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Via e-mail

James Harley
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Law Courts
Melbourne VIC 8010
Australia

Dear Mr. Harley:

Thank you for the opportunity to review the Australian Communications and Media Authority's (the ACMA) best practice case study on its Do Not Call Register. The case study illustrates the significant progress the ACMA has achieved in protecting Australian consumers from unsolicited telephone calls and faxes. The ACMA's case study describes a comprehensive and detailed compliance program for Do Not Call enforcement. The statistics cited in the case study suggest that the ACMA's "advise/warn/investigate" enforcement strategy has yielded impressive results. This success is particularly laudable given the fact that the Australian Do Not Call program has been in existence for only a few short years.

We understand that you are seeking informal comments on the case study.¹ We offer below general comments covering the topics raised in your questionnaire that may be useful for the ACMA to consider as you evaluate best practices in this area. In particular, we provide comparative information regarding the United States' Do Not Call initiatives.

As you know, the Federal Trade Commission (FTC) is an independent agency of the U.S. government that promotes competition and protects consumers. As part of its consumer protection mission, the FTC enforces a wide range of statutes that, among other things, prohibit

¹ The comments provided in this letter are solely staff comments and do not represent the views of the Commission or any individual Commissioner.

unfair or deceptive acts or practices.² In particular, the FTC has a longstanding and robust program aimed at combating fraudulent and abusive telemarketing practices. As early as 1991, the FTC has brought telemarketing fraud cases pursuant to its general authority under Section 5 of the FTC Act to combat unfair or deceptive acts or practices.³ In 1994, Congress provided the FTC with additional enforcement authority by passing the Telemarketing and Consumer Fraud and Abuse Prevention Act, which directed the FTC to issue a trade regulation rule defining and prohibiting deceptive or abusive telemarketing acts or practices.⁴

Pursuant to this Act, the FTC issued the Telemarketing Sales Rule, which it has successfully used in over 265 enforcement actions.⁵ In 2003, the FTC amended the Telemarketing Sales Rule to strengthen its privacy protection provisions by, among other things, establishing the National Do Not Call Registry.⁶ Notably, the U.S. Federal Communications Commission (FCC) also adopted rules in 2003 under the Telephone Consumer Protection Act, which require entities under its jurisdiction to comply with Do Not Call requests made via the Registry.⁷ During the time period between 2003 and 2009, consumers registered over 191 million telephone numbers on the Registry.⁸ According to a Harris Interactive Survey conducted in October 2007, 72 percent of Americans have registered their telephone numbers on the Registry, and more than 90 percent of those who registered their numbers reported fewer unwanted telemarketing calls.⁹

While there appears to be a high rate of compliance with Do Not Call laws, the FTC vigorously enforces Do Not Call violations to ensure the long-term effectiveness of the Registry. Between July 1, 2003 and September 30, 2009, there were over 7.3 million Do Not Call complaints in Consumer Sentinel, an online complaint database administered by the FTC and shared with state, federal, and foreign law enforcement agencies.¹⁰ During this same period, the FCC received over 100,000 Do Not Call complaints from consumers.¹¹ In response to these complaints, the FTC has pursued 65 enforcement actions involving Do Not Call violations.¹²

The FTC enforces the Telemarketing Sales Rule in two types of civil proceedings. First, the FTC files federal court actions seeking preliminary relief to immediately halt deceptive telemarketing and Do Not Call law violations. Second, the FTC also initiates actions seeking civil penalties. Businesses that violate Do Not Call laws are subject to civil penalties of up to

² See 15 U.S.C. § 45(a).

³ See *Hearing on Economic and Security Concerns in Tourism and Commerce: H.R. 3232 and H.R. 1776 Before the Subcomm. on Commerce, Trade, and Consumer Protection of the House Comm. on Energy and Commerce*, 110th Cong. (2008) (statement of the Federal Trade Commission) [hereinafter *Call Center Hearing*], available at <http://www.ftc.gov/os/2008/09/P034412tsrcallcenters.pdf>.

⁴ See 15 U.S.C. §§ 6101-6108.

⁵ See Telemarketing Sales Rule, 16 C.F.R. Part 310; see *Call Center Hearing*, *supra*, note 3, at 2.

⁶ See Telemarketing Sales Rule; Final Rule, 68 Fed. Reg. 4580 (Jan. 29, 2003).

⁷ See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Final Rule, 68 Fed. Reg. 44,144 (July 25, 2003) (codified at 47 C.F.R. § 64.1200).

⁸ FTC, Biennial Report to Congress Pursuant to the Do Not Call Registry Fee Extension Act of 2007, at 1 (2009) [hereinafter *Biennial Report*], available at <http://www.ftc.gov/os/2010/01/100104dncbiennialreport.pdf>.

⁹ See *Call Center Hearing*, *supra* note 3, at 4 & n.9.

¹⁰ FTC, Additional Report to Congress Pursuant to the Do Not Call Registry Fee extension Act of 2007, at 3 (2009) [hereinafter *2009 Additional Report*], available at <http://www.ftc.gov/os/2010/01/100104dncadditionalreport.pdf>.

¹¹ *Id.*

¹² This includes cases involving Do Not Call Registry violations and entity-specific Do Not Call opt-out requests. See generally <http://www.ftc.gov/bcp/edu/microsites/donotcall/cases.html>.

\$16,000 per violation.¹³ The U.S. Department of Justice typically files the civil penalty actions following the FTC's referral of a complaint.¹⁴ Notably, the FCC may impose civil forfeiture penalties and, unlike the FTC, is authorized to impose such penalties on its own without the need to initiate a court proceeding.¹⁵

In addition to enforcement, the FTC launched an extensive education campaign to inform consumers about the Registry and advise businesses on how to comply with Do Not Call laws. The FTC's website also contains Do Not Call consumer alerts and detailed business compliance information.¹⁶ In some instances, the FTC has conducted targeted education campaigns for specific consumer groups. For example, the campaign entitled, "*Who's Calling? Recognize and Report Phone Fraud*," targeted senior citizens and African-American consumers.¹⁷ To promote the campaign, the FTC partnered with state, federal, and foreign agencies as well as advocacy groups for the elderly, including the American Association of Retired Persons.¹⁸ The materials for the campaign included a website in English and Spanish with practical tips on avoiding telemarketing fraud and instructions for placing telephone numbers on the Registry.¹⁹

The ACMA's case study highlights a similar public information campaign to increase consumer awareness of the Registry. The survey results cited in the study—75 percent of respondents had heard about the Register—suggest that the consumer education campaign has had a substantial impact. The use of conventional and new media undoubtedly assists the ACMA in developing effective messaging and reaching more consumers. The compliance guides the ACMA has prepared for businesses also appears to be a useful tool. Interestingly, the case study does not mention the issue of targeted education campaigns. It would therefore be helpful to learn whether the ACMA has conducted any research regarding whether there is a higher incidence of violations involving specific consumer groups, or whether the ACMA has launched targeted consumer education initiatives, such as those geared toward the elderly.

The ACMA's case study also illustrates interesting differences between the Australian and U.S. Do Not Call programs. For example, the ACMA's case study describes the operation of the Register, noting that there are eight different subscription types ranging from no cost to AUD \$90,000. The fees are based on the number of telephone numbers submitted for "washing" per year. If a marketer submits 500 numbers, the service is free. To check 10 million numbers, the fee is AUD \$27,000. If a marketer would like to submit 100 million numbers, the maximum AUD \$90,000 fee is imposed.

In the United States, most entities pay annual fees to access the Registry data, but the cost is assessed based on the number of area codes accessed. The current annual fee per area code is \$55 (with the first five area codes provided at no cost), and the maximum annual fee for accessing the entire Registry is currently \$15,058.²⁰ In some instances, certain entities can

¹³ See 2009 Additional Report, *supra* note 10, at 3 & 17 n.10.

¹⁴ 15 U.S.C. § 56(a)(1).

¹⁵ See 2009 Additional Report, *supra* note 10, at 4 & 17-18 nn.13-16.

¹⁶ See <http://www.ftc.gov/bcp/menus/consumer/phone/dnc.shtm>, <http://business.ftc.gov/documents/bus27-complying-telemarketing-sales-rule>.

¹⁷ See 2009 Additional Report, *supra* note 10, at 4-5.

¹⁸ *Id.*

¹⁹ See <http://www.ftc.gov/bcp/edu/microsites/phonefraud/index.shtml>.

²⁰ See Telemarketing Sales Rule Fees, 75 Fed. Reg. 55269 (Sept. 10, 2010); see 16 C.F.R. 310.8(c).

access the Registry without having to pay a fee, including exempt organizations that are not required by law to comply with Do Not Call requirements but voluntarily access the data to avoid calling consumers who do not wish to receive calls.²¹ In Fiscal Year 2009, 3,924 entities paid fees totaling \$15,693,667 for access to the Registry.²² During the same time period, 40,406 entities subscribed to access five or fewer area codes at no charge, and 1,002 entities claiming “exempt organization” status obtained free access.²³

In addition to the fee structure, there are also key distinctions in other aspects of the U.S. and Australian legislative frameworks. For example, the U.S. Registry applies only to telephone numbers—both landlines and mobile numbers. However, the recent legislative amendments in Australia extend the Australian Register to fax numbers. Although fax numbers are not eligible for inclusion on the U.S. Registry, there are other U.S. laws that prohibit the sending of unsolicited faxes unless there is an established business relationship or prior express consent.²⁴ In addition, another difference between the two frameworks is that the Australian Register has a five-year registration period. When the U.S. Registry was first implemented in 2003, registrations were also scheduled to expire after five years. However, the U.S. Congress subsequently passed legislation eliminating the automatic removal requirement and making registrations permanent.²⁵ This important change has enabled consumers to maintain their right to privacy without interruption and has not decreased the accuracy of the Registry.²⁶ The ACMA may find it useful to explore whether permanent registrations could offer similar benefits to Australian consumers.

Both the ACMA and the FTC are constantly monitoring implementation of their Do Not Call programs to adapt to new developments. The ACMA has responded quickly to legislative changes that came into effect in May 2010 that expanded the Register to include faxes. In response to this change, the case study indicates that the ACMA updated compliance manuals and enforcement procedures, and evaluated, tested, and implemented changes to some of the main systems underpinning the Register within very short time frames to ensure its continued accurate operation. Similarly, the FTC has responded to legislative changes and advances in telecommunications technology by implementing new procedures for identifying numbers that should no longer appear on the Registry (e.g., disconnected or abandoned numbers) to maintain its accuracy.²⁷

In addition to managing the implementation of the Registry and enforcing compliance, the case study indicates that the ACMA, in consultation with industry, has issued a national industry standard establishing a minimum level of conduct for all telemarketing and research voice calls. The Australian telemarketing industry standard identifies days and times when telemarketing and research calls cannot be made and includes requirements related to enabling caller identification and providing minimum disclosures. The FTC also values consultation with

²¹ See *id.* See also Biennial Report, *supra* note 8, at 3.

²² Biennial Report, *supra* note 8, at 3. The fees during Fiscal Year 2009 were \$54 per area code, with a maximum of \$14,850 for the entire Registry. See Do-Not-Call Registry Fee Extension Act of 2007, Pub. L. 110-188, 122 Stat. 635 (2008).

²³ Biennial Report, *supra* note 8, at 3.

²⁴ See 47 U.S.C. § 227; 47 C.F.R. § 64.1200

²⁵ See Do-Not-Call Improvement Act of 2007, Pub. L. No. 110-187, 122 Stat. 633 (2008).

²⁶ Biennial Report, *supra* note 8, at 4.

²⁷ See *id.* at 4-5.

industry and other relevant stakeholders and, before issuing its regulations, provides the public with the opportunity to comment on the proposed rules, including the Telemarketing Sales Rule and its subsequent amendments.²⁸ Similar to the Australian industry standard, the Telemarketing Sales Rule also sets forth requirements related to minimum disclosures and call times, as well as outlining prohibitions on other deceptive and abusive telemarketing practices.²⁹

Finally, although the case study does not identify enforcement challenges, we understand that one of the most significant challenges that the ACMA and other foreign enforcers face is tracking down individuals and companies responsible for calls that originate overseas. The FTC previously cooperated with the ACMA in a Do Not Call matter involving a U.S. entity that was targeting Australian consumers, and we look forward to continuing our cooperation—both bilaterally and in multilateral fora—to ensure effective enforcement of Do Not Call laws.

In summary, there are several similarities and interesting differences between the ACMA's and the FTC's Do Not Call programs. Notably, enforcement and consumer education are key components of both agencies' initiatives. We have found the opportunity to share best practices developed for these initiatives very useful, and we hope that the comments provided above are helpful to you as you evaluate your Do Not Call program. If you have any questions, please do not hesitate to contact us.

Sincerely,

Shaundra Watson
Counsel for International Consumer Protection
U.S. Federal Trade Commission

²⁸ The FTC engaged in substantial public consultation prior to amending the Telemarketing Sales Rule, including hosting three public forums. *See* <http://www.ftc.gov/bcp/rulemaking/tsr/tsrrulemaking/index.shtm>.

²⁹ *See* 16 C.F.R. Part 310.