



Federal Trade Commission

THE IMPORTANCE OF SELF-REGULATION: A VIEW FROM THE FEDERAL TRADE COMMISSION

J. Thomas Rosch¹
Commissioner, Federal Trade Commission

at the

American Teleservices Association Washington Summit
Washington, DC
April 24, 2007

Good morning. I am delighted to be here with you today to offer some of my views on issues and developments at the Federal Trade Commission that relate to the telemarketing industry generally, and in particular, to the importance and effectiveness of self-regulation in this industry.

As many of you may know, the Commission considers the Do Not Call Registry to be an unqualified success. More than 143 million telephone numbers have been registered since its inception in 2003. Yahoo! ranked the launch of the FTC's Do Not Call website as one of the top 100 moments on the web over the last ten years. The success of the DNC Registry also has caught the attention of the international community – other countries, including Mexico, have consulted with the FTC in deciding whether to develop their own registry frameworks, and

¹ The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I would like to express my gratitude to Beth Delaney and Serena Viswanathan, my attorney advisors, for their contributions to this speech.

Canada and Australia have authorized their own do not call programs.

Most entities covered by the DNC Rule comply with its requirements, and while the FTC appreciates the high level of compliance, tough enforcement against those who don't is a high priority.² For example, the San Francisco Chronicle recently reported that some Bay Area residents are seeing a rise in the last year of unsolicited calls from what they believe are telemarketers who are violating the spirit of the DNC provisions.³ In particular, the article mentioned that some of these calls may be from "lead generators" based overseas. So far, our complaint data hasn't indicated that this is a widespread problem. However, we take reports like this seriously and we will be continuing to examine this issue closely.

Since the FTC began enforcing compliance with the Registry in October 2003, the agency has brought 25 enforcement actions against 52 individual and 73 corporate defendants, alleging that they had called consumers protected by the Registry. In 19 of those cases, the FTC obtained settlements with orders requiring payment in the aggregate of \$9 million in civil penalties and more than \$8.2 million in consumer redress and disgorgement.

Of these, there are a few particularly notable cases I would like to highlight. For example, in December 2005, the FTC announced its then-largest civil penalty in a consumer

² In fiscal year 2006, the FTC received more than 1,000,000 consumer complaints alleging DNC violations.

³ Ryan Kim, "Telemarketers Getting Through," S.F. Chronicle, Apr. 16, 2007, at C1.

protection action – \$5.3 million – to settle FTC charges that a satellite television firm and companies it hired to promote its programming violated the DNC provisions of the Telemarketing Sales Rule.⁴ That following January, under a settlement reached by the FTC, a company and its CEO became the first service providers to pay a penalty for allegedly violating the “assisting and facilitating” provision of the TSR.⁵ In May 2006, in the FTC’s first case alleging transmission of false caller ID information, the agency sought civil penalties and an injunction against a nationwide telemarketer of mortgage loans for calling people whose numbers are listed on the Registry and doing so without identifying itself.⁶

In June 2006, in the FTC’s first case to highlight the application of DNC provisions to corporate affiliates, a seller of discount drug cards and its telemarketer were ordered to pay \$300,000 and \$50,000 respectively, to settle charges that they violated the DNC provisions of the TSR.⁷ The defendants had asserted that they were permitted to call consumers on the DNC Registry on the basis of a purported established business relationship between the consumers and the seller’s corporate affiliates, but the FTC contended that the relationship did not meet the

⁴ *U.S. v. DirecTV*, Civil Action No.: SAC V05 1211 (C.D.Cal 2005). Complaint and Stipulated Judgment and Order available at www.ftc.gov/os/caselist/0423039/0423039.shtm.

⁵ *U.S. v. Entrepreneurial Strategies, Ltd.*, Civil Action No.: 2:06-CV-15 (WCO), (N.D.Ga. 2006). Complaint and Stipulated Judgment and Order available at www.ftc.gov/os/caselist/0523098/0523098.shtm.

⁶ *U.S. v. Venkataraman*, Civil Action No.: 06-1928 (MCL) (D.N.J. filed May 2006), available at www.ftc.gov/os/caselist/0523120/0523120.shtm.

⁷ *U.S. v. Peoples Benefit Services*, Civil Action No.: 06 CV 4612 (S.D.N.Y. 2006). Complaint and Stipulated Judgment and Order available at www.ftc.gov/os/caselist/0423077/0423077.shtm.

“consumer expectation” test for allowing such calls. The Commission also challenged the defendants’ access of the Registry via a separately incorporated affiliate as a failure to pay the access fees.

Most recently, the FTC successfully resolved litigation against a telemarketer that specialized in broadcasting prerecorded calls.⁸ A civil penalty action was filed by DOJ on behalf of the FTC in December 2005 alleging that the defendants had called numbers on the DNC Registry and made millions of abandoned calls. Prior to this filing, the defendants had preemptively challenged the FTC’s authority to apply the TSR’s call abandonment provision to prerecorded charitable solicitation calls made by for-profit telefundraisers. In April 2006, a federal district court granted the FTC’s motion to dismiss this suit and just this February, the defendants settled the DOJ action, agreeing to comply with the TSR and pay a \$1 million civil penalty.

Issues relating to prerecorded and abandoned calls remain of high interest to consumers, your industry, and the FTC. As you are aware, in October 2006, the FTC published a Federal Register Notice which discussed issues raised by petitions submitted by the Voice Mail Broadcasting Corporation and the Direct Marketing Association.⁹ In this Federal Register Notice, the Commission denied VMBC’s request for a safe harbor for prerecorded calls to

⁸ *U.S. v. Broadcast Team*, Civil Action No.: 6:05-CV-01920 PCF-J6C (M.D.Fla. 2005). Complaint available at www.ftc.gov/os/caselist/0523025/0523025.shtm. Stipulated Order and Judgment available at www.ftc.gov/os/caselist/0523025/070126tbtstipjdgmntandorder.pdf.

⁹ 71 Fed. Reg. 58716 (Oct. 4, 2006).

customers with whom the seller had an established business relationship. Based on the more than 13,000 comments from consumers received after an initial federal register notice about the VMBC request,¹⁰ the Commission proposed, and invited comments on, an amendment prohibiting prerecorded calls to consumers unless the caller has obtained prior written consent from the consumer. The Commission also has asked for public comments on another proposed amendment to the Rule, which would adjust the methodology used to calculate abandoned call rates.

The comment period for these amendments was extended until late December 2006 and the Commission has received over 600 comments – including one from the ATA – in response to these proposed amendments. Because these issues are still being considered – in fact, staff is working on this project as I speak – I am unable to discuss them further. However, I can mention, as you probably already know, that during the pendency of this rulemaking, the Commission has extended its forbearance policy on enforcement action against sellers or telemarketers that place telephone calls delivering prerecorded messages to consumers with whom the seller has an established business relationship.¹¹

With respect to the Registry, I would like to mention one more thing. Shortly after the Telemarketing Sales Rule was amended to establish the Do Not Call Registry, Congress passed

¹⁰ Notice of Proposed Rulemaking, 69 Fed. Reg. 67287 (Nov. 17, 2004).

¹¹ See Press Release, FTC Approves Federal Register Notice on Enforcement of the Call Abandonment Provisions of the Telemarketing Sales Rule (Dec. 18, 2006), available at www.ftc.gov/opa/2006/12/fyi0682.shtm.

the Do-Not-Call Implementation Act, which gave on the Commission the specific authority to “promulgate regulations establishing fees sufficient to implement and enforce the provisions” of the DNC Registry.¹² That authorization expires this year and Senator Mark Pryor has introduced legislation to re-authorize the Registry. We expect to work closely with Congress and industry on this important issue so that we can continue to protect consumers’ privacy.

* * *

Now, I would like to spend a little time talking about another important topic – and the reason we are here today – self regulation. Meaningful self regulation provides a critical complement to the FTC’s law enforcement actions. It can offer flexibility and timeliness that may not always be present in enforcement actions. The judgment and experience of an industry in crafting rules also can be of great benefit, especially where, as here, the business practices are complex and industry members have inside knowledge on how best to craft best practices. The FTC strongly encourages self-regulatory efforts that provide clear guidance to industry and create effective enforcement mechanisms to protect consumer rights.

First off, I would like to compliment you on the thoughtful and thorough job that your organization has done in undertaking this comprehensive self-regulatory initiative. I commend your organization on this effort.

¹² Pub. L. No. 108-10, 117 Stat. 557 (2003).

Second, I thought it might be helpful for me to discuss some of the agency's history and experience with self-regulation, to give you a sense of how we view these initiatives, and what has worked well in the past.

Advertising and marketing to children is one interesting example. Self-regulation in that area actually has developed from the Commission's inability to implement a rule limiting advertising to children. Beginning back in the 1970s, there was a concern about the large amount of television advertising directed to young children, especially by so-called "host sellers" – characters from children's programming who advertised the sponsor's products. The Commission explored a possible rule limiting this type of advertising as well as restricting the marketing of sugary foods to children. Ultimately these efforts, dubbed the "Kid Vid" initiative, were terminated, in part because although the record showed some cause for concern, there did not appear to be a way to develop workable rules to address those concerns. You may remember that the Washington Post accused us of trying to be the "National Nanny."¹³

However, self regulation stepped in. In 1974, the Children's Advertising Review Unit (CARU) was founded to promote responsible children's advertising as part of a strategic alliance with the major advertising trade associations through the National Advertising Review Council (NARC).¹⁴ CARU is the children's arm of the advertising industry's self-regulation program and

¹³ Editorial, "*The FTC as National Nanny*," Wash. Post., Mar. 1, 1978 at A14.

¹⁴ See "*About the Children's Advertising Review Unit*," available at www.caru.org/about/index.asp.

the other arm is the National Advertising Division (NAD). CARU and NAD are charged with the responsibility of monitoring and reviewing national advertising for truthfulness, accuracy and, in the case of CARU, consistency with its self-regulatory guidelines.¹⁵ CARU and NAD case decisions are published, and if an advertiser or challenger to an ad disagrees with their recommendations, they can appeal to the National Advertising Review Board.¹⁶ If an advertiser chooses not to participate in the self-regulatory process, a referral is made to the appropriate state or federal law enforcement agency. Anyone can submit a complaint to NAD or CARU regarding national advertising. This program has been in existence for over thirty years, and on many levels has been extremely effective.

Recently, other self-regulatory efforts directed toward the health and safety of children have been undertaken – in particular, efforts to combat childhood obesity. For example, the Children’s Food and Beverage Advertising Initiative – a voluntary self-regulation program with 11 of the largest food and beverage companies as charter participants – has been established.¹⁷ These companies have agreed that at least half of their advertising directed at children under the age of 12 would promote healthier foods or contain messages that encourage healthy lifestyles.¹⁸

¹⁵ See “*The Advertising Industry’s Process of Voluntary Self-Regulation*,” effective Aug. 23, 2005, available at www.nadreview.org/05_procedures.pdf.

¹⁶ See “*About the National Advertising Review Board*,” available at www.narbreview.org/about/index.asp.

¹⁷ Andrew Martin, “*Leading Makers Agree to Put Limits on Junk Food Advertising Directed at Children*,” N.Y. Times, Nov.15, 2006.

¹⁸ Information about the Initiative is available at www.cbbb.org/initiative/. As noted by the Chairman in a recent speech, the Initiative has real promise and the Commission will be closely watching its effect. However, if messages that encourage physical activity are

This initiative will also have a monitoring and enforcement component,¹⁹ which is not yet fully fleshed out. However, as a preliminary matter, the program will monitor company commitments, and will respond to public inquiries relating to compliance. Procedures will be developed to expel companies that do not comply with their commitments, and under appropriate circumstances, refer them to the FTC. The initiative also plans to publicly issue reports detailing its activities, including expulsions and referrals.²⁰

As you can imagine, efforts like this not only serve the purpose of improving the lives of children, they make good business sense. The more energy the food industry puts into regulating itself, the less chance the government will get involved in trying to legislate the same results. In addition, developing and implementing initiatives like these also improves an industry's reputation and goodwill with consumers.

Self regulation can also be very effective and useful even when there is government regulation in place. A good illustration of this is the intersection between the FTC's Funeral Rule and the funeral industry's self-regulatory program. As you may or may not be aware, the Funeral Rule, among other things, requires funeral homes to give consumers a list of prices for

“always accompanied by promotion of a food or drink high in calories or low in nutritional value, it is unclear whether a true ‘healthy lifestyle’ message will be conveyed.” See Chairman Deborah Platt Majoras, “*Advertising Resolutions for the New Year*,” Association of National Advertisers, (Jan. 17, 2007), available at www.ftc.gov/speeches/majoras/070117adresnewyear.pdf.

¹⁹ See “*Children’s Food and Beverage Advertising Initiative*,” available at www.cbba.org/initiative/ProgramDocument.pdf.

²⁰ *Id.*

the merchandise and services they offer. The Rule ensures that consumers have access to price information, that they understand that they only have to buy the services that they want or that are required by law, and that it is okay to talk about prices. The Rule was enacted in 1982 and became effective in 1984.

Unfortunately, studies of the industry done in the late 1980s and a review of the Rule done in 1994 by the Commission, showed that even though the Rule had been in effect 10 years, there was extremely low compliance levels with it. In fact, compliance with the basic requirement that a funeral home give consumers an itemized price list may have been as low as 23 percent.²¹

In 1996, in order to boost compliance with the Rule, the National Funeral Directors Association submitted a proposal to the Commission for an industry self-regulatory program. The FTC subsequently approved and implemented it.²² The major component of the program is the “Funeral Rule Offenders Program,” which is a non-litigation alternative for correcting certain Funeral Rule violations, such as the failure to provide mandatory itemized price lists in the time or manner required by the Rule. Funeral providers – identified through “test shopping” industry sweeps – can participate in the Offenders Program rather than face law enforcement action by

²¹ See *Federal Trade Commission Bureau of Economics Staff Report – An Analysis of the Funeral Rule Using Consumer Survey Data on the Purchase of Funeral Goods and Services* (Feb. 1989) at p. 20.

²² Press Release, *Consumer Access To Price Information About Funerals To Get Major Boost Under New FTC/Industry Program*, (Jan. 19, 1996), available at www.ftc.gov/opa/1996/01/funera.shtm.

the FTC, which could otherwise result in civil penalties of as much as \$11,000 per violation. Violators that opt for this alternative make voluntary payments to the U.S. Treasury in an amount slightly less than the civil penalty the FTC would seek in a law enforcement action, pay annual administrative fees to the NFDA, and participate in industry-led training and competency testing. They remain in the program for three years and certify completion of the program to the National Funeral Directors Association.

Importantly, this option is only available for certain violations – violations of other provisions, such as embalming without consent or imposing illegal tying arrangements, are outside the scope of this program, and the Commission addresses those violations through conventional law enforcement.

In 2006, the FTC made undercover visits to 100 funeral homes in seven states to assess their compliance with the Funeral Rule. This time around, compliance was substantially improved – we found violations at 12 funeral homes and faced with the prospect of FTC lawsuits that could lead to a court order and civil penalties, these funeral homes elected to participate in the Offenders Program.²³ As part of the Offenders Program, these funeral homes will receive on-site compliance training, legal review of price list disclosures required by the Funeral Rule, and

²³ See Press Release, *FTC Tests Funeral Homes for Compliance With Funeral Rule; New Brochure Explains Consumer Rights Under Federal Law*, Dec. 13, 2006, available at www.ftc.gov/opa/2006/12/funeralsweeps.shtm. We also sent enforcement letters 32 other funeral homes, warning them to correct technical violations of the Rule.

regular testing and compliance monitoring.²⁴

I am confident that the ATA's self-regulatory standards have the potential to be even more effective and encompassing than the examples I have just cited. There are a couple of things in particular that I found notable. First, the draft Standards do a good job of incorporating the many federal and state laws and regulations that affect the teleservices industry. I think it is efficient and useful to set up a comprehensive framework like this.

Second, the drafters of the proposed Standards worked hard to identify areas where there was confusion, vagueness or undefined terms. Precise terminology and consistency in interpreting these terms will help ensure that everyone is on a level playing field, and will assist in making sure that compliance with the regulations is both accurate and high.

Another component of the proposed Standards that impresses me is the effort that the drafters undertook to sift through and then synthesize the various opinions and law enforcement actions of the FCC, the FTC and the States. Before returning to the FTC a year and a half ago, I was a private practitioner for 41 years, first at the McCutchen firm in San Francisco, then for the last 11 years at Latham & Watkins in San Francisco. Over that period of time, I did a lot of corporate and compliance counseling. So I know what an advantage it is for you to have had the drafters examine things like Civil Investigative Demands issued by the various agencies, in order

²⁴ Since initiation of the program, more than 2,000 funeral homes have been "shopped," and 247 homes have participated in the Offenders Program.

to craft comprehensive compliance and record-keeping standards.

I would like to add that appropriate compliance, auditing and enforcement mechanisms are also necessary components in a self-regulatory program like this. In this current draft, the compliance program includes written policies and procedures; employee training; monitoring; and record-keeping. I would suggest that you also might want to consider an independent auditing component. The FTC has some experience in this area with respect to safe harbor programs established under the Children’s Online Privacy Protection Act. In order to be approved, self-regulatory guidelines implementing COPPA must include an “effective, mandatory mechanism for the independent assessment” of the participants’ compliance with the safe harbor guidelines.²⁵ In the COPPA context, organizations such as CARU, TRUSTe, and the Entertainment Software Rating Board, perform audits of their members to ensure that they are complying with the safe harbor guidelines.

In developing the enforcement standards, look to both your program’s internal mechanisms for fostering compliance with the Standards, as well as an external mechanism – or “third-party review” – for resolution of disputes about whether a particular practice violates the Standards. Under similar circumstances, the Commission has recommended that a third-party review system be: (1) impartial and objective; (2) be public; and (3) apply standards

²⁵ 16 C.F.R § 312.10 (b)(2).

consistently.²⁶

In particular, this issue came up in 1999, when the FTC first began encouraging the alcohol industry trade associations to strengthen their enforcement mechanisms.²⁷ As a result of this recommendation, the Distilled Spirits Council of the United States (DISCUS) adopted a third-party review process. It has an industry review board consisting of trade association members that rule on complaints about advertising and it also has an external review board of advertising and regulation experts who rule on complaints in the event the internal board cannot come to agreement.²⁸ In 2005, DISCUS, for the first time, published a report detailing the internal review board's actions on advertising complaints received during the prior year.²⁹

The COPPA Rule also considers the existence of “effective incentives” for participants’ compliance with self-regulatory guidelines. For example, a safe harbor program is considered to have effective incentives if it includes things such as mandatory, public reporting of disciplinary action; consumer redress for violations; or referral to the FTC of participants who engage in a

²⁶ See *Alcohol Marketing and Advertising, A Report to Congress*, Sept. 2003, at pp. 8-9, available at www.ftc.gov/os/2003/09/alcohol08report.pdf.

²⁷ *Self-Regulation in the Alcohol Industry: A Review of Industry Efforts to Avoid Promoting Alcohol to Underage Consumers*, Sept. 1999, available at www.ftc.gov/reports/alcohol/alcoholreport.shtm. See also, Deborah Platt Majoras, Self Regulatory Organizations and the FTC, Speech before the Council of Better Business Bureaus, Apr. 2005, available at www.ftc.gov/speeches/majoras/050411selfregorgs.pdf.

²⁸ See *Code of Good Practice for Distilled Spirits Advertising and Marketing* (2003) available at www.discus.org/industry/code/code.htm.

²⁹ See Distilled Spirits Council of the United States, Semi-Annual Code Report (2005), available at www.discus.org/pdf/SemiAnnualCode.pdf.

pattern of violative conduct.³⁰ These are all things that you may want to consider as you move forward in finalizing your Standards.

Finally, I would like to add, to the extent that the draft Standards go beyond what is legally required, and propose Best Practices for the industry, that reinforces the true value of a self-regulatory program. Not only are you complying with the basic requirements, but you are also offering additional benefits to consumers, thereby improving your own goodwill and reputation.

I appreciate the opportunity to speak with you today. Thank you.

³⁰ 16 C.F.R § 312.10 (b)(3).