

February 18, 2011

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Comments of Catalog Choice on A Preliminary FTC Staff Report on "Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers"

Dear Staff and Commissioners of the FTC:

Thank you for accepting comment upon "Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers." Catalog Choice submits the following comments.

Catalog Choice, Inc. has created an opt-out system capable of effectively protecting consumer privacy in a self-regulatory environment. All self-regulatory systems, however, require actors to behave within certain commonly accepted norms. Our comments address several ways in which the Commission's proposed framework can help ensure that consumer choice mechanisms are convenient, effective, enforceable, persistent, and universally available.

I. INTRODUCTION

Catalog Choice is a non-profit organization based in Berkeley, California, whose mission is to help people reduce unwanted mail, save natural resources, and protect their privacy. Catalog Choice maintains an easy-to-use service, online at <http://www.catalogchoice.org>, which allows both households and businesses to opt out of receiving direct mail advertising and request that their name and address not be sold or traded with affiliates or other companies. Since we launched the Catalog Choice service in October 2007, nearly 1.3 million Catalog Choice members have sent more than 19 million opt-out requests to 3,100 brands and companies.

A. **How the Catalog Choice System Works**

Catalog Choice provides a centralized portal with all the information and tools members need to implement their privacy choices. Members first create a free account, which they verify by confirming receipt of a registration email.¹ Members begin the opt-out process by selecting, on a title-specific basis, the companies or brands to which they would like to send opt-out requests.

¹ This is similar to the email verification process used when people list their phone numbers in the Do Not Call Registry, *see* <https://www.donotcall.gov/register/reg.aspx>, where only a phone number and email address are required to register a phone number.

To make a request, in most cases a member needs only select a company, his or her name and address, and submit a request to be removed from that company's mailing list and that his or her name and address not be shared with other companies. Catalog Choice creates a unique email address for each request on its email domain (cmails.org), in order to keep the member's personal email addresses private when sending a request, to monitor the status of the request, and to notify the member if additional action is needed to complete the request.

Over 650 of the nation's largest multichannel merchants actively participate in the Catalog Choice system. Throughout 2008, we collaborated with the American Catalog Mailers Association (ACMA) and representatives from Crate & Barrel, Williams Sonoma, LL Bean, and others in developing a license agreement to govern the relationship between Catalog Choice and participating companies. Companies that sign a license agreement may, without charge, establish secure accounts that allow them to obtain brand-specific opt-out requests in a bulk, machine-readable format. Participating companies can also provide Catalog Choice members with the ability to opt in to receiving certain communications, and "opt down" (*i.e.*, reduce the frequency of mailings). As an additional benefit, Catalog Choice collects survey data from members and provides this valuable marketing information to participating companies.²

For non-participating companies, the Catalog Choice staff reviews the company's privacy policy to determine what approach members should take in communicating their privacy choices. Catalog Choice provides members with various tools to send requests directly to the company in accordance with the often idiosyncratic processes specified in companies' privacy policies.

B. Auditing and Incentivizing Compliance with Opt-Out Requests

One of the integral components of the Catalog Choice system is our ability to promote accountability by auditing compliance with members' opt-out requests.³ Catalog Choice enables members to submit complaints to companies if requests are not honored within 90 days. The service was recently enhance so that members can also authorize Catalog Choice to submit complaints on their behalf to the FTC Consumer Sentinel Network in the event their complaints are not addressed within 30 days thereafter. Our audit model is based on a crowd sourcing system in which we monitor, among other metrics, the volume of repeat opt-out requests and complaints submitted by members on a brand-specific basis. Our audit model encompasses all companies listed on catalogchoice.org, not just participating companies. The full list of companies is available by viewing the Company Index link listed in the site footer.

² For more on the benefits companies can receive by participating in Catalog Choice, *see* https://www.catalogchoice.org/merchants/best_practices.

³ *Cf.* Fed. Trade Comm'n, *Self-Regulatory Principles for Online Behavioral Advertising* 47 (Feb. 2009) ("[s]elf-regulation can work only if concerned industry members actively monitor compliance and ensure that violations have consequences.").

Catalog Choice is also in the final development stages of its Respected Choice certification program. Companies may place the Respected Choice certificate on their website and marketing material if they participate in the Catalog Choice system and agree to ongoing audits of their privacy practices and compliance with opt-out requests.⁴ Respected Choice seeks to make honoring consumer choice a competitive advantage rather than simply a cost of doing business, and provide the “enhanced notice” that quickly communicates consumer choice mechanisms.

We audit and insist direct mailers comply with consumer choice because industry groups like the Direct Marketing Association do not. Many consumers are justifiably uncomfortable relying on trade associations to represent their privacy interests, and the DMA has failed to dispel their skepticism. Although the DMA operates an online mail preference service, DMAChoice, they have not and cannot effectively represent consumers’ interests. For decades, the DMA's Mail Preference Service suffered from basic flaws that prevented it from being a viable self-regulatory system: (1) forcing consumers to make an “all or nothing” choice between receiving solicitations from all DMA members or none of them, (2) charging consumers for the privilege of exercising choice, and (3) limiting consumer choice to prospect mail and providing no way for consumers to opt-out of mail from companies with which they have an existing customer relationship.⁵ To its credit, the DMA recently remedied items 1 & 2 problems—albeit as a direct response to Catalog Choice's increasing popularity among consumers and support from many in the direct mail industry.⁶ Notwithstanding these long-overdue and obvious improvements, DMAChoice remains woefully inadequate, due to the DMA's anemic promotional efforts and the simple fact that DMAChoice only enables consumers to send prospect opt-outs to DMA members⁷, who represent only a fraction of companies engaged in direct mail advertising.⁸

Furthermore, the DMA has consistently failed to adequately enforce its ethical standards with any sort of meaningful transparency; in fact, its “Ethical Case Reports” epitomize this lack of public accountability. The reports, although purportedly based on thousands of complaints and dozens of “in-depth” case reviews, are only a few pages long, couched in extremely vague terms, and—as a rule—never identify members who commit even the most egregious ethical

⁴ See Catalog Choice, Inc. *Respected Choice*, https://www.catalogchoice.org/merchants/respected_choice.

⁵ Jeff Sobern, *Opting In, Opting Out, or No Options at all: The Fight for Control of Personal Information*, 74 WASH. L. REV. 1033, 1076-77 (1999). See *id.*

⁶ See Carol Krol, “Swelling ranks of consumer ‘do not mail’ lists prompt DMA response,” BtoB Magazine, Feb. 11, 2008, available at <http://www.btobonline.com/> (search keyword “swelling ranks”) (quoting DMA executive admitting that “the changes were made in part in response to new groups such as Catalog Choice,” which he described as “a wake up call.”).

⁷ See *Will the DMA help you?* <http://blog.catalogchoice.org/2011/01/05/will-the-dma-help-you/>

⁸ See also Chris Walters, “Direct Marketing Association's Opt Out Website is a Joke,” THE CONSUMERIST (Sept. 24, 2009).

violations.⁹ Compliance monitoring and enforcement must be performed by an independent third-party advocate for the interests of consumers and honest direct mailers, not trade associations. Trade associations should collaborate with independent services, like the ACMA works with Catalog Choice, but they cannot be the arbitrator of compliance.¹⁰

C. Changing the Economics of Opt Out in the Direct Mail Environment

Catalog Choice's rapid growth and success reflects unique concerns many consumers have with the direct mail industry. While the CAN-SPAM Act and Do Not Call alleviated many problems associated with commercial email and telemarketing, respectively, direct mail advertising remains self-regulated. Moreover, while consumers in the online world may rely on spam filters, pop-up blockers, and other means to avoid unsolicited advertisements, they must expend time and energy sorting and disposing of unwanted advertising mail.

The external costs associated with direct mail advertising are substantial. In 2009, American households received roughly 85 billion pieces of advertising mail.¹¹ Sorting through unwanted mail is estimated to consume eight months of the average consumer's life.¹² The annual cost of dealing with unsolicited mail and telephone advertising is \$1 billion.¹³ This estimate, substantial as it is, understates the actual figure because it does not include intangible costs such as feeling a loss of control over one's personal information.¹⁴ Nor does it reflect the environmental impact of direct mail advertising, which accounts for more than five million tons of solid waste every year,¹⁵ increasing municipal disposal and recycling costs.¹⁶

⁹ Direct Marketing Ass'n, *Ethics Case Report Archive*, <http://www.the-dma.org/guidelines/ethicscasearchive.shtml>.

¹⁰ See ACMA, *Catalogers on Catalog Choice: Love It? Hate It? Leave It? or Embrace It?*, <http://www.catalogmailers.org/clubportal/clubstatic.cfm?clubID=2129&pubmenuoptID=35377>

¹¹ See United States Postal Office, *Household Diary Study: Mail Use and Attitudes in FY 2009*, p. 121 Table A3-5, available at <http://www.usps.com/householddiary/welcome.htm>.

¹² Sovern, *Opting In*, *supra* note 5, at 1054-55.

¹³ Estimate is based on the following assumptions – 111 million households in the United States receive on average 100 pounds of advertising mail and 20 pounds of telephone directories each year. The annual collection and disposal costs have been estimated to be \$148 per ton by the City of Seattle.

¹⁴ *Id.* at 98-99.

¹⁵ EPA, *Municipal Solid Waste Factsheet 1995-2008*, <http://www.epa.gov/epawaste/nonhaz/municipal/msw99.htm>.

¹⁶ Because of direct mail's impact on disposal costs, several cities across the United States have engaged Catalog Choice to operate a voluntary preference registry in association with their waste management departments. The City of Seattle, for example, recently hired Catalog Choice to maintain an opt-out registry on the City's behalf,

The direct mail industry operates under an opt-out system, where consumers bear the burden of determining and controlling how their information is used and with whom it is shared.¹⁷ The sheer volume of direct mail that American households receive, however, makes it virtually impossible for consumers to personally implement their privacy preferences for each company with which they have a relationship. Consumers must locate privacy policies, determine the proper opt-out procedure, and then take all the necessary steps to communicate their requests to each individual company (and often the company's affiliates and third-party marketing relations). Even where consumers actually invest the time and effort, they are typically without recourse if the company fails to honor their requests.

For these reasons, over one million American households embrace Catalog Choice as their agent and preferred tool for communicating their privacy preferences. Instead of visiting company websites and researching privacy policies themselves, Catalog Choice members can leverage the background research and productivity tools that we provide. From company search to confirmation, the process takes between 10 and 15 seconds, a significant time-savings over the “do it yourself” alternative. Simply put, Catalog Choice has changed the economics of opt out.

II. COMMONLY ACCEPTED PRACTICES

Although the shortcomings of privacy policies are well-documented,¹⁸ Catalog Choice's accumulated experience in manually reviewing the privacy policies of more than 3,100 companies gives us a unique perspective on how the Commission can improve their efficacy. We track how long our analysts take to locate a specific company's privacy policy and identify the email address or web form the company uses to receive opt out requests. *Even for specially trained analysts, this process of locating a privacy policy and determining what choice mechanisms are offered takes **seven minutes** on average.*¹⁹ *In fact, we train our staff to read*

financed by fees paid by phone book distributors. See <http://www.seattle.gov/purchasing/docs/bids/RFPSPU2799%2520Letter%2520of%2520Intent%2520to%2520Award.doc>; see also City of Seattle Ordinance No. 123532 (Oct. 14, 2010), available at <http://clerk.ci.seattle.wa.us/~public/cbory.htm>. Catalog Choice has also been endorsed by major environmental groups such as the National Wildlife Federation and the Natural Resources Defense Council.

¹⁷ This system is similar to the Notice and Choice model of the FTC's Fair Information Practices. See, e.g., DMA, *Guidelines to Ethical Business Practice* Art. 31, p.14, available at <http://www.dmaresponsibility.org/guidelines> (2007); see also DMA, *Commitment to Consumer Choice*, available at <http://www.dmaccc.org/> (2007).

¹⁸ See generally Fed. Trade Comm'n, *Protecting Privacy in an Era of Rapid Changes: A Proposed Framework for Businesses and Policymakers* 25-27, 53-57, 70. (Dec. 1, 2010) (hereinafter “FTC Report.”).

¹⁹ By contrast, ordinary consumers take 18-26 minutes on average even to skim privacy policies in order to find answers to specific questions. See Aleecia M. McDonald and Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 I/S: J. L. & POL'Y FOR INFO. SOC'Y 543, 555 (Winter 2008-2009).

privacy policies from the bottom up, since we find that the important, actionable information is almost always located at the end of the policy.

The proposed framework seeks to make privacy policies clearer and shorter by designating certain uses of information “commonly accepted practices,” for which notice and consent are not required.²⁰ Before addressing the precise scope of the practices designated as “commonly accepted,” Catalog Choice first comments on what we believe is the proper significance of that designation.

A. The Significance of the “Commonly Accepted Practices” Designation

The Report correctly observes that requiring consumers to make a series of decisions about innocuous and generally obvious activities serves no useful purpose, and merely burdens consumers.²¹ Disclosing commonly accepted practices is not merely without benefit to consumers, however. Rather, it affirmatively causes detriment to consumers because companies routinely disclose commonly accepted practices in ways that enable them to bury, obfuscate, or deemphasize more objectionable uses of consumer information. Because we read thousands of privacy policies, we can marshal many examples of these tactics:

- *Harriet Carter Gifts, Inc.* The first bolded heading of Harriet Carter's privacy policy²² reads “[W]hat information is gathered about me and why?,” and only discloses commonly accepted practices: order fulfillment, communicating with customers, diagnosing server problems, website administration, and investigating fraud. This section does not mention direct mailing or information sharing. Not until the tenth paragraph, under a different heading, does the policy disclose that customers may “receive mailings from other carefully screened companies with whom we sometimes share our valued customer list.” The email address for receiving opt-out requests does not appear until the fifteenth paragraph.
- *VistaPrint.* The section of VistaPrint's privacy policy²³ entitled “Use and Disclosure of

²⁰ See FTC Report, *supra* note 18 at 53-57. The proposed list of commonly accepted practices generally includes product and service fulfillment, internal operations, fraud prevention, legal compliance, and first-party marketing, as well as disclosure to third parties that perform these tasks on behalf of companies with whom consumer directly share their information. *Id.*

²¹ *Id.* at 54.

²² Harriet Carter Gifts, Inc., *Privacy Statement* (Appendix 1), <http://www.harrietcarter.com/index.cfm/fuseaction/content.page/nodeID/6c002c72-34ac-4daa-99fc-cf3be2f16786/> (last visited Jan. 25, 2011).

²³ VistaPrint, *Privacy Policy* (Appendix 2), <http://www.vistaprint.com/customer-care/privacy-and-security.aspx> (last visited Jan. 25, 2011).

Information” states that VistaPrint uses consumer information for order fulfillment, website and account administration, personalizing consumer experience, and to “inform you about products and services that might be of interest to you.” The next two paragraphs explain in great detail VistaPrint's disclosure of information to other companies for purposes of order fulfillment and other commonly accepted practices,²⁴ disclosure as part of an investigation into unlawful activities, and disclosure in the event VistaPrint merges with or is acquired by another company. Disclosure of information to other direct marketers does not appear under the heading “Use and Disclosure of Information,” but rather in the fifteenth paragraph of the policy.

- *The J. Peterman Company.* J. Peterman's privacy policy²⁵ states that the company uses customer information to “improve your overall shopping experience,” “understand your shopping experience and preferences,” “analyze site traffic, audience trends, etc.,” “improve site design,” and “process and track your order and contact you[.]” Under the heading “How do we use this information?,” the policy states that the “only times” J. Peterman will share consumer data with third-parties other than “an approved vendor . . . performing a specific task or function on behalf of the company” are 1) in response to legal process, and 2) when customers volunteer information in publicly available portions of the website, such as forum posts and reviews. Elsewhere, the policy contradicts this representation by revealing that the company “occasionally make[s] our postal list available for limited use by a few reputable and carefully screened firms.”
- *Tower Hobbies.* Tower Hobbies' privacy policy²⁶ begins by explaining that consumer information is used “to send orders and information about our company to our customers,” and “to bill the user.” The policy's disclosure that Tower Hobbies “occasionally” shares postal addresses with “trusted and approved high-quality companies” is sandwiched between numerous statements regarding commonly accepted practices, as well as a lengthy explanation that Tower Hobbies does not collect information about children under thirteen—*i.e.*, that it does not violate COPPA. Moreover, both immediately before and after the disclosure of address sharing appears the assurances that “We WILL NOT sell or rent your e-mail address to other companies” and “*We never sell or rent e-mail addresses, phone numbers or financial information.*”²⁷

²⁴ The policy provides, as an example, the disclosure of information to a third-party payment processor “as a part of the normal process of completing your purchase,” and assures consumers that these companies are “required to safeguard” information and “are not authorized to use it for any other purpose than completing their contractual requirements[.]”

²⁵ The J. Peterman Company, *Privacy Policy* (Appendix 3), <http://www.jpeterman.com/Privacy> (last visited Jan. 25, 2011).

²⁶ Tower Hobbies, *Protecting Your Online Privacy* (Appendix 4), <http://www.towerhobbies.com/help/privacy.html> (last visited Jan. 25, 2010).

²⁷ *Id.* (emphasis in original).

Consumers reading the policy might reasonably notice the capitalization and italics, rather than the careful limitation to email addresses and omission of any mention of consumer names and postal addresses.

These examples are by no means exceptional. Rather they illustrate a widespread pattern of using commonly accepted practices to create misleading impressions. Commonly accepted practices are immediately disclosed at the beginning of the policy, while more objectionable practices are buried at the end, in the fine print of what is essentially a fine print policy. Commonly accepted practices are given visual emphasis through the use of italics, capitalization, boldface, and prominent headings, while direct mail advertising and information sharing appear in plain text and under separate, less intuitive, headings. Commonly accepted practices are explained in great detail, while direct mail advertising and information sharing are only briefly disclosed in vague and general terms, if at all.

Catalog Choice believes that such misleading disclosures rise to the level of deceptive trade practices.²⁸ A substantial body of research demonstrates that the average reader is highly likely to overlook hidden information after being inundated with other information first.²⁹ In the advertising context, courts and the Commission have concluded that an advertisement, taken as a whole, is misleading where a company conveys one primary impression that is negated by fine-print disclosures. Privacy policies should be held to the same standard.³⁰

Simply put, consumers will be better off if companies do not include commonly accepted practices in their privacy policies. Even if companies need not obtain consent for commonly accepted practices, however, they will continue to disclose commonly accepted practices as a matter of course in order to maintain an informational advantage regarding how they use consumer data. Dispensing with the requirement of consent for commonly accepted practices will have little, if any, effect on the status quo. Thus the proposed framework does not go far enough: the FTC should require companies to disclose practices that are not commonly accepted (such as sale to third parties) and how to opt out of such uses early in the policy and before

²⁸ See, e.g., *Fed. Trade Comm'n v. Cyberspace.com LLC*, 453 F.3d 1196, 1200 (2006) (“A solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures”).

²⁹ See, e.g., John C. Bergstrom & John R. Stoll, *An Analysis of Information Overload with Implications for Survey Design Research*, 12 LEISURE SCI. 265 (1990); Kevin L. Keller & Richard Staelin, *Effects of Quality and Quantity of Information on Decision Effectiveness*, 14 J. CONSUMER RESEARCH 200, 211 (1987); Naresh K. Malhotra, *Information Load and Consumer Decision Making*, 8 J. CONSUMER RESEARCH 419 (1982).

³⁰ Cf. FTC Report, *supra* note 18 at E-1 (statement of Comm'r Rosch) (“A privacy notice that is *opaque* or fails to disclose material facts (such as the fact that consumer information may be shared with third parties) is deceptive under Section 5.”) (emphasis added).

disclosing commonly accepted practices.³¹

B. Other Issues Concerning the Proposed List of Commonly Accepted Practices

- *Should first-party marketing be limited to the context in which the data is collected from the consumer?*

Our unique position as the Choice Portal for millions of consumers and thousands of companies has given us insight into the complexity of first party marketing issues. Consumers want to control the volume and content of marketing that they receive through all marketing channels. Consumers make choices about each channel independently, including postal mail, email, phone (mobile and landline), Internet, newspapers, magazines, radio and TV. At the same time, companies must be able to send marketing material to their customers as a standard business practice.

Identifying “the context in which the data is collected from the consumer” is extremely difficult since companies operate in a multi-channel environment and they obtain prospect names through multiple sources. It is virtually impossible to determine with certainty if a consumer is making a purchase online as a response to email advertising, online advertising, direct mail advertising, or other offline advertising. As a result, when a company prospects for new customers through multiple marketing channels, one cannot reliably define the “context in which the data is collected from the consumer.” This is especially true when the data was collected as part of a list rental.

Catalog Choice has unique data about customer behavior and perception as it pertains to postal mail. Catalog Choice asks each member, at the time they submit an opt-out request, to indicate why they decided to send a request to that particular brand or company. Approximately 15% of the 8 million responses indicate that members opted out because they preferred to go online for products and services, while 38% of opt-outs were made to “help the environment.” In other words, more than half of these opt-out requests reflect a deliberate choice about marketing channels, and the member may continue to purchase that company's products or services. By contrast, roughly 39% of responses indicate that members opted out of a particular company's direct mail advertising because they had no interest in the company's products.³²

The issue of context is complicated by the fact that limiting first-party marketing to the context

³¹ Analogizing from website design principles and best practices, unexpected uses of data should appear “above the fold” in privacy policies. “Above the fold” is a graphic design concept that refers to the location of important or appealing text or images, and in the web development context refers to portions of a webpage that are visible without scrolling.

³² A graphic depicting the full results of this survey to date appears in Appendix 16.

in which a consumer transacts with a company aligns with consumer expectations. Catalog Choice conducted an additional survey in response to the FTC Report, with 1,700 members responding. Only 25.4% of respondents said that they expect to receive direct mail after completing an online transaction. While not based on a random sample of the public, these results demonstrate that at least among Catalog Choice members, there is a basic sense that establishing a relationship with a vendor or service provider in one context should not create an inference of consent to receive advertising in other context.

Since there are divergent consumer expectations and necessary company practices, it is not possible to limit first party marketing to the context in which the data is collected. As a result, it is critical that the FTC framework ensure that it is easy for consumers to opt-out of marketing through any channel that relies on personal information and that the opt-out persist over time.

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

Catalog Choice takes the position that marketing by commonly-branded affiliates, as well as information sharing among commonly-branded affiliates, is generally an acceptable practice. Catalog Choice believes, however, that the definition of “commonly-branded” should be limited to affiliates which share a common trademark. Based on our first-hand experience fielding inquiries from our members regarding how brands are connected through parent or holding companies, there are likely to be only a few, if any, scenarios where it is sufficiently clear to ordinary consumers that two affiliates are commonly branded unless they share a trademark.

The issue of whether information sharing among affiliates is a commonly accepted practice is less important than the issue of parity in the opt-out process. Companies that share information among affiliates, as a matter of course, require consumers to send separate opt-out requests to each affiliate. If a company shares consumer information with its affiliates, it should offer a corporate-wide opt-out process, and a title-specific one if they so choose. Unless such a process is available, companies should not only have to disclose the fact that they share information with their affiliates, but also that multiple opt-out requests will be necessary. The issue of parity is further explored below in Part III.A, *infra*.

III. PRACTICES THAT REQUIRE MEANINGFUL CHOICE

- *What is the most appropriate way to obtain consent for practices that do not fall within the “commonly accepted” category?*

The proposed framework is based on the premise that the opportunity to make a meaningful decision at the time consumers provide their information is all they need to implement their privacy choices.³³ Consumers, however, frequently act to terminate or revoke the “consent” they

³³ See, e.g., FTC Report, *supra* note 18, at 58 (stressing that consumer choice mechanisms “should be offered at the

previously gave to certain practices. They may have failed to understand the company's disclosures, or simply failed to read them; they may have comprehended the nature of the practices disclosed but not the extent or consequences of those practices; or they may have genuinely consented to the company's practices and merely changed their minds at a later date.³⁴

Whatever their reasons, consumers who want to stop companies from using their information after the initial transaction should be able to do so easily. The Report's focus on notice and choice **during** the initial transaction is therefore too narrow. Consumers must have a reliable, standardized, post-transaction opt-out mechanism in addition to notice and consent during the initial transaction.³⁵

A. Companies Unnecessarily Complicate the Post-Transaction Opt-Out Process

Once the initial transaction is complete, however, opting out is difficult for typical consumers because post-transaction opt-out processes vary considerably among companies.³⁶ Determining the opt-out process specified in a privacy policy and taking the necessary steps to complete the process takes a substantial amount of time—enough to prevent many consumers from exercising their options.³⁷ Many companies compound this problem by adding unreasonable obstacles to the process, such as

- *Severely Limiting the Ways in Which Consumers May Send Requests.* Many companies insist that consumers submit opt out requests in inconvenient ways. Meredith Corporation, for instance, requires that consumers send a letter to opt out of receiving unsolicited postal mail.³⁸ Discover Card and HSBC only accept opt-out requests over the

point when the consumer is providing data or otherwise engaging with the company.”). For offline retailers, “disclosure and consumer control should take place at the point of sale,” while online retailers should provide choice “on the page on which the consumer types in his or her personal information.” *Id.*

³⁴ The 18 million opt-out requests sent by Catalog Choice suggest that these scenarios are more than mere hypotheticals. Many requests sent by Catalog Choice members are directed at companies with which the member has a relationship. Thus, these members opt-out of direct mail they previously “agreed” to receive.

³⁵ The Report essentially concedes as much by acknowledging that even if companies fully disclose their practices in a comprehensible manner, consumers are unlikely “to interrupt an ongoing transaction,” locate and read these disclosure, and then “consider how the data . . . will be shared and used for other purposes, potentially at a later date.” *Id.* at 27. If only for this reason, consumers will continue to unknowingly “consent” to practices they find objectionable, even if privacy policies are fully disclosing and comprehensible.

³⁶ *Sovern, Opting In, supra* note 5, at 1074-75.

³⁷ *Id.* at 1075, 1090. This is especially true given that the average consumer is profiled on dozens, if not hundreds, of different databases. *See id.* at 1036.

³⁸ Meredith Corp., *Online Privacy Statement* (Appendix 5), http://www.meredith.com/privacy.html#Opt_out (last

phone.³⁹ VistaPrint requires consumers to create an online account with the company or write a letter.⁴⁰ Many companies that actually accept requests via email often do not inform consumers of this option. Gevalia, for example, accepts opt-outs via email, yet tells consumers that they must call or write a letter to “request that we refrain from contacting you.”⁴¹ Other companies provide email forms, but require consumers to provide often unknown customer ID numbers or source codes, or to complete captchas.⁴²

- *Arbitrarily Bifurcating the Opt-Out Process.* Some companies force consumers to separately opt-out of direct mail advertising and information sharing even though both choices directly relate to the company's use of consumer names and addresses. For instance, Hanes requires consumers to complete its email form twice—once to opt out of receiving direct mail, and once to opt out of information sharing.⁴³ LEGO's online consumers may opt out of *information sharing* at the point where they provide their information, but cannot opt out of *direct mail* at that point.⁴⁴ Likewise, LEGO customers may use the company's email form to opt out of *direct mail*, but not *information*

visited Feb. 9, 2011). Note that the instructions on how to opt out of direct mail do not appear under the hyperlinked heading “Opt-Out Information.”

³⁹ See HBSC, *Privacy FAQs* (Appendix 6), <http://www.us.hsbc.com/1/2/3/personal/inside/privacy/faqs> (last visited Feb. 9, 2011); Discover Card, *Privacy Notice*, (Appendix 7), <http://www.discovercard.com/customer-service/privacy-policies/> (last visited Feb. 9, 2011).

⁴⁰ See VistaPrint, *Privacy Policy*, *supra* note 23.

⁴¹ Gevalia, *Privacy Notice* (Appendix 8), <http://www.gevalia.com/privacy-notice.aspx#collect> (last visited Feb. 9, 2011).

⁴² Captchas are a common method of limiting access to online services by requiring visual verification of a bitmapped image. Although purportedly used to combat spam, captchas have a documented negative impact on the accessibility and usability of web forms, as studies have shown that the use of captchas significantly reduces the number of people who complete a web form. See, e.g., Casey Hen, *CAPTCHA's Effect on Conversion Rates*, available at <http://www.seomoz.org/blog/captchas-affect-on-conversion-rates> (July 19, 2009); see also World Wide Web Consortium, *Inaccessibility of CAPTCHA: Alternatives to Visual Turing Tests on the Web*, W3C Working Group Note, available at <http://www.w3.org/TR/turingtest> (Nov. 2005) (describing usability problems, particularly for individuals who are vision impaired or dyslexic, and describing alternatives that enable systems to test for human users while preserving accessibility). In the direct mail opt-out context, where captchas are increasingly common, this additional step does nothing to verify the identity of the person making the request, and merely increases transaction costs for consumers.

⁴³ Hanes Clothing, *Contact Us by Email*, <http://www.hanes.com/Hanes/Marketing/EmailCustomerService.aspx> (last visited Feb. 9, 2011) (user must send one email under the preformatted subject heading “Stop Catalog Mailings,” and another under a separate preformatted heading, “Do Not Rent My Name or Address.”).

⁴⁴ The LEGO Group, *Privacy Policy* (Appendix 9), http://shop.lego.com/TermsPolicies/privacy_policy.asp (last visited Feb. 9, 2011).

sharing.⁴⁵ Rather, once they complete the initial transaction, the only way consumers can opt out of information sharing is by calling LEGO's customer service number.

- *Disclosing Nonexistent Opt-Out Mechanisms.* Some companies describe methods for sending opt outs that do not actually exist. Goldshield Healthcare Direct, for example, states that consumers may opt-out "at the point where we request information."⁴⁶ Contrary to this representation, the webpage where consumers enter their billing and shipping information to complete purchases does not provide any opt-out mechanism. Belk's privacy policy, while it does not expressly state that consumers have any ability to submit opt-out requests, describes and links to an email form on the "Contact Us" page for submitting "questions regarding [Belk's] privacy policy." Despite this representation, there is no email form on the "Contact Us" page, or anywhere else on the Belk website.⁴⁷
- *Failing to Disclose Any Opt Out Process for Certain Practices.* Gevalia discloses the fact that it shares information with other marketers, but does not state that users have the ability to opt out of such sharing—rather, the only opt out mechanism described is for direct mail.⁴⁸ Goldshield Direct represents that consumers have "options for removing their information from our database."⁴⁹ This clearly implies some way of opting out after consumers provide their information, yet the policy fails to specify any way to do so.
- *Designing the Opt Out Process to Yield Ambiguous Results.* Many companies describe their opt-out process in ways that make the effect of opt-outing indiscernible. VistaPrint says that it will not share "Personal Information, such as [] email address or name, with unaffiliated organizations" unless consumers opt in by checking a box.⁵⁰ VistaPrint later reveals, however, that "[e]ven if you do not opt in to this sharing" with unaffiliated organizations, "we may still share Personal Information about you with other companies

⁴⁵ Although Lego's privacy policy states that consumers with questions about their child's privacy "may contact our Chief Privacy Officer" by clicking a hyperlink, the link provided merely directs them to the same generic email form addressed to Lego's customer service department. *See id.*

⁴⁶ *See* Goldshield Healthcare Direct, Inc. (Appendix 10), *Privacy Policy*, http://www.goldshielddirect.com/privacy_policy.html (last visited Feb 9, 2011).

⁴⁷ The policy directs to a webpage, which, instead of featuring an email form, lists *fifty* different links; clicking on the "Privacy" link merely redirects consumers back to the privacy policy. *See* Belk Inc., (Appendix 11), *Contact Us*, http://www.belk.com/AST/Misc/Belk_Stores/Customer_Service/Contact_Us.jsp (last visited Feb. 9, 2011).

⁴⁸ *See* Gevalia, *Privacy Notice*, *supra* note 41

⁴⁹ *See* Goldshield Direct, *Privacy Policy*, *supra* note 46.

⁵⁰ *See* VistaPrint, *Privacy Policy*, *supra* note #. "Unaffiliated organizations" apparently does not include "Other companies with whom we have joint marketing arrangements," with whom VistaPrint may share freely. *See id.*

as permitted or required by law.”⁵¹ Despite having encountered this and similar language in hundreds of different privacy policies, Catalog Choice and its experts cannot be sure what it meant by it.

- *Fragmenting the Opt Out Process.* Companies that share consumer information with their affiliates require, virtually without exception, that consumers complete individual opt-out requests for each affiliate.⁵² For example, when consumers complete an online purchase from Hanes, they consent (by default) to receive direct mail from each of the eleven brands owned by Hanesbrands, Inc.⁵³ Consumers who request that Hanes stop sending direct mail may continue to receive direct mail from Champion and other brands. If consumers request that Hanes stop selling their information, Playtex may continue to do so. Thus, although consumers provide their information only once, they must visit multiple websites and send multiple opt-out requests in order to effectively control the information provided. A similar problem occurs with data brokers.
- *Failing to Confirm Opt-Out Requests.* Companies often fail to acknowledge the consumer’s opt-out request. Approximately 20% of the requests submitted through Catalog Choice never receive a confirmation from the company. Given that companies often tell consumers that they may continue to receive direct mail advertising for up to ninety days after submitting a request, consumers often cannot determine whether a company even received their request for three months after opting out.

Many of these actions may seem reasonable taken individually. Cumulatively, however, they prevent consumers from implementing their privacy preferences without an unreasonable expenditure of time. Given that companies derive a direct financial benefit from keeping names on their customer file lists, the reasonable inference is that time-consuming and inconvenient options are designed to raise transaction costs and thus decrease the chances that a consumer will

⁵¹ *Id.* (emphasis added). VistaPrint, as “permitted” by law, sells nineteen customer lists on NextMark.com, some with nearly 3 million names. See Nextmark, Inc., “VistaPrint Mailing Lists,” <http://lists.nextmark.com/market> (search “VistaPrint.”) (last visited Jan. 25, 2011).

⁵² LL Bean is a rare exception. LL Beans gives its customers the choice of opting out of individual LL Bean brands, or sending a corporate-wide opt out, which removes the consumers information from the mailing lists of all LL Bean brands. This is just one way, among many, that LL Bean does an extraordinary job at facilitating consumer choice.

⁵³ These brands include Hanes, Champion, Playtex, Wonderbra, Just My Size, Outer Banks, L’eggs, barely there, Bali, Duo Fold, and Hanes Hosiery. See Hanesbrands, Inc., *Our Brands*, <http://www.hanesbrands.com/hbi/templates/OurBrands/Default.aspx> (last visited Feb. 1, 2011). The Hanes privacy policy identifies only seven of these brands, and neither provides information on how to send opt-out requests to other brands nor links to their websites nor. See Hanes Clothing, *Privacy Statement* (Appendix 12), <http://www.hanes.com/Hanes/Service/contentviewer.aspx?ID=PrivacySecurity> (last visited Feb. 17, 2011).

exercise their options. This runs counter to the FIPPs, the DMA Ethical Guidelines, and, in many instances, the companies' own claims of respecting consumer privacy.

B. Frustrating Legitimate Agency Relationships

Precisely because companies make opting-out so complicated and time-consuming, many consumers cannot deal with the large amount of direct mail advertising they receive without services like Catalog Choice. The vast majority of the 3,100 companies listed on catalogchoice.org do an excellent job at honoring our members' choices. However, several hundred direct mail advertisers, including some of the largest in the country, have failed to honor requests sent by our members at one point or another.

Some companies have flatly refused to accept members' requests, often justifying their refusal to honor consumer choice by stating that they do not accept "third-party" requests.⁵⁴ But Catalog Choice members themselves initiate the opt-out process, on a title-specific basis, and whether to draft their own request or use the default language we provide. Catalog Choice does not create and send opt-out requests—our members do. Catalog Choice merely streamlines the process and transmits members' requests on their behalf and at their direction. To the extent that additional authority is necessary to perform these functions, our members expressly authorize Catalog Choice to act as their agent in communicating their opt-out requests.⁵⁵ Consistent with this agency agreement, members retain the right to revoke a request or terminate their at-will relationship with Catalog Choice at any time. Therefore, any contention that Catalog Choice is a "third party" not only ignores reality, but also ignores universally accepted agency principles firmly established in the law of every state for centuries.⁵⁶ The DMA has directly encouraged companies to continue erroneously and unreasonably asserting that Catalog Choice is a "third party," in ignorance of fundamental agency principles.⁵⁷

Some companies attempt to justify their refusal to honor our members' choices because they

⁵⁴ See, e.g., Tower Hobbies, *Protecting Your Online Privacy*, *supra* note 26.

⁵⁵ The Terms of Service on Catalog Choice's website explicitly state that Catalog Choice will act as an agent for its members. See Catalog Choice, Inc., *Terms of Service*, <https://www.catalogchoice.org/tos>.

⁵⁶ An act by the agent designed to carry out the purpose of the agency is considered the act of the principal. See e.g. *In re Guardianship of Muriel K.*, 251 Wis.2d 10 (Wis. 2002). Under Cal. Civ. Code § 2319, an agent has the authority to "do everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of his agency."

⁵⁷ See Emails from John Greco, President and CEO, DMA, "TO: THE CATALOG COMMUNITY ON THIRD PARTY SUPPRESSION LISTS CC: Related Industries, ACTION: "JUST SAY NO" (Appendix 13) (Nov. 30, 2007) ("The DMA does not and will not accept third party mail suppression lists and neither should your organization!").

question the authenticity of our members' accounts and requests.⁵⁸ This rationale is untenable, for several reasons. First, although direct mail advertising benefits consumers in many ways, the likelihood and probable consequences of an erroneous opt-out simply does not justify a blanket refusal to accept all opt-outs sent by Catalog Choice members, which in many cases amounts to tens of thousands of requests for a single brand. Second, Catalog Choice's email authentication process is not only industry-standard, but is virtually identical to the process the FTC uses for the Do Not Call Registry, and there is no compelling reason why opting out of one company's direct mail advertising necessitates greater safeguards than opting out of *all* telemarketing. Third, Catalog Choice utilizes a number of measures to track abnormal use patterns and identify fraudulent accounts.⁵⁹ Finally, Catalog Choice allows companies to request additional information from members to confirm the validity of a request.

Other companies surreptitiously employ a variety of technological means to block our members' requests. Catalog Choice retained an expert, Dr. Nathan Good, to document these deceptive practices.⁶⁰ Dr. Good discovered that one company, Goldshield Direct, accepted (but did not respond to) emails sent from consumers' personal email addresses, while blocking identical emails sent from Catalog Choice's domain. Dr. Good concluded that Goldshield Direct manipulated its email server to block emails based on the sender's identity, and even sent return messages falsely stating that the inbox was full. Another company, Giro's Garage, blocked all emails containing the words "Catalog Choice," whether sent from Catalog Choice accounts or consumers' personal email addresses. Another company, Wine Country Gift Baskets, has programmed their Contact Us form to not accept the unique Catalog Choice email address that we provide to our members and the member chooses to use when submitting an opt-out request.⁶¹ Another company, KBM Group, one of the nation's largest data service providers, has programmed their mail server to refuse email sent from the Catalog Choice email server.⁶²

When companies fail to honor requests simply because consumers sent them through Catalog Choice, they fail to honor requests made by consumers themselves. Thus, in virtually all of these

⁵⁸ *See id.*

⁵⁹ Many of the authentication and validation measures voluntarily adopted by Catalog Choice recently became mandated by regulation as part of Catalog Choice's agreement with the City of Seattle. Catalog Choice implements these measures across our entire system.

⁶⁰ Dr. Good has previously presented research at FTC workshops on peer-to-peer programs and negative option marketing. Dr. Good's preliminary report focuses on 31 direct mailers and details the technical means employed to refuse their customers' requests. Catalog Choice would gladly submit Dr. Good's results to the Commission if permitted to do so under seal.

⁶¹ Wine Country Gift Baskets contact form is located at: http://www.winecountrygiftbaskets.com/information/online_service.asp and this error page appears when one uses <https://img.skitch.com/20110218-eceucrct9pp9kj1td2qrwrn1r.jpg>

⁶² Bounce report : 550 Rule imposed mailbox access for privacy@knowledgebasemarketing.com refused privacy@knowledgebasemarketing.com February 16, 2011 - 1:50 pm

instances, the failure to honor consumer opt-out requests was in direct contravention of express or implied representations in the company's privacy policy. The DMA not only tolerates but actually *encourages* this ongoing deception by telling its members, both directly and indirectly, not to work with Catalog Choice.⁶³

This deceptive conduct harms a number of different stakeholders. First, it forces consumers to either incur the costs of disposing unwanted mail or expend additional time and energy pursuing other opt-out strategies. Furthermore, refusing requests sent from Catalog Choice email accounts forces consumers to send opt-out requests with their personal email address, which companies misuse.⁶⁴ Second, by preventing Catalog Choice from fulfilling the sole purpose of its agency, these companies directly harm Catalog Choice through damage to goodwill. Third, by continuing to send advertisements and engage in information sharing, these companies gain an unfair economic advantage over those companies who do honor consumer requests.

C. A Proposal For a Standardized Post-Transaction Opt-Out Mechanism

For the reasons described above, the Commission should create a mandatory, universal opt-out process that remains available to consumers beyond the initial transaction. Companies should be required to have this mechanism in place before they collect and use information for any purpose

⁶³ Emails from John Greco, President and CEO, DMA, "TO: THE CATALOG COMMUNITY ON THIRD PARTY SUPPRESSION LISTS CC: Related Industries, ACTION: "JUST SAY NO" (Nov. 30, 2007 ("We urge you to refuse to use their service and "Just say No." . . . Vendors, such as Catalog Choice, have made it clear that their priority is to eliminate catalogs as a marketing medium – it is not in your interest to further their efforts! . . . The DMA does not and will not accept third party mail suppression lists and neither should your organization!")); *see also* Emails from John Greco to DMA Members (Feb. 12, 2008; June 26, 2008).

The DMA's obstinacy stands in stark contrast to industry groups like the ACMA, who recognize the legitimacy and necessity of opt-out agents like Catalog Choice in a self-regulatory opt-out model. *See* ACMA, "Comments on Commercial Data Privacy and Innovation in the Internet Economy: A Dynamic Policy Framework," at 2, 7 (Jan. 28, 2011) ("[O]utside third-party services such as . . . Catalog Choice [] give consumers the control they need," and are "important self-regulation tools."); *see also* Hamilton Davison, Catalogers on Catalog Choice: Love It? Hate It? Leave It? or Embrace It?, available at <http://www.catalogmailers.org/clubportal/clubstatic.cfm?clubID=2129 &pubmenuoptID=35377> (ACMA Executive Director noting that Catalog Choice is "not anti-catalog" and "legitimately organized and sincere in its business goals."); *see also* ACMA Press Release, "ACMA calls on catalogers to participate with Catalog Choice to execute consumer preference requests" (announcing "unanimous decision to recommend catalogers actively embrace consumer mail preferences and enter into a merchant licensing agreement with Catalog Choice[.]").

⁶⁴ For example, companies have sent *more than 18,000 spam emails* to emails.org email addresses. *See* Catalog Choice, Inbox Screenshot (Appendix 14), *available* at <http://bit.ly/merchantoptoutspam> (inbox showing 18,169 spam emails from various merchants as of Feb. 18, 2011). Companies only obtain these anonymous email addresses when consumers clearly express their desire to stop receiving communications by sending an opt-out request, yet companies respond by adding consumers to their email databases. As indicated in Appendix 14, some of these companies—including many of the nation's largest retailers, as well as many DMA members—sent spam emails to over a hundred emails.org addresses in a single day.

not deemed a “commonly accepted practice.” This process should incorporate the following requirements:

- Companies must at least provide a dedicated email address for receiving opt-out requests.⁶⁵
- Companies must confirm the receipt of the opt-out request so that the consumer has a record of their transaction for future reference.
- Companies that receive an opt-out request must cease engaging in all uses of the requester's information other than commonly accepted practices, unless the request expressly states otherwise.⁶⁶
- Companies that share consumer information with affiliates must either provide a corporate-wide opt-out mechanism, or treat an opt-out request sent to any one affiliate as an opt-out request sent to all affiliates unless the request expressly states otherwise.⁶⁷
- Once a consumer sends an opt-out request, a company must obtain affirmative consent before engaging in practices that are not commonly accepted with regard to that consumer; a consumer's failure to disturb a default setting in a subsequent transaction does not constitute affirmative consent.⁶⁸
- Companies must accept opt-out requests sent by consumers through the use of an agent.

These proposed requirements are not without precedent. The CAN-SPAM Act already imposes many of these requirements in the commercial email context. Catalog Choice does not propose, suggest, or endorse a wholesale import of CAN-SPAM into other contexts. The Commission should, however, consider the ways in which CAN-SPAM has shaped consumer expectations regarding unsolicited communications in the years since its passage. Importantly, Congress already has expressly declared much of the conduct described above to be unfair or deceptive trade practice.⁶⁹ Virtually identical conduct in other contexts, including the direct mail industry,

⁶⁵ Compare 15 U.S.C. § 7703(a)(3)(A) (senders of commercial email messages must include an email address capable of receiving opt-out requests for at least 30 days after transmission of the original message).

⁶⁶ At minimum, a company that receives a request to stop receiving direct mail advertisements must cease selling, sharing, or trading the requester's information for marketing purposes. Compare *id.* at § 7704(a)(4)(A)(iv) (senders of commercial email may not sell, lease, exchange or otherwise transfer the email address of someone who opts-out of receiving email solicitations for any purpose other than compliance with law).

⁶⁷ Compare *id.* at § 7704(a)(4)(A)(ii) (applying prohibitions to “any person acting on behalf of the sender.”); see also *id.* at § 7704(a)(4)(A)(iv) (“any other person who knows” that an individual has declined email solicitations may not transfer that individual's email address “for any purpose other than compliance with . . . law.”).

⁶⁸ Compare *id.* at § 7704(a)(4)(B) (after receiving an opt-out, sender of commercial email may not send commercial email messages without obtaining “subsequent affirmative consent.”); see also *id.* at § 7702(1) (defining “affirmative consent”).

⁶⁹ See *id.* at § 7706(a).

is no less unfair or deceptive, and should be addressed accordingly.

IV. REASONABLE ACCESS TO CONSUMER DATA

- *Should companies inform consumers of the identity of those with whom the company has shared data about the consumer, as well as the source of the data?*

Consumers are entitled to know how their information will be or has been shared, but there is no way for them to find out unless companies tell them. Very few privacy policies, however, accurately describe information sharing practices. Instead, misleading statements about information sharing—both express and implied—are the norm in privacy policies.

Many companies sell their customer lists to any company willing to pay the asking price, often through websites like NextMark.com.⁷⁰ These companies, however, represent to consumers they only “sometimes”⁷¹ or “occasionally”⁷² share information with third-party marketers. The companies further represent that sharing is limited to their “partners,”⁷³ or “trusted and approved high-quality companies” chosen according to “a very high standard,”⁷⁴ or “carefully screened companies.”⁷⁵ For example, the “carefully screened firms” with which J. Peterman “occasionally” shares information includes *fifty-two* companies that have purchased its customer files on Nextmark.com alone.⁷⁶

⁷⁰ Eight of the twelve companies discussed in this comment sell their customer lists through NextMark. See generally NextMark, *Mailing List Finder*, <http://lists.nextmark.com/market>. The exceptions are HSBC, CapitalOne, Lego and Belk.

⁷¹ See Harriet Carter, *Privacy Statement*, *supra* note 22.

⁷² See e.g. J. Peterman, *Privacy Policy*, *supra* note 25.

⁷³ See, e.g., Goldshield Direct, *Privacy Policy*, *supra* note 46. Goldshield Direct's privacy policy only discloses information sharing by stating that consumers may “opt-out of receiving communications from us *and our partners* . . .” *Id.* (emphasis added). *But cf.* http://lists.nextmark.com/market?page=order/online/search_results&selection=0&searchText=goldshield&searchMode=1&prevSearchMode=1&listType=ALL&listStatus=ACTV (last visited Feb. 17, 2011).

⁷⁴ See, e.g., Tower Hobbies, *Protecting Your Online Privacy*, *supra* note 26. *But cf.* <http://lists.nextmark.com/market?page=order/online/datacard&id=260420> (last visited Jan. 25, 2011).

⁷⁵ See Harriet Carter, *Privacy Statement*, *supra* note 22. *But cf.* NextMark, *Harriet Carter Masterfile Mailing List Data Card*, available at <http://lists.nextmark.com/marketpage=order/online/datacard&id=216474> (last visited Jan. 25, 2011).

⁷⁶ See NextMark, *J. Peterman Co. Mailing List Data Card*, <http://lists.nextmark.com/marketpage=order/online/datacard&id=263657> (last visited Jan. 25, 2011).

At minimum, these “opaque” statements are unlikely to aid consumers in understanding the nature and extent of a company’s information sharing practices.⁷⁷ The resultant uncertainty makes it difficult for consumers to exercise control over their information and privacy preferences. In many cases, however, these representations are not only unhelpful but reflect a deliberate effort to mislead consumers into believing that sharing is less extensive than it actually is. Even if other statements in these privacy policies constitute truthful statements about information sharing, courts and the Commission have long recognized that, where the general effect of a communication conveys one message, the existence of accurate disclosures will not prevent the communication from being deceptive as a whole.⁷⁸

Simply granting consumers the right to request that a company disclose the identities of the third-parties who receive information from the company is insufficient, as many California residents have learned. As many California residents have learned, however, simply mandating that companies identify. California’s “Shine the Light” law gives its residents a right to request disclosure of how a company uses their information for secondary marketing purposes.⁷⁹ Of course, this right is little help to consumers considering whether to complete an online transaction, because companies have 30 days to respond to a request. Moreover, as indicated by researchers at University of California, Berkeley, the level of compliance with the law is low: only 55% of companies properly complied with the law’s requirements.⁸⁰

Companies engaged in third-party information sharing should therefore be required to explicitly identify third parties to whom they sell or transfer consumers’ information. It may not be feasible for companies to precisely track the third-parties to which they have provided a particular consumer’s information in the past. However, companies should be required to list the name of every third-party it currently shares consumer information with and update the list semi-annually. Ideally, this list would appear in the company’s privacy policy. If the Commission believes that including the list in privacy policies would hinder its goal of making privacy policies shorter, companies should include a hyperlink in their privacy policy which displays this list (and only this list). Catalog Choice also believes that rather than listing third parties’ identities in plain text, the list should contain hyperlinks to each third parties homepage or privacy policy.

⁷⁷ Cf. FTC Report, *supra* note 17 at E-1 (statement of Comm’r Rosch) (“A privacy notice that is *opaque* or fails to disclose material facts (such as the fact that consumer information may be shared with third parties) is deceptive under Section 5.”) (emphasis added).

⁷⁸ *Fed. Trade Comm’n v. Cyberspace.com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006); *see also Fed. Trade Comm’n v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 40 (D.C. Cir.1985).

⁷⁹ *See* Cal. Civ. Code §§ 1798.80-1798.84.

⁸⁰ Chris Jay Hoofnagle and Jennifer King, *Consumer Information Sharing: Where the Sun Still Don’t Shine*, U.C. Berkeley School of Law, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1137990 (Dec. 17, 2010). A copy of this study appears in Appendix 15.

Such a requirement would enable consumers to effectively control who possesses their information and how it is used. More importantly, perhaps, requiring companies to affirmatively identify third-parties would serve as a quick and reasonably reliable way to gauge a company's commitment to privacy, and thus promote competition.

V. CONCLUSION

Thank you for soliciting comments on the preliminary staff report. We urge the FTC to:

- Encourage the adoption of centralized, standardized choice mechanisms that are easy to use, effective and enforceable for all marketing channels.
- Encourage the development of *privacy agents* that act on behalf of consumers to reduce transaction costs in expressing preferences.
- Create incentives for privacy policy drafting that presents unexpected uses and choice mechanisms in clear and usable way for consumers.

Please do not hesitate to contact us if you have any questions or would like additional information.

Respectfully Submitted,

/s

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