510 Recent Developments in Advertising & Marketing Regulation

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Recent Developments in Marketing and Federal & State UDAP Laws

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Marketing Trends

- "Multi-marketing"
  - Multi-channel marketing: Similar messages through multiple channels
  - Multi-tiered marketing: Tailoring to specific populations with same characteristics or behavior
  - Multi-party marketing: Marketing by partners, vendors and any of their subcontractors
- New channels being used which may redefine marketing strategies and rules
  - Examples:
    - Word of mouth (WOM) or viral marketing: forward to a friend, monitoring online
    - Brand or product placement or integration
    - Podcasting, blogging, mobile marketing
    - Advergaming
    - Video marketing: Video-on-demand (VOD) and viral video
    - Advertising on social networking sites (e.g., MySpace.com, Friendster.com, Xanga.com, FaceBook.com)
    - TIVO advertising
  - Success and legal rules are still being determined
    - Application of existing rules under UDAP laws and regulations
    - New rules may be adopted specific to channel being used, e.g., CAN SPAM, adware/spyware

Unfair or Deceptive Acts or Practices (UDAP)

- What's UDAP?
  - Primary set of laws governing marketing
  - Federal and state level
- Why should you care?
  - Incredibly elastic laws based on the eye of the beholder
  - Trend to use as basis for lawsuits and regulatory action
  - Damages and penalties can be steep
  - Reputation consequences
- Where do most of the changes happen?
  - Enforcement actions from federal regulators and state AGs
  - Litigation
  - Industry standards (DMA, BBB/NAD)

Litigation: A "Universal Tort"

- Trend to bring UDAP as a claim "helper" because often easier to prove, class actions may be available, and higher damages can be received
  - FDCPA: *Williams v. Edelman,* 2006 WL 45902 (S.D. Fla. January 9, 2006)
  - FCRA: *Abusaab v. Equifax,* 2006 WL 1214782 (E.D. Pa. May 4, 2006) (denied)
- Trend to bring UDAP as basis for action in newer areas
  - Information security, FTC enforcement action against DSW (consent order 03/14/06)
  - Privacy, FTC enforcement action against ChoicePoint (consent order 01/26/06) (also for FCRA violations)
- Interesting cases of note in the last few months
  - *Craig & Bishop, Inc., v. Piles,* 2005 WL 3078860 (Ky. App. 11/18/2005)
    - Misrepresentation can be regarding past, present, or future fact
  - *Rodia v. Coppola,* 2005 WL 3371163 (Conn. Super. 11/25/2005)
    - Breach of contract can be basis for UDAP claim

Changing Regulator Focus

- Financial institution regulators are focusing more on this area
  - OCC taking strong positions to justify preemption
  - Other regulators following suit, e.g. Fed/FDIC Guidance from 2004
- FTC
  - Always an area of focus because core area
  - As new marketing techniques are developed, this area is reinforced and revisited
  - FTC seen as source for financial institution regulators
- State AGs
  - Favored basis for tackling undesirable practices that are otherwise difficult to prove to be a violation of law
  - Can use to help change industry practices through high profile cases

Third Party Relationships

- Regulator focus increasing on third party relationships and each company's accountabilities for joint activities
  - Can't "hide" behind your supplier or partner
    - Does this mean contractual representations are not enough?
    - Where is the line between companies?
    - How much oversight is too much or too little?
      - Co-employment and indemnity impacts?

Preemption and State Laws

- Questions still exist around whether federal law preempts state law in this space for financial institutions
  - For federally regulated financial institutions, OCC has been fighting this fight
  - GAO report on OCC preemption released in April 2006 recommends OCC take further steps to clarify applicability of state consumer protection laws
- California consumer laws
  - CA appellate court reaffirms decisions that state law UDAP claims are not preempted by federal law (*Hood v. Santa Barbara Bank and Trust, California Appellate Court, 09/28/06*)
  - As a result of Proposition 64, plaintiffs' lawyers still determining whether consumers have better cause of action under Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750 et seq. or Unfair Competition Law (UCL), Cal. Civ. Code § 1750 et seq.
    - Two opinions have found Proposition 64 standards apply to undecided cases as of date of passage (*Californians for Disability Rights* and *Branick*, California Supreme Court, 07/24/06)
    - Recent opinion rejects class action certification under Proposition 64's new standing requirements, requiring actual injury and reliance (*Pfizer v. Los Angeles Superior Court, 2nd App. Dist. Div. 3, 07/11/06, petition for review filed 08/11/06)*

Recent Developments in Telemarketing Regulation

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October 24, 2006

The major telemarketing developments over the past year have been in the area of Do Not Call

What is Do Not Call?

- Federal: Telephone Consumer Protection Act (FCC) and Telemarketing Sales Rule (FTC)
  - Prohibits telemarketing calls to consumers who have registered telephone numbers on the national DNC registry and to consumers who have made a company-specific request not to be called
  - Prohibits virtually all calls to wireless numbers using autodialer unless prior express consent
  - Significant exceptions for customers with whom caller has an "established business relationship"
  - Enforcement by FTC/FCC with fines up to $11,000 per violation. State AGs and private litigants may recover up to $1,500 per violation
  - More than 125 million numbers listed on federal DNC list since 2003
- States
  - At least 39 states have their own version of DNC
  - Occasionally, state laws are more restrictive that the federal
  - Open issue as to whether state laws apply to interstate calls

Federal regulatory activity has not been positive

- Still no action by FCC on petitions preempt state regulation of interstate calls
- Still no action by FCC on petition to allow collection calls to wireless numbers
- FTC has proposed new rules that would prohibit prerecorded sales calls to customers with whom the caller has an "established business relationship"

Though few in number, federal enforcement actions over the past year have been significant in scope and size, highlighting potential pitfalls

- $5.3 million settlement between FTC and DIRECTV for DNC violations by its marketing partners/vendors
- $680,000 settlement between FTC and Bookspan for DNC violations despite state of the art compliance systems
- $1.1 million settlement between FTC and mortgage company for calling unscrubbed leads (all but $50,000 suspended due to inability to repay)
- $300,000 settlement with Peoples Benefit Services for improper use of affiliate's DNC list

Aggressive enforcement and preemption issues continue to predominate on the state side

- Some AGs have been very aggressive not only in enforcement but lobbying, too.
  - Indiana AG lobbying efforts
  - Missouri and Florida AGs enforcement actions
- North Dakota supreme court decision finds that state telemarketing laws are not preempted
  State ex rel. Stenehjem v. FreeEats.com, Inc., 12 N.W.2d 828, 2006 ND 84 (2006)
- California supreme court decision finds that two-party consent required to record calls placed to California residents.
  Kearney v. Salomon Smith Barney, Inc., 39 Cal.4th 95, 137 P.3d 914, 45 Cal.Rptr.3d 730 (2006)

Private litigation regarding DNC, too, has been novel

- Ryan Swanberg -- bogus claims of TCPA violations
- Verizon Wireless and Cingular suits against telemarketers for calling wireless numbers
- Even the NASD is enforcing DNC compliance
  - $850K fine imposed on a Royal Bank of Scotland sub for, among other things, failing to ensure that called customers were not on FTC's DNC list

The biggest development in fax advertising this year has been the passage of the Junk Fax Prevention Act

- Federal legislation passed in 2005 changed landscape of fax marketing.
- May not send an "unsolicited facsimile advertisement" unless (1) there is an established business relationship with the recipient; (2) the number was obtained voluntarily; and (3) the fax includes a notice which allows the recipient to opt-out of future faxes.
- Applies only to "advertisements"
  - Does NOT include rate sheets when sent "for the purpose of communicating the terms on which a transaction has already occurred" but DOES include rate sheets when transmitted to a "potential borrower or potential brokers."
  - Does NOT include transactional messages with a *de minimis* amount of advertising provided that primary purpose of the message is transactional
  - Does NOT apply to solicitations by or on behalf of non-profits

What is as an "established business relationship" for JFPA purposes?

- Burden is on sender to prove EBR; should keep records to document existence of EBR
- Must have an EBR **and** the fax number must be provided voluntarily for EBRs established on or after July 9, 2005
  - "Provided voluntarily" means
    - Sender obtained number directly from recipient within the context of the EBR (on application, contact form or over telephone); or
    - Recipient voluntarily made number publicly available in a directly, advertisement or internet site
- EBR formed by "inquiry, application, purchase or transaction." Merely visiting a website or inquiring about store locations does not form an EBR
- EBR does not extend to affiliates
- EBR, once established, has an unlimited duration unless terminated by recipient.
- EBR for purposes of faxes may be terminated by request even if recipient continues to do business with sender

What must be on the fax?

- Opt-Out Notice
  - Must include domestic contact telephone number and fax number.
  - Notice must be on first page at top or bottom of page and separated from any advertising material by bold, italics or different font (p. 15)
  - Must have cost-free means to opt out. Cost-free means website, email address or toll free phone or fax number. Must be available 24/7
  - Must advise of right to opt out and penalties for failure to honor request
- Identification Requirements
  - Must have business entity name, telephone number of sending machine and date and time sent (numbers may be included in opt-out notice)
- Sample:

The recipient of this facsimile may request the sender not to send any future unsolicited advertisements to the recipient's telephone facsimile machine. The recipient may make such a request by calling [TOLL-FREE TELEPHONE NUMBER FOR PROCESSING OPT-OUTS] or by faxing the request to [FAX NUMBER FOR PROCESSING OPT-OUTS]. The request must identify the facsimile number to which the request relates. The sender's failure to comply with such a request within 30 days is unlawful.

Federal and state enforcement actions in Do Not Fax have been significant, too

- The FCC has had considerable success enforcing Do Not Fax
  - $770,000 fine (maximum) against recalcitrant mortgage company
- State enforcement actions have had mixed results
  - US DC finds California fax law preempted by federal law to extent it purports to regulate interstate faxes
  - US DC for S.D. Cal. imposed $51 million judgment against Fax.com for repeated do not fax violations
- Private litigation
  - $2 million paid by Kappa Publishing to settle class action claim
  - Fax litigation becoming a cottage industry

ACC Association of Corporate Counsel

Year Ahead

- **Preemption petitions, lawsuits**
- **Wireless calls**
- **SMS messaging**
- **VOIP applications**

ACC Association of Corporate Counsel

Spyware and Spam: Protecting Against Consumer Desktop Intrusions

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October 2006

"Spyware": A Potpourri of Desktop Problems

- "Spyware" issue actually comprises several distinct problems
  - Programs exhibiting malicious behavior (e.g. "malware" used by hackers/spammers to take control of users' desktops)
  - Surreptitious tracking of consumer behavior (e.g. "snoopware" and keyloggers designed to monitor user behavior)
  - Programs that once installed serve advertisements in unexpected or unwanted ways ("adware")
  - Other "potentially unwanted software" that modifies basic functioning of the desktop
- Adequacy of consumer disclosure and consent is a key issue for some, but not all, of these software behaviors
- Consumer control issues – particularly the availability of uninstall features – are also significant
- Resources:
  - **http://www.antispywarecoalition.org**
  - **http://www.stopbadware.org**
  - **http://www3.ca.com/securityadvisor/pest/**
  - **http://www.benedelman.org**

With nuisance adware, the consumer's computer is targeted with pop-ups even when the consumer is not using the software with which it was bundled.

Legislators have moved rapidly to address the spyware problem

- **More than a dozen states have passed specific anti-spyware laws, and many other states are considering legislation**
  (summary at h**ttp://www.ncsl.org/programs/lis/spyware06.htm**)
- **Federal legislative proposals, though moving on a slower track, will likely result in a national anti-spyware standard with some degree of state law preemption (similar to anti-spam law).**
- **While many of the worst spyware practices are already illegal, the new legislation is intended to close gaps in existing law, and to stimulate enforcement in the absence of a technological silver-bullet.**

Anti-"spyware" legislation comes in different flavors

- "**Bad Practices" flavor**: bans the most egregious software-related practices, such as drive-by downloads; key-stroke logging; surreptitious changes to connectivity, proxy or security settings; or blocking user efforts to uninstall (California, Texas, e.g.)
- "**Trademark" flavor**: bans adware that serves pop-ups that are triggered by a competitor's trademarks (Utah, Alaska, e.g.)
- **"Consumer Protection Label" flavor**: if software gathers personal information about consumers, or their Web browsing, the software maker must provide a pre-installation warning label
  "*This program will collect and transmit information about you and will collect information about Web pages you access and use that information to display advertising on your computer. Do you accept?"* (see proposed federal "SPY ACT" – H.R. 29)

Enforcement under spyware laws and other consumer protection statutes

- **FTC and state AGs have been actively pursuing cases involving objectionable behaviors**
  - FTC obtained a $4 million judgment against provider of "Smartbot" adware surreptitiously installed on consumer desktops (available at http://www.ftc.gov/opa/2006/05/seismic.htm)
  - Washington suit against software vendor who misrepresented that its "Spyware Cleaner" was a Microsoft product (see http://www.atg.wa.gov/releases/2006/rel_NH_Man_Fined_Spyware_060606.html)
- **New state statutes have also resulted in enforcement actions in unexpected contexts**
  - Texas Attorney General (and private attorneys) brought actions against Sony for installation of digital rights management software containing "root kit" features (see http://www.oag.state.tx.us/oagnews/release.php?id=1266)
  - Microsoft targeted with class actions claiming it failed to adequately disclose features of software used to detect licensed copies of Windows (see http://pub.bna.com/eclr/20600900.pdf and http://pub.bna.com/eclr/20600927.pdf)
- **Resources: see summary of enforcement actions at** http://www.cdt.org/privacy/spyware/20060626spyware-enforcement.php

"Spyware" enforcement may also present risks for online advertisers

- New York Attorney General's suit against Direct Revenue alleged surreptitious installation of adware programs
  See http://www.oag.state.ny.us/press/2006/apr/apr04a_06.html
- The suit also raised questions about whether major online advertisers who work with Direct Revenue and similar technology providers know that their advertisements are being presented through adware
  See http://www.benedelman.org/news/071806-1.html
- Similarly, questions have been raised about the extent to which advertisements purchased through major online advertisement networks are being retransmitted though adware providers' networks
  See http://www.businessweek.com/technology/content/may2005/tc2005055_1258_tc024.htm
- CDT report last August charged that more than half of pop-up ads are knowingly placed by advertisers
  See http://www.cdt.org/press/20060809press.php

Spam: Increasing Clarity Around Do's and Don'ts

- **CAN SPAM Act of 2004 establishes general framework**
  - Prohibits falsification of transmission information ("outlaw" spam)
  - Sets baseline requirements for commercial email senders
    - clear and conspicuous identification that the message is an advertisement or solicitation;
    - clear and conspicuous identification of an opt-out mechanism that takes effect in 10 business days; and
    - a valid physical postal address for the sender.
  - Deceptive/misleading subject lines prohibited
  - Warning labels required for commercial email containing sexually oriented material
- **Enforcement actions track these basic regulatory objectives:**
  - ISPs and consumer protection agencies have continued to vigorously pursue professional "outlaw spammers"
    - FTC TRO against pornography spammers using "botnets" to send spam without warning labels (available at http://www.ftc.gov/opa/2006/01/dugger.htm)
  - Failure by a commercial e-mail sender to provide a working opt-out may result in penalties
    - FTC enforcement action against Kodak Imaging Network (available at http://www.ftc.gov/opa/2006/05/ofotokodak.htm)
  - Improper uses of viral e-mail techniques used for commercial e-mail marketing may also result in enforcement
    - FTC obtained a $900K fine from Jumpstart Technologies for using "personal" subject lines to transmit free movie ticket promotions (available at http://www.ftc.gov/opa/2006/03/freeflixtix.htm)

Recent spam developments

- FTC discretionary rulemaking will resolve some remaining issues under CAN-SPAM (such as definition of "sender" and opt-out processing response time)
  - See http://www.ftc.gov/opa/2005/05/canspamfrn.htm
- Some states have experimented with "Do Not E-Mail" registries designed to protect children
  - see http://www.protectmichild.com (Michigan); https://www.UtahKidsRegistry.com/compliance.html (Utah)
- FCC now has in operation its wireless domain registry under stricter CAN-SPAM provisions for e-mail to wireless devices
  - See http://www.fcc.gov/cgb/consumerfacts/canspam.html
- Marked increase in phishing activity has led to the deployment of new technologies to improve authentication (particularly transactional e-mails)
  - See, e.g., www.goodmail.com (certified e-mail technology)

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July 19, 2006

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Re: Request for Informal Advisory Opinion Concerning the Application of the Telemarketing Sales Rule's "Established Business Relationship" Exemption to an Internet-based Lead Generation Mechanism

Dear Mr. Goodman:

This staff advisory opinion responds to your letter of April 3, 2006, seeking an informal opinion letter regarding the application of the Telemarketing Sales Rule's ("TSR's" or the "Rule's") established business relationship ("EBR") exemption to an Internet-based lead generation mechanism. The central issue your letter presents is whether the exemption applies to a lender that initiates a telephone call to a consumer based on contact information the lender obtains from a lead generator.

Our conclusion is that, under a strict reading of the language of the Rule, the lender does not have an EBR with a consumer who responds to a lead generator's solicitation, and therefore would not normally be entitled to claim the EBR exemption. However, FTC staff would not recommend a Do Not Call enforcement action against a lender that calls consumers who have responded to a lead generator's solicitation if, as described more fully below, the lead generator makes full and adequate prior disclosure of certain material facts about the consequences of responding to such solicitations. The opinions expressed in the following discussion of the basis for this conclusion are those of Commission staff only and are not attributable to, nor binding on, the Commission itself or any individual Commissioner.

Rule Provisions

Section 310.4(b)(1)(iii) of the TSR provides, among other things, that it is a violation of the Rule to initiate any outbound telemarketing call to a person when that person's telephone number is on the National Do Not Call Registry unless the seller has an EBR with such person. *See* 16 C.F.R. § 310.4(b)(1)(iii). The Rule defines an EBR as:

> a relationship between a seller and a consumer based on:
>
> (1) the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within eighteen (18) months immediately preceding the date of a telemarketing call; or
>
> (2) the consumer's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call.

16 C.F.R. § 310.2(n).

Discussion

Your letter discusses an Internet-based mechanism that generates leads for lenders. It describes the mechanism in the following way:

> [The] consumer visits a website that offers to arrange for several lenders to compete for the consumer's business. Before the consumer submits an inquiry, the website may disclose approximately how many lenders are likely to respond. The names of those lenders are not disclosed at that point, however, because they have not yet been determined. The website may have a network of dozens or even hundreds of lenders who may be asked to respond to a consumer's inquiry with proposed lending terms. . . . The lenders' names are disclosed to the consumer when the lenders contact the consumer to present lending terms.
>
> The consumer is asked to submit contact information with her inquiry. Typically, this includes an email address and telephone number. Some websites may expressly disclose that contact information is collected so that lenders can respond to the consumer.

FTC staff's opinion is that a lender who receives a consumer's contact information from such a lead generation mechanism generally does not have an EBR with the consumer.[1] The

[1] For the purposes of this advisory opinion, we presume that the lenders described in your letter are "persons, partnerships, or corporations" under Sections 5(a)(2) and 19(a) of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a)(2) and 57b(a), and meet the definition of a "seller" under Section 310.2(z) of the TSR, 16 C.F.R. § 310.2(z).

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July 19, 2006 -

Rule provides that, for the EBR exemption to apply, the seller must itself have a relationship with the consumer. *See* 16 C.F.R. §§ 310.4(b)(1)(iii)(B)(*ii*) and 310.2(n). In the scenario your letter describes, it is the lead generator, not the seller, that has an inquiry-based established business relationship with the consumer.

However, we agree with your letter's assertion that the consumer's reasonable expectations regarding the lender must be considered. In the Statement of Basis and Purpose ("SBP") accompanying the Rule, the Commission states: "The consumer's expectations of receiving the call are the measure against which the breadth of the [EBR] exemption must be judged." SBP, 68 Fed. Reg. 4594, Jan. 29, 2003. The SBP does not discuss consumer expectations specifically in the context of lender-clients of a lead generator. However, it does discuss them in a related context, *i.e.*, with regard to the affiliates of a corporate seller:

> If consumers received a call from a company that is an affiliate or subsidiary of a company with whom they have a relationship, would consumers likely be surprised by that call and find it inconsistent with having placed their telephone number on the national "do-not-call" registry?

Id.

Thus, the question is whether the consumer in the scenario your letter describes has a reasonable expectation of receiving calls from lenders who receive her name and telephone number from a lead generator. We believe that the consumer's expectation of privacy is such that, if she receives (1) calls from lenders when she does not expect to receive such calls, (2) calls from an infinite number of lenders when she only expects to receive calls from a few, or (3) calls from lenders whose identities are not linked in her mind to her online inquiry, she will be surprised, and find these calls invasive of her privacy and contrary to the promised protection of the National Do Not Call Registry. However, we also agree with your letter's basic assertion that the consumer expects to receive some calls as a result of her visit to the website. In addition, we believe the lead generation mechanism your letter describes offers the consumer a true benefit, *i.e.*, the ability to quickly and easily obtain multiple credit offers based on her unique financial situation.

In view of these considerations, FTC staff believes that the Commission should exercise discretion in evaluating the use of lead generators by lenders, as described in your letter. As long as the lead generator provides the consumer with certain material disclosures, staff likely would not recommend filing a Do Not Call enforcement action against the lender. Specifically, staff likely would not recommend taking such action if the lead generator clearly and conspicuously discloses to the consumer, before the consumer divulges her telephone number, *both* that the consumer may receive telemarketing calls as a consequence of submitting her telephone number, *and* the maximum number of entities from which the consumer may receive these calls.

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July 19, 2006

In addition, FTC staff's opinion is that the consumer should, if possible, be informed of the identities of the lenders who may call the consumer before the consumer receives any such calls.[2] This disclosure should be made in a manner likely to be seen and understood by the consumer, in light of the medium used to induce the consumer to submit her information to the lead generator.[3] We note that, as a practical matter, notifying the consumer in this way about which specific lenders may be calling makes good business sense. The consumer is more likely to accept a telemarketing call from a lender when she is expecting that particular lender to call. She may reject a call from a lender she does not recognize and instruct the lender not to make further telemarketing calls to her, thereby asserting her rights under the TSR's entity specific Do Not Call provision. *See* 16 C.F.R. § 310.4(b)(1)(iii)(A). Of course, consistent with Section 310.2(n)(2) of the TSR, 16 C.F.R. § 310.2(n)(2), the lender may only initiate an outbound call to the consumer within three months of the date of the consumer's inquiry to the lead generator. In the staff's opinion, fulfilling the above conditions ensures that the use of lead generators is consistent with the privacy expectations of a consumer who has placed her number on the Registry.

I hope this discussion is helpful to you. If you have any further questions, please do not hesitate to contact me.

Sincerely,

Thomas P. Rowan

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[2] The lead generator should not refer the consumer to a lengthy list of hundreds or thousands of lenders that may contact the consumer. Rather, it should inform the consumer of the identities of the lenders with which it has "matched" the consumer.

[3] If contact between the lead generator and the consumer occurred online, these disclosures appropriately could be made via email. Conventional mail disclosures likely would not be adequate where the initial exchange took place online. Nothing in this letter should be construed to mean that such electronic message need not comply with the CAN-SPAM Act, 15 U.S.C. §§ 7701 - 7713. Note, however, that the email likely would constitute a "transactional or relationship message," and would therefore not be subject to many of the CAN-SPAM Act's requirements. *See* 15 U.S.C. § 7702(17).

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May 31, 2006

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Re: Request for Advisory Opinion Concerning Upselling and Certain Exemptions to the Telemarketing Sales Rule

Dear Mr. Cerasale:

This staff advisory opinion responds to your letter of April 3, 2006, seeking informal clarification of whether the telemarketing program it describes ("marketing program" or "program") constitutes "upselling" under the Telemarketing Sales Rule ("TSR" or "the Rule"), 16 C.F.R. Part 310. As you noted in your letter, if the program does not constitute upselling, calls made as part of the program may be exempt from the Rule under Sections 310.6(b)(4) and (5), 16 C.F.R. §§ 310.6(b)(4) and (5).

Based on your description, our conclusion is that the program does constitute upselling and is not exempt from the Rule. The opinions expressed in the following discussion of the basis for this conclusion are those of Commission staff only and are not attributable to, nor binding on, the Commission itself or any individual Commissioner.

Rule Provisions

The TSR defines "upselling" to mean:

> soliciting the purchase of goods or services following an initial transaction during a single phone call. The upsell is a separate telemarketing transaction, not a continuation of the initial transaction. An "external upsell" is a solicitation made by or on behalf of a seller different from the seller in the initial transaction. An "internal upsell" is a solicitation made by or on behalf of the same seller as in the initial transaction, regardless of whether the initial transaction and subsequent solicitation are made by the same telemarketer.

16 C.F.R. § 310.2(dd). Upselling is the "direct solicitation for a product or service other than that for which the consumer initiated the call." Statement of Basis and Purpose ("SBP") accompanying the amended Rule, 68 Fed. Reg. 4656, Jan. 29, 2003. Upselling is subject to each of the Rule's requirements except the Do Not Call provisions, 16 C.F.R. § 310.4(b)(1)(iii), and calling time restrictions, 16 C.F.R. § 310.4(c). SBP, 68 Fed. Reg. 4596.

Certain types of calls are exempt from the Rule. *See* 16 C.F.R. 310.6. These include: telephone calls initiated by a customer or donor "that are not the result of any solicitation by a seller, charitable organization, or telemarketer . . ." or that are "in response to an advertisement through any medium other than direct mail solicitation . . .." 16 C.F.R. §§ 310.6(b)(4) and (5). These exemptions do not apply "to any instances of upselling included in such telephone calls." *Id.*

Discussion

The program you describe in your letter is one whereby DMA members market products through relationships with financial institutions, such as banks and mortgage companies. Specifically, you state:

> The marketing program involves an inbound call from a customer of the . . . [financial institution] to the . . . [financial institution] where the customer requests account, transaction, balance and/or payment information. After responding to the customer's request, the . . . [financial institution] highlights a service offering and asks the customer if he/she would like to hear more about it. If the customer says yes, the call is transferred to the Member. The customer's call initially might be answered and transferred to the Member *via* an individual or a voice response unit.

FTC staff's opinion is that the member in this scenario is engaged in upselling. The member is soliciting the purchase of goods or services following an initial transaction during a single phone call. *See* 16 C.F.R. § 310.2(dd). The initial transaction involves an inbound call to a financial institution by a customer seeking account or other similar information. The Commission contemplated such a transaction as a precursor to an upsell. The Commission stated in the SBP: "The term 'initial transaction' is intended to describe any sort of exchange between a consumer and a seller or telemarketer, including but not limited to . . . customer service calls initiated by . . . the consumer . . .." SBP, 68 Fed. Reg. 4596.[1]

[1] *See* SBP, 68 Fed. Reg. 4597 n.180 ("'The upsell can follow either a sales call or a call related to customer service, such as a call about an account payment or product repair

DMA argues that the member is not engaged in upselling because the initial transaction does not involve a "seller" as that term is defined in the Rule. We disagree with this assertion. While the upselling definition includes language describing two types of upsells in which the initial transaction involves a seller, the first sentence of the definition – "[u]pselling means soliciting the purchase of goods or services following an initial transaction during a single telephone call" – is sufficiently broad to include other scenarios. *See* 16 C.F.R. § 310.2(dd). In our view, the meaning of the term "initial transaction" is not narrowly restricted to sales or the consummation of other types of contracts, but instead, as indicated by the SBP, broadly reaches to include such exchanges as completed customer service calls. Therefore, we believe that the scenario described in the DMA letter constitutes "upselling" under Section 310.2(dd).

In addition, we believe that DMA's interpretation of the TSR's upselling provisions is inconsistent with the provisions' underlying purpose: "to ensure that consumers in upselling transactions receive the same information and protections as consumers in other telemarketing transactions subject to the Rule." *See* SBP, 68 Fed. Reg. 4596. From the consumer's standpoint, there is little or no material difference between an upsell and an outbound telemarketing call:

> [T]he consumer is hearing the terms of the upsell offer for the first time on the telephone. The consumer has not had an opportunity to review and consider the terms of the offer in a direct mail piece, or to view an advertisement and gather information on pricing or quality of the particular good or service before determining to make the purchase.

Id at 4597.

The consumer encountering the marketing program described in your letter is in this position. The consumer receives the offer by phone and has not had the opportunity to review the terms of the offer in writing or to gather information on the pricing or quality of the good or service. In addition, because the member may have access to the consumer's financial information through its relationship with the financial institution, the consumer is particularly vulnerable to financial injury. As the Commission noted in the SBP: "[l]aw enforcement experience indicates that the fact that the consumer has already provided or authorized use of his or her billing information in an initial transaction may actually result in greater risk or abuse during the second transaction." *Id*. at 4597-98 n.192.

The TSR provides important protections for the consumer presented with the described marketing program. Among other things, the Rule requires disclosure of all information material to the consumer's decision to accept the offer before the consumer authorizes payment for the purchase. *See* 16 C.F.R. §§ 310.3(a)(1) and 310.4(d). It also requires the member to obtain

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. . ..'")(quoting the National Association of Attorneys General Comment on the January 30, 2002 Notice of Proposed Rulemaking accompanying the proposed amended TSR).

express, informed consent before submitting the consumer's billing information for payment. *See* 16 C.F.R. § 310.4(a)(6). In our view, the Rule cannot be interpreted in a manner that would result in the removal of these protections for consumers confronted by marketing scenarios like the one described in your letter. Moreover, TSR coverage of upsells in the scenario you describe requires no more than basic fair dealing with consumers, and imposes no undue burden on the upseller.

Conclusion

FTC staff's opinion is that the described marketing program constitutes upselling and is not exempt from the TSR. The member is soliciting the purchase of goods or services following an initial transaction during a single phone call. The term "initial transaction" includes completed customer service calls. Moreover, the purpose of the upselling provisions is to cover the type of marketing program described in your letter. The TSR makes clear that, absent any other safeguards, the Rule's most basic protections apply to consumers who are initially solicited to purchase goods and services over the telephone. As the consumers in the marketing program you describe fall into this category, they should receive the Rule's protections.

I hope this discussion is helpful to you and to DMA's members. If you have any further questions, please do not hesitate to contact me.

Sincerely,

Thomas P. Rowan
Staff Attorney

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May 31, 2006

Mr. Jerry Cerasale
Senior Vice President
Government Affairs
Direct Marketing Association
1111 19th Street, N.W., Suite 1100
Washington, D.C. 20036-3603

Re: Request for Advisory Opinion Concerning Upselling and Certain Exemptions to the Telemarketing Sales Rule

Dear Mr. Cerasale:

This staff advisory opinion responds to your letter of April 3, 2006, seeking informal clarification of whether the telemarketing program it describes ("marketing program" or "program") constitutes "upselling" under the Telemarketing Sales Rule ("TSR" or "the Rule"), 16 C.F.R. Part 310. As you noted in your letter, if the program does not constitute upselling, calls made as part of the program may be exempt from the Rule under Sections 310.6(b)(4) and (5), 16 C.F.R. §§ 310.6(b)(4) and (5).

Based on your description, our conclusion is that the program does constitute upselling and is not exempt from the Rule. The opinions expressed in the following discussion of the basis for this conclusion are those of Commission staff only and are not attributable to, nor binding on, the Commission itself or any individual Commissioner.

Rule Provisions

The TSR defines "upselling" to mean:

> soliciting the purchase of goods or services following an initial transaction during a single phone call. The upsell is a separate telemarketing transaction, not a continuation of the initial transaction. An "external upsell" is a solicitation made by or on behalf of a seller different from the seller in the initial transaction. An "internal upsell" is a solicitation made by or on behalf of the same seller as in the initial transaction, regardless of whether the initial transaction and subsequent solicitation are made by the same telemarketer.

16 C.F.R. § 310.2(dd). Upselling is the "direct solicitation for a product or service other than that for which the consumer initiated the call." Statement of Basis and Purpose ("SBP") accompanying the amended Rule, 68 Fed. Reg. 4656, Jan. 29, 2003. Upselling is subject to each of the Rule's requirements except the Do Not Call provisions, 16 C.F.R. § 310.4(b)(1)(iii), and calling time restrictions, 16 C.F.R. § 310.4(c). SBP, 68 Fed. Reg. 4596.

Certain types of calls are exempt from the Rule. *See* 16 C.F.R. 310.6. These include: telephone calls initiated by a customer or donor "that are not the result of any solicitation by a seller, charitable organization, or telemarketer . . ." or that are "in response to an advertisement through any medium other than direct mail solicitation . . .." 16 C.F.R. §§ 310.6(b)(4) and (5). These exemptions do not apply "to any instances of upselling included in such telephone calls." *Id.*

Discussion

The program you describe in your letter is one whereby DMA members market products through relationships with financial institutions, such as banks and mortgage companies. Specifically, you state:

> The marketing program involves an inbound call from a customer of the . . . [financial institution] to the . . . [financial institution] where the customer requests account, transaction, balance and/or payment information. After responding to the customer's request, the . . . [financial institution] highlights a service offering and asks the customer if he/she would like to hear more about it. If the customer says yes, the call is transferred to the Member. The customer's call initially might be answered and transferred to the Member *via* an individual or a voice response unit.

FTC staff's opinion is that the member in this scenario is engaged in upselling. The member is soliciting the purchase of goods or services following an initial transaction during a single phone call. *See* 16 C.F.R. § 310.2(dd). The initial transaction involves an inbound call to a financial institution by a customer seeking account or other similar information. The Commission contemplated such a transaction as a precursor to an upsell. The Commission stated in the SBP: "The term 'initial transaction' is intended to describe any sort of exchange between a consumer and a seller or telemarketer, including but not limited to . . . customer service calls initiated by . . . the consumer . . .." SBP, 68 Fed. Reg. 4596.[1]

[1] *See* SBP, 68 Fed. Reg. 4597 n.180 ("'The upsell can follow either a sales call or a call related to customer service, such as a call about an account payment or product repair

DMA argues that the member is not engaged in upselling because the initial transaction does not involve a "seller" as that term is defined in the Rule. We disagree with this assertion. While the upselling definition includes language describing two types of upsells in which the initial transaction involves a seller, the first sentence of the definition – "[u]pselling means soliciting the purchase of goods or services following an initial transaction during a single telephone call" – is sufficiently broad to include other scenarios. *See* 16 C.F.R. § 310.2(dd). In our view, the meaning of the term "initial transaction" is not narrowly restricted to sales or the consummation of other types of contracts, but instead, as indicated by the SBP, broadly reaches to include such exchanges as completed customer service calls. Therefore, we believe that the scenario described in the DMA letter constitutes "upselling" under Section 310.2(dd).

In addition, we believe that DMA's interpretation of the TSR's upselling provisions is inconsistent with the provisions' underlying purpose: "to ensure that consumers in upselling transactions receive the same information and protections as consumers in other telemarketing transactions subject to the Rule." *See* SBP, 68 Fed. Reg. 4596. From the consumer's standpoint, there is little or no material difference between an upsell and an outbound telemarketing call:

> [T]he consumer is hearing the terms of the upsell offer for the first time on the telephone. The consumer has not had an opportunity to review and consider the terms of the offer in a direct mail piece, or to view an advertisement and gather information on pricing or quality of the particular good or service before determining to make the purchase.

Id at 4597.

The consumer encountering the marketing program described in your letter is in this position. The consumer receives the offer by phone and has not had the opportunity to review the terms of the offer in writing or to gather information on the pricing or quality of the good or service. In addition, because the member may have access to the consumer's financial information through its relationship with the financial institution, the consumer is particularly vulnerable to financial injury. As the Commission noted in the SBP: "[l]aw enforcement experience indicates that the fact that the consumer has already provided or authorized use of his or her billing information in an initial transaction may actually result in greater risk or abuse during the second transaction." *Id*. at 4597-98 n.192.

The TSR provides important protections for the consumer presented with the described marketing program. Among other things, the Rule requires disclosure of all information material to the consumer's decision to accept the offer before the consumer authorizes payment for the purchase. *See* 16 C.F.R. §§ 310.3(a)(1) and 310.4(d). It also requires the member to obtain

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Mr. Jerry Cerasale
Direct Marketing Association
May 31, 2006 -

express, informed consent before submitting the consumer's billing information for payment. *See* 16 C.F.R. § 310.4(a)(6). In our view, the Rule cannot be interpreted in a manner that would result in the removal of these protections for consumers confronted by marketing scenarios like the one described in your letter. Moreover, TSR coverage of upsells in the scenario you describe requires no more than basic fair dealing with consumers, and imposes no undue burden on the upseller.

Conclusion

FTC staff's opinion is that the described marketing program constitutes upselling and is not exempt from the TSR. The member is soliciting the purchase of goods or services following an initial transaction during a single phone call. The term "initial transaction" includes completed customer service calls. Moreover, the purpose of the upselling provisions is to cover the type of marketing program described in your letter. The TSR makes clear that, absent any other safeguards, the Rule's most basic protections apply to consumers who are initially solicited to purchase goods and services over the telephone. As the consumers in the marketing program you describe fall into this category, they should receive the Rule's protections.

I hope this discussion is helpful to you and to DMA's members. If you have any further questions, please do not hesitate to contact me.

Sincerely,

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July 19, 2006

Michael Goodman, Esq.
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1020 19th Street, N.W., 7th Floor
Washington, D.C. 20036

Re: Request for Informal Advisory Opinion Concerning the Application of the Telemarketing Sales Rule's "Established Business Relationship" Exemption to an Internet-based Lead Generation Mechanism

Dear Mr. Goodman:

This staff advisory opinion responds to your letter of April 3, 2006, seeking an informal opinion letter regarding the application of the Telemarketing Sales Rule's ("TSR's" or the "Rule's") established business relationship ("EBR") exemption to an Internet-based lead generation mechanism. The central issue your letter presents is whether the exemption applies to a lender that initiates a telephone call to a consumer based on contact information the lender obtains from a lead generator.

Our conclusion is that, under a strict reading of the language of the Rule, the lender does not have an EBR with a consumer who responds to a lead generator's solicitation, and therefore would not normally be entitled to claim the EBR exemption. However, FTC staff would not recommend a Do Not Call enforcement action against a lender that calls consumers who have responded to a lead generator's solicitation if, as described more fully below, the lead generator makes full and adequate prior disclosure of certain material facts about the consequences of responding to such solicitations. The opinions expressed in the following discussion of the basis for this conclusion are those of Commission staff only and are not attributable to, nor binding on, the Commission itself or any individual Commissioner.

Rule Provisions

Section 310.4(b)(1)(iii) of the TSR provides, among other things, that it is a violation of the Rule to initiate any outbound telemarketing call to a person when that person's telephone number is on the National Do Not Call Registry unless the seller has an EBR with such person. *See* 16 C.F.R. § 310.4(b)(1)(iii). The Rule defines an EBR as:

> a relationship between a seller and a consumer based on:
>
> (1) the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within eighteen (18) months immediately preceding the date of a telemarketing call; or
>
> (2) the consumer's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call.

16 C.F.R. § 310.2(n).

Discussion

Your letter discusses an Internet-based mechanism that generates leads for lenders. It describes the mechanism in the following way:

> [The] consumer visits a website that offers to arrange for several lenders to compete for the consumer's business. Before the consumer submits an inquiry, the website may disclose approximately how many lenders are likely to respond. The names of those lenders are not disclosed at that point, however, because they have not yet been determined. The website may have a network of dozens or even hundreds of lenders who may be asked to respond to a consumer's inquiry with proposed lending terms. . . . The lenders' names are disclosed to the consumer when the lenders contact the consumer to present lending terms.
>
> The consumer is asked to submit contact information with her inquiry. Typically, this includes an email address and telephone number. Some websites may expressly disclose that contact information is collected so that lenders can respond to the consumer.

FTC staff's opinion is that a lender who receives a consumer's contact information from such a lead generation mechanism generally does not have an EBR with the consumer.[1] The

[1] For the purposes of this advisory opinion, we presume that the lenders described in your letter are "persons, partnerships, or corporations" under Sections 5(a)(2) and 19(a) of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a)(2) and 57b(a), and meet the definition of a "seller" under Section 310.2(z) of the TSR, 16 C.F.R. § 310.2(z).

Rule provides that, for the EBR exemption to apply, the seller must itself have a relationship with the consumer. *See* 16 C.F.R. §§ 310.4(b)(1)(iii)(B)(*ii*) and 310.2(n). In the scenario your letter describes, it is the lead generator, not the seller, that has an inquiry-based established business relationship with the consumer.

However, we agree with your letter's assertion that the consumer's reasonable expectations regarding the lender must be considered. In the Statement of Basis and Purpose ("SBP") accompanying the Rule, the Commission states: "The consumer's expectations of receiving the call are the measure against which the breadth of the [EBR] exemption must be judged." SBP, 68 Fed. Reg. 4594, Jan. 29, 2003. The SBP does not discuss consumer expectations specifically in the context of lender-clients of a lead generator. However, it does discuss them in a related context, *i.e.*, with regard to the affiliates of a corporate seller:

> If consumers received a call from a company that is an affiliate or subsidiary of a company with whom they have a relationship, would consumers likely be surprised by that call and find it inconsistent with having placed their telephone number on the national "do-not-call" registry?

Id.

Thus, the question is whether the consumer in the scenario your letter describes has a reasonable expectation of receiving calls from lenders who receive her name and telephone number from a lead generator. We believe that the consumer's expectation of privacy is such that, if she receives (1) calls from lenders when she does not expect to receive such calls, (2) calls from an infinite number of lenders when she only expects to receive calls from a few, or (3) calls from lenders whose identities are not linked in her mind to her online inquiry, she will be surprised, and find these calls invasive of her privacy and contrary to the promised protection of the National Do Not Call Registry. However, we also agree with your letter's basic assertion that the consumer expects to receive some calls as a result of her visit to the website. In addition, we believe the lead generation mechanism your letter describes offers the consumer a true benefit, *i.e.*, the ability to quickly and easily obtain multiple credit offers based on her unique financial situation.

In view of these considerations, FTC staff believes that the Commission should exercise discretion in evaluating the use of lead generators by lenders, as described in your letter. As long as the lead generator provides the consumer with certain material disclosures, staff likely would not recommend filing a Do Not Call enforcement action against the lender. Specifically, staff likely would not recommend taking such action if the lead generator clearly and conspicuously discloses to the consumer, before the consumer divulges her telephone number, *both* that the consumer may receive telemarketing calls as a consequence of submitting her telephone number, *and* the maximum number of entities from which the consumer may receive these calls.

Michael Goodman, Esq.
Hudson Cook, LLP

In addition, FTC staff's opinion is that the consumer should, if possible, be informed of the identities of the lenders who may call the consumer before the consumer receives any such calls.[2] This disclosure should be made in a manner likely to be seen and understood by the consumer, in light of the medium used to induce the consumer to submit her information to the lead generator.[3] We note that, as a practical matter, notifying the consumer in this way about which specific lenders may be calling makes good business sense. The consumer is more likely to accept a telemarketing call from a lender when she is expecting that particular lender to call. She may reject a call from a lender she does not recognize and instruct the lender not to make further telemarketing calls to her, thereby asserting her rights under the TSR's entity specific Do Not Call provision. *See* 16 C.F.R. § 310.4(b)(1)(iii)(A). Of course, consistent with Section 310.2(n)(2) of the TSR, 16 C.F.R. § 310.2(n)(2), the lender may only initiate an outbound call to the consumer within three months of the date of the consumer's inquiry to the lead generator. In the staff's opinion, fulfilling the above conditions ensures that the use of lead generators is consistent with the privacy expectations of a consumer who has placed her number on the Registry.

I hope this discussion is helpful to you. If you have any further questions, please do not hesitate to contact me.

Sincerely,

Thomas P. Rowan

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[2] The lead generator should not refer the consumer to a lengthy list of hundreds or thousands of lenders that may contact the consumer. Rather, it should inform the consumer of the identities of the lenders with which it has "matched" the consumer.

[3] If contact between the lead generator and the consumer occurred online, these disclosures appropriately could be made via email. Conventional mail disclosures likely would not be adequate where the initial exchange took place online. Nothing in this letter should be construed to mean that such electronic message need not comply with the CAN-SPAM Act, 15 U.S.C. §§ 7701 - 7713. Note, however, that the email likely would constitute a "transactional or relationship message," and would therefore not be subject to many of the CAN-SPAM Act's requirements. *See* 15 U.S.C. § 7702(17).