FOOD MARKETING INSTITUTE

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Submitted Electronically

The Honorable Jon Leibowitz
Chairman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

RE: Preliminary FTC Staff Report: Protecting Consumer Privacy in an Era of Rapid Change

On December 1, 2010, the Federal Trade Commission (FTC or Commission) published a preliminary staff report entitled Protecting Consumer Privacy in an Era of Rapid Change: A Staff Report for Businesses and Policymakers (the Staff Report).

The Food Marketing Institute (FMI) appreciates the opportunity to respond to the request of the FTC for comments on the Staff Report. FMI will be focusing these comments on loyalty card programs. Italicized text indicates observations or questions or posed by FTC in the Staff Report.

FMI is the national trade association that conducts programs in public affairs, food safety, research, education and industry relations on behalf of its 1,500 member companies – food retailers and wholesalers – in the United States and around the world. FMI's members in the United States operate approximately 26,000 retail food stores and 14,000 pharmacies. Their combined annual sales volume of $680 billion represents three-quarters of all retail food store sales in the United States. FMI's retail membership is composed of large multi-store chains, regional firms, and independent supermarkets. Our international membership includes 200 companies from more than 50 countries. FMI's associate members include the supplier partners of its retail and wholesale members.

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I. Background

Loyalty Card Programs

Loyalty card programs are an essential tool for much of the retail grocery industry. Competition in the industry is fierce, and retailers know that in order to succeed, they must be able to build and maintain a personal relationship with their customers. For many retailers, loyalty card programs are a critical element in maintaining this relationship.

In the early days of the grocery industry proprietors of the corner store knew their customers on a personal level and responded to their needs. If the owner of shop was aware that the family up the street liked a particular jam, he or she would always try to keep a few jars in stock to meet their needs. For perishable products knowledge of shopper preferences was essential. Many foods that today's consumers enjoy year round were once available only for limited periods, holidays or seasons. These include turkeys, fish and all fresh fruits and vegetables.[1] As stores grew larger and chain supermarkets emerged, retailers sought to maintain personal relationships with their customers. In the modern era of food retailing, loyalty card programs emerged as a key way to maintain a personal connection with consumers.

To participate in a loyalty program, consumers must opt-in by completing a simple application. When applying, consumers are given information regarding how data obtained from the operation of the program is used and managed. Shoppers are also generally given the opportunity to opt-out of receiving personally tailored coupons and offers on the application. By participating in a loyalty program, consumers enjoy significant benefits such as discounts on merchandise, discounts on fuel purchases, personally tailored coupons and offers on the products they purchase most, and the opportunity to win prizes among other things. Coupons may be e-mailed to consumers, given to consumers at the register, or offers provided through a website portal linked to the card.

Consumers Value Loyalty Card Programs

When given the choice of whether or not they wish to participate in loyalty card programs, the vast majority of consumers choose to enroll. About 80 percent of U.S. households belong to a loyalty card program.[2] In fact, the average household now participates in more than six loyalty card programs.[3]

[1] William Greer, Food Marketing Institute, America the Bountiful, How the Supermarket Came to Main Street (1986).
[2] Marketing Weekly News, February 12, 2011, Valassis and AOL to Deliver More Coupon Offers Through Retail Frequent Shopper Programs.
[3] MarketResearch.com**,** January 1, 2010, Customer Satisfaction and Loyalty Programs – US.

Shoppers enroll in loyalty card programs because of the significant benefits they receive from them—the most important of which is discounts on merchandise. As the nation has coped with recession in recent years price has been the most important factor in consumers selecting a primary store.[4] In FMI's latest shopper survey, 37 percent of consumers cited having low prices as being the top consideration in deciding a primary grocery store, up from 31 percent in 2007.[5] Among very important factors considered in selecting a store, consumers stated low prices more frequently than any other factor.[6] In FMI's 2010 consumer survey low prices were stated as a very important factor by 75 percent of respondents, up from 64 percent in 2007.[7]

Loyalty card programs lower prices for consumers. In order to save money inside the store, 39 percent of consumers rely on a loyalty card program.[8] Consumers value the personalized offers loyalty card programs provide. A full 68% of shoppers are somewhat or very interested in receiving promotional emails and texts from their primary store.[9] Consumers are using electronic coupons more and more frequently. 37 percent of shoppers use coupons they found on the Internet, up from 29 percent in 2009. Loyalty card coupon redemption rates are magnitudes higher than general coupon mailers.

Loyalty Card Programs are of Key Importance to Retailers

Loyalty card programs provide retailers with an essential tool which allows them to better serve consumer needs. By assessing the shopping preferences of their most loyal customers, retailers are given information that enhances their ability to manage inventory to meet customer demands. Loyalty card programs also provide retailers with an effective way of introducing consumers to new products that may interest them. Consumers may be sent coupons for new products that are similar to the items they purchase most. This is an effective tool to educate consumers about new items they may be interested in. Shoppers say that the availability of coupons has the greatest influence when determining whether or not to purchase a food product for the first time.[10] Loyalty card programs may also be used by retailers—as one of a number of methods—to communicate information about recalls to consumers.

It is clear that loyalty card programs provide important benefits to both consumers and retailers. A testament to their effectiveness is evident in the fact that use of loyalty card programs by retailers continues to rise. In the latest FMI industry survey, more than 57.4 of respondents stated that they implement a frequent shopper/loyalty card program, an increase of nearly 7 percent over the

[4] Food Marketing Institute, 2010 U.S. Grocery Shopper Trends.
[5] Id.
[6] Id.
[7] Id.
[8] Id.
[9] Id.
[10] Id.

previous year. Survey respondents also ranked loyalty card programs as one of the most successful differentiation strategies.[11] Such programs have proven to be effective. Consumers claim more loyalty to supermarkets than any other retail segment.[12] Three-quarters of the total number of shopping trips of a consumer are to a primary store.[13] As stated previously, more and more consumers are taking advantage of loyalty card benefits as well.

II. Loyalty Cards and the Staff Report

Protecting Consumer Information

No information is more important to a retailer than data about their loyal customers and companies go to great lengths to ensure it is protected. In circumstances where personal information must be shared with third parties to implement loyalty programs (e.g. to mail out coupons), strict non-disclosure agreements are in place. If information is shared with a manufacturer, it is done so in an anonymous way (e.g. aggregated).

Food retailers go to these great lengths because they care about their customers and know that maintaining their trust is essential for success in the industry. Trust in a company factors into purchase decisions for most consumers.[14] Consumers have acknowledged the efforts retailers take to maintain trust. The supermarket industry was rated the most honest and trustworthy industry in America in 2009 and has held this position for six of the past seven years.[15] Furthermore, of all major industries in the U.S., supermarkets are the least likely to be cited by the public as needing more government regulation.[16]

Consumer Awareness of Information Maintenance and Use

When signing up for a loyalty card program, consumers are given clear disclosures on the application as how their information may be used by a retailer and also how it is maintained. The Staff Report states that "some consumers are troubled by the collection and sharing of their information. Others have no idea that any of this information collection and sharing is taking place. Still others may be aware of this collection and use of their personal information but view it as a worthwhile trade-off for innovative products and services."

[11] Food Marketing Institute, 2010 The Food Retailing Industry Speaks.
[12] Colloquytalk, The Loyalty Marketing Mix (June 2008).
[13] Food Marketing Institute, 2009 US Grocery Shopper Trends.
[14] Euro RSCG Worldwide, The Value Study 2009.
[15] Harris Interactive, The Harris Poll 2009.
[16] Harris Interactive, The Harris Poll 2009.

In the case of a loyalty card program, consumers are made aware that certain information may be collected and indeed view it as a worthwhile trade-off. A 2004 survey conducted by Boston University's college of communication found that seven in ten shoppers now know that grocery stores keep track of what they spend and 69 percent of consumers report that the card benefits them in the form of lower prices and access to special promotions. "The fact that consumers, even those generally concerned about privacy, are willing to use these cards is testament to the fact that personal information is a commodity people are willing to trade with the right company for the right price," explained Professor James McQuivey, who supervised the research project.[17]

Distinctions Between Loyalty Card Programs and On-Line Data Collection

Much of the concern FTC expresses in the report is directed at on-line data collection activity. Supermarket loyalty cards programs are entirely different.

Consumer Choice

Loyalty card programs are all opt-in. Consumers must apply to participate. When applying, consumers are given information regarding how data obtained from the operation of the program is used and managed. At the time of application shoppers are also generally given the opportunity to opt-out of personally tailored offers and communications. On-line data collection activity often is not opt-in.

Disclosures

When consumers apply for a loyalty card, they are given information on how their information may be maintained and used. This information is generally contained on the application itself. With on-line data collection activity, consumers may not be provided with such disclosures. When consumers are provided with disclosures in the on-line environment, they are generally not as readily apparent.

Limited Scope

Loyalty card data maintained by a retailer is limited to information obtained by consumer activity within that retailer's outlets. It is generally based on purchase data. On-line data collection activity involves much more than purchase data (e.g. website viewing) and is pulled from various sources, such as visits to multiple websites—and combined.

[17] http://couponing.about.com/od/groceryzone/a/loyalty_cards.htm

Commonly Accepted Practices—First-Party Marketing

FTC staff has identified a limited set of "commonly accepted practices" for which companies should not be required to seek consent once the consumer elects to use the product or service in question. One of these practices is first-party marketing**.** FTC cites examples: "online retailers recommend products and services based upon consumers' prior purchases on the website. Offline retailers do the same and may, for example, offer frequent purchasers of diapers a coupon for baby formula at the cash register."

Loyalty card programs are precisely what the FTC describes as first-party marketing. Retailers provide coupons and discounts to consumers based on the products those consumers buy most. FMI agrees that first-party marketing should fall under "commonly accepted practices" for which companies should not be required to seek consent for sending such offers once the consumer elects to enroll in a program such as a loyalty card. FMI notes that retailers generally provide consumers with the ability to opt-out of personally tailored offers at the time of application.

FMI however is concerned that the term "first-party marketing" is too vague in the context of the Staff Report. What first-party marketing means to one company may mean something entirely different to another. FTC should provide additional clarification of what it views the term as encompassing.

In addition, as FTC is well aware, marketing practices can change quickly. Any standard of commonly accepted practices should be adaptable to changes in technologies and marketing techniques. A rigid, narrow standard will become obsolete quickly.

What types of first-party marketing should be considered "commonly accepted practices?"

Providing in-store discounts to loyalty card members, sending coupons and personally tailored offers to consumers via mail or electronically should all be considered commonly accepted practices. Providing gas rewards and prizes to consumers should also be considered commonly accepted practices.

Should first-party marketing be limited to the context in which the data is collected from the consumer? An offline example would include a retailer offering a coupon to a consumer at the cash register based upon the consumers' prior purchases in the store. Is there a distinction, however, the offline retailer sends offers to the consumer in another context—for example, via postal mail, email, or text message?

FMI does not believe that first-party marketing should be limited to the context in which the data is collected from the consumer. Retailers generally do give consumers the choice to decline offers sent in another context.

Should consumers have an opportunity to decline solicitations delivered through such means, as provided by existing sectoral laws?

Food retailers generally provide consumers with the ability to decline personally tailored solicitations through other means at the time of application.

Should marketing by commonly branded affiliates be considered first-party marketing?

FMI believes that marketing by commonly branded affiliates should be considered first-party marketing. Once a consumer enrolls in a loyalty program, they are likely to benefit from marketing by commonly branded affiliates and value such offers.

Point of Sale Disclosures

FTC states in the Staff Report: *"For an offline retailer, the disclosure and consumer control should take place at the point of sale by, for example, having the cashier ask the customer whether he would like to receive marketing offers from other companies."*

POS opt-out is not feasible at this time. Firstly, the technology is not available. Secondly, it is not practical. For most retailers, the customer service desk is the only area with access to the loyalty card network. This helps to maintain the security of card data. With margins of a penny on the dollar, the food retailing industry is a volume driven business. Slowing down the check-out process would have significant economic consequences for the industry. It would also be of great inconvenience to consumers. In FMI's 2010 consumer survey, fast checkout was cited by more than half of shoppers as a very important factor in choosing a store.

Consumer Access to Information

Staff also proposes providing consumers with reasonable access to the data that companies maintain about them, particularly for companies that do not interact with consumers directly, such as data brokers. Because of the significant costs associated with access, staff believes that the extent of access should be proportional to both the sensitivity of the data and its intended use.

Should companies be allowed to charge reasonable cost for certain types of access?

Retailers do provide consumers with access to the data that they maintain about them. It is done with strict controls to ensure the privacy of the information. Retailers often provide such information to consumers as a service, free of charge. However, FMI believes that in some circumstances, retailers should be able to charge a reasonable cost for certain types of access.

Data Retention Period

Should the retention period depend upon the type or the sensitivity of the data at issue? For example, does the value of information used for behavioral advertising decrease so quickly that retention periods for such data can be quite short?

In the supermarket industry information going back several years is necessary to allow retailers to respond to consumer demands. As many food items are seasonal, retailers need information from several previous seasons to produce models and forecast for the future.

FMI appreciates the opportunity to comment on this important matter.

Sincerely,

Erik R. Lieberman
Regulatory Counsel