between the marketer and the consumer endorser is clear from the context, a failure to disclose the relationship is deceptive.

We are also exploring consumer choice implications with respect to behavioral marketing. Last month, we held a town-hall meeting on this issue, where four points of consensus emerged.[11] First, behavioral marketing is a growing practice that is still fairly invisible to consumers. Second, although reasonable minds can differ as to whether the practice itself raises concerns, there appears to be a fair amount of agreement that greater transparency and consumer control would be a good thing. Third, there are also concerns about what happens to the consumer data collected for advertising. Is it limited to use in advertising, or could it be

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[9] FTC Conference, *Protecting Consumers In The Next Tech-Ade*, http://www.ftc.gov/bcp/workshops/techade/index.html.

[10] Letter from FTC Staff to Gary Ruskin, Executive Director, Commercial Alert (Dec. 7, 2006), *available at* http://www.ftc.gov/os/closings/staff/061211staffopiniontocommercialalert.pdf.

[11] FTC Conference, *Ehavioral Advertising*, http://www.ftc.gov/bcp/workshops/ehavioral.

used for some secondary purpose? Fourth, there are concerns about the security of the data collected. What if it falls into the wrong hands, especially if the data is sensitive or personally identifiable? All stakeholders, including the FTC, are obviously thinking very seriously about the challenges here. Based on what we heard, we'd like to see an approach that is flexible, so as not to stifle innovation; gives consumers information and control, without placing unrealistic demands on their time and willingness to study and analyze long disclosures; prevents any harms arising from the collection and storage of the personal data collected; and creates accountability among businesses that are collecting and using the information. We look forward to working with stakeholders and collaborating together on new ideas.

The third and final lesson from Do Not Call is that, when the task requires government involvement, the government is equal to the task. When we initially proposed the National Registry, there was great skepticism about the government's ability to perform this function. Now, five years later, I think we can lay that skepticism to rest. Indeed, the Harris Interactive website has this to say about the Do Not Call Registry: "With the pessimistic attitude toward a great deal of what Washington does, it is rare to see a government agency enjoying such a success as the FTC and this Registry. When very strong majorities of Americans not only sign up for something that the government proposes, but then also say it is working, that is worth noting."[12]

II. Practical Lessons

Now, I would like to step away from the ivory tower philosophical discussion of Do Not Call and move to a practical level. As direct marketers, what do you need to know to avoid

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[12] Harris Interactive, *National Do-Not-Call Registry: Seven in Ten are Registered* (Oct. 31, 2007), http://www.harrisinteractive.com/harris_poll/index.asp?PID=823.

having an FTC enforcement action in your future?

Last month, we announced 6 settlements and one complaint recommendation involving Do Not Call. In total, we have brought a total of 34 actions against individuals and companies alleged to have violated the Do Not Call provisions of the Telemarketing Sales Rule, and collected more than $16 million in civil penalties.[13] Let me share some lessons from these enforcement actions.

First, don't try to establish an existing business relationship with a customer through a sweepstakes entry. Over the years, the FTC has seen how sweepstakes entry forms can be used in a deceptive manner to obtain "authorization" from a consumer to incur a charge. Authorization through subterfuge is ineffective. Similarly, sweepstakes entry forms do not provide a viable way to get a consumer's permission to place telemarketing calls to him or her.

One of our recent settlements, with Craftmatic Industries, involved this issue.[14] Craftmatic ran a sweepstakes promotion offering a prize – in this case, a bed – to consumers who completed an entry form. The entry number was the consumer's telephone number. Craftmatic placed literally hundreds of thousands of calls to consumers who entered the prize promotion, even though their sweepstakes form did not say they might receive calls and did not seek their permission to get calls. Many of these consumers were on the Do Not Call list. We alleged that Craftmatic's conduct violated the Do Not Call rule. Craftmatic Industries and related entities agreed to pay a $4.4 million civil penalty to settle these allegations. The bottom

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[13] FTC News Release, *FTC Announces Crackdown on Do Not Call Violators* (Nov. 7, 2007), *available at* http://www.ftc.gov/opa/2007/11/dncpress.shtm.

[14] *United States v. Craftmatic Indus., Inc. et al.*, 2:07cv4652 (E.D. Pa. 2007), *available at* http://www.ftc.gov/os/caselist/0423094/071106craftmaticstipfinal.pdf.

line: don't use sweepstakes entries to establish an existing business relationship with a consumer.

Second, if you get consumer telephone numbers from a lead generator, make sure the lead generator discloses to consumers that they might get telephone calls. This principle is illustrated by the recent settlement with Ameriquest.[15] Consumers who received calls from Ameriquest surfed "lead generation" websites looking for financial information without reaching out to any particular lender or seller. One or more operators of these websites sold consumers' information to Ameriquest, who subsequently called consumers on the Do Not Call Registry. No consumer reached out to Ameriquest in particular, and so, the company had no established business relationship with any consumer. A consumer might expect to receive an email from a company, but the FTC does not believe that a consumer who is registered on the DNC list would reasonably expect to start receiving phone solicitations – and lots of them – ABSENT disclosure to that effect at the lead generator's website.

The Ameriquest settlement created a safe harbor: If Ameriquest chooses to call consumers whose information it obtains from an online "lead generator," it must ensure that the lead generator has made three clear and conspicuous disclosures to consumers. First, that the consumer might be called; second, the maximum number of calls they might receive; and third, if possible, the identity of any company that might call the consumer as a result of an inquiry.

This safe harbor strikes just the right balance: it protects consumers' privacy while preserving an efficient and beneficial practice. Lead generators can provide effective and quick matching of consumer interests with prospective sellers. But when consumers whose numbers

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[15] *United States v. Ameriquest Mortgage Co.*, 8:07cv1304 (C.D. Cal. 2007) *available at* http://www.ftc.gov/os/caselist/0423082/071106ameriqueststipfinal.pdf.

are on the DNC list actively seek mortgage or other purchase information online and submit their telephone numbers, they should be told that they may be contacted offline. Providing that kind of disclosure is not exactly burdensome. And requiring sellers to ensure that their lead generator uses basic, clear, and conspicuous disclosures protects consumers' reasonable privacy expectations.

The third lesson from our cases is to monitor the conduct of your affiliates. This message is clear from our settlement with ADT and related entities.[16] ADT marketed its security systems through its own call center, and through authorized dealers that used a variety of marketing methods, including telemarketing. The settlements are a reminder that both the seller and its telemarketers can be held liable for Do Not Call violations. A seller simply cannot ignore – or pretend it cannot control – the telemarketing activity undertaken for its benefit and on its behalf. The ADT settlements reinforce our view that the Do Not Call rules apply across the marketing chain, a lesson we made clear when we announced a settlement with DirecTV in December 2005.[17] The message from the ADT and DirecTV settlements is the same: Sellers are fully responsible for calls placed on their behalf.

Fourth, when telemarketing, you must connect a consumer to a ***live*** representative within 2 seconds after the consumer says "hello." This comes from the provision in the Telemarketing Sales Rule that prohibits abandoned calls.[18] The prohibition on abandoned calls is violated when

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[16] *United States v. ADT Security Services, Inc.*, 9:07cv81051 (S.D. Fla. 2007), *available at* http://www.ftc.gov/os/caselist/0423091/071107consentadt.pdf.

[17] *United States v. DIRECTV, Inc. et al.*, 8:05cv1211 (C.D. Cal. 2005), *available at* http://www.ftc.gov/os/caselist/0423039/051213stipdirectv0423039.pdf.

[18] 16 C.F.R. § 310.4(b)(1)(iv) (2007).

the consumer hears dead air, as alleged in Craftmatic, or when the consumer hears a pre-recorded message instead of a live representative, as alleged in our settlement with Guardian Communications.[19] The Guardian settlement emphasizes a principle we have articulated before: blasting pre-recorded messages to consumers is illegal.

Fifth, you must transmit accurate Caller ID information with the name of the telemarketer or seller. This is a critical rule requirement for obvious reasons. One of the allegations in our recent civil penalty complaint against Global Mortgage Funding was that it failed to transmit accurate Caller ID information.[20]

Finally, it should really go without saying, but you must honor a consumer's company specific request not to be called again. The Craftmatic, ADT, and Ameriquest settlements involved allegations of non-compliance with this requirement.

Clearly, DNC enforcement remains a top priority for the FTC. I can assure you that we continue to investigate violations and bring enforcement action as appropriate. To this end, we appreciate DMA's referral of complaints to the FTC against entities that cannot be resolved through its internal processes. We take such referrals very seriously and hope you'll continue to bring possible bad actors to our attention.

III. Preview of Coming Attractions

I would like to now give you a preview of some other, non-DNC areas where you will likely see FTC action. First, telemarketing fraud is at the top of the list. As one illustration of

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[19] *United States v. Guardian Communications, Inc. et al.*, 4:07cv4070 (C.D. Ill. 2007), *available at* http://www.ftc.gov/os/caselist/0523166/071106guardiancommstipjudgmnt.pdf.

[20] *United States v. Global Mortgage Funding, Inc. et al.*, SA CV 07-1275 DOC (PJW) (C.D. Cal. 2007), *available at* http://www.ftc.gov/os/caselist/0623107/071030globalmtgfundingcmplt.pdf.

the agency's robust telemarketing enforcement program, this summer, we sued Suntasia Marketing,[21] which, according to the FTC's complaint, took millions of dollars directly out of consumers' bank accounts without their knowledge or authorization. Suntasia tricked consumers into divulging their bank account numbers by pretending to be affiliated with the consumer's bank and offering a purportedly "free gift" to consumers who accepted a "free trial" of Suntasia's products. Once the consumer divulged his or her bank account number, Suntasia was able to debit each consumer's account for initial fees ranging from $40 to $149. Often, charges between $19.95 and $49.95 recurred on a monthly basis, and Suntasia frustrated consumers' attempts to stop them. Working in cooperation with the FBI and United States Postal Inspection Service, the Commission moved aggressively to stop Suntasia's allegedly unlawful practices. At the Commission's request, a court halted the scheme, appointed a receiver, and froze the assets of the nine corporate defendants and six individual defendants. You can certainly expect more FTC actions in this area in the future.

Another area in which we continue to remain active is spam. Just last week, we announced a settlement with Adteractive, Inc., a large online advertiser that drove traffic to its Web sites using spam e-mails with misleading subject lines.[22] Adteractive offered so-called "free gifts" to consumers without disclosing that, in order to obtain the free gifts, consumers had to spend money first. The settlement requires the defendant to disclose the costs and obligations to qualify for the advertised "gifts," bars it from sending e-mail that violates the CAN-SPAM

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[21] *FTC v. FTN Promotions, Inc.*, 8:07-cv-1279-T-30TGW (M.D. Fla. July 23, 2007), *available at* http://www.ftc.gov/os/caselist/0623162/070723suntasiacomplaint.pdf.

[22] *United States v. Adteractive, Inc.*, CV-07-5940 SI (N.D. Cal. 2007), *available at* http://www.ftc.gov/os/caselist/0723041/071128consent.pdf.

Act, and requires that the company pay $650,000 in civil penalties. In addition to bringing more spam cases, we plan to release a report on this summer's Spam Summit shortly. We will also host a half-day roundtable on phishing this winter, where we hope to obtain commitments from stakeholders to heighten consumer awareness about phishing and to develop new strategies for disseminating educational information.

On the subject of spam, I would like to applaud the DMA for its leadership in this area. We were pleased to hear Jerry Cerasale's announcement during our Spam Summit this summer, describing a new service that will function as a "report card" for its membership. This service will advise DMA members on how well they are doing with CAN-SPAM compliance and email authentication. Indeed, the DMA has shown great initiative in supporting the deployment of email authentication. In October 2005, it announced that it would require its member companies to adopt email authentication systems that help verify the authenticity of legitimate commercial email messages. I know the DMA's commitment to encouraging email authentication among its membership continues, and we appreciate the DMA's leadership.

A third enforcement priority is data security. You already heard from my colleague Joel Winston about some of our work on privacy, data security, and Social Security numbers. I hope to see many of you at our workshop on Social Security number usage next week, December 10-11. And we expect to announce new actions against companies for failure to maintain reasonable safeguards to protect consumer information shortly.

On the regulatory front, I know many of you are eager to have the FTC finalize its abandoned call rules addressing pre-recorded messages to existing customers.[23] The comments

[23] 69 Fed. Reg. 67287 (2004).

have been lively, the issues strike nerves among consumers and businesses, and I appreciate this has been in the pipeline for some time.

I am committed to finalizing that rule, as well as the pending CAN SPAM rule issues, which are part of what has been referred to as the Discretionary Rule Making.[24] As an agency with limited resources, balancing our law enforcement initiatives with discretionary regulatory projects involves trade-offs. Still, I fully appreciate the need for clarity and we are hard at work on these projects.

Conclusion

Thank you for your time, and I would be happy to answer any questions.

[24] 70 Fed. Reg. 25426 (2005).