Via Electronic Submission

Mr. Donald S. Clark
Secretary
Federal Trade Commission
Room H-113 (Annex X)
600 Pennsylvania Avenue NW
Washington, DC 20580

Re: FTC Workshop on Online Lead Generation

Dear Mr. Clark:

I appreciate this opportunity to provide further comments on the issues raised at the Federal Trade Commission's recent Online Lead Generation Workshop. The Workshop brought together many viewpoints to begin an important dialogue.

The Workshop included a discussion of existing pan-industry regulation with respect to consumer protection, as well as additional industry-specific regulation in certain verticals. Notwithstanding the existing per- and pan-industry regulatory regime, consumer advocates and vendors of compliance and other services noted consumer experiences and vendor practices that they believed merited additional scrutiny.

As Jessica Rich, Director, Bureau of Consumer Protection, noted in her opening remarks, "lead generation is a well-established industry that has served a very important role in the marketplace for many, many decades." I appreciate the Commission's engagement on this topic, and look forward to discussing further how lead generation can be practiced in a way that meets consumer needs while also enabling industry participants to meet their meet their consumer protection responsibilities, including as business and regulatory requirements continue to evolve.

As detailed further below, contemporary online lead generation is in part a consequence of a consumer and vendor preferences. Meeting those preferences in in the context of multiple overlapping regulatory regimes is challenging, particularly as technology continues to develop. Yet technology, operated at scale, may also be part of the solution. Scaled solutions tend to require consensus as to what is required, which in turn can be informed by what is practicable. Accordingly, as someone who has recently been involved in the legal, compliance and business development aspects of performance marketing, I offer the following observations.[1]

[1] The views expressed are those of the author and not those of his employer, fellow employees, directors, commercial counterparties or other industry participants.

I. Contemporary Consumers Expect Online Considered Comparisons

By definition, advertising exists in context. As an advertising technique, online lead generation needs to also be viewed in the context of consumer and vendor preferences, and how those have evolved over time.

History. Lead generation is a marketing technique that involves divining or initiating consumer interest in a product or service. Lead generation pre-dates consumer access to the World Wide Web, although its applications have expanded along with consumer use of the web to investigate products and services, including for purchase.[2]

Click marketing was an early form of online lead generation, as the relative dearth of online consumers implied that each click evinced high intent. The identification of high-intent consumers is particularly important to vendors of products and services who must incur substantial costs to vet and engage consumers through a multi-step application process (e.g., mortgage brokers). These vendors were also drawn to the performance marketing aspects of online lead generation, which enabled external marketing spend to be based upon performance, as defined by the vendor. For these high-touch vendors, online lead generation also offered the prospect of deploying internal resources only to the highest-quality, highest-intent prospective customers.

Considered Comparisons. From the consumer's side, the online search for products and services often results in a preference for contemporaneous comparisons. This has led to the development of online comparison sites where consumer input is used to match consumers with multiple vendors of desired products and services for the consumer's consideration.[3]

In certain verticals (e.g., air travel), the consumer's individual attributes are unlikely to impact the vendor's offer. In those cases considered comparisons can be generated with minimal consumer data (e.g., departure date and time). Substantially all of the consumer information required to complete the purchase can be gathered further down-funnel on the branded site vendor site selected by the consumer.[4]

[2] For a cultural initiation into the role of lead generation in the sales process consider David Mamet's *Glengarry Glen Ross*.

[3] For an overview of the lead generation process, see http://www.jdsupra.com/legalnews/the-five-stages-of-online-lead-41083/ , part of a three part series on issues raised by the Workshop, by Theodore Flow & Christopher J. Willis (hereinafter, *Flow & Willis*)

[4] As noted by one panelist, conversion on a branded site was three times more likely if a consumer had previously visited a comparison site. Due to the difficulty of attribution, however, comparison sites are not generally compensated by vendors for this contribution.

In other verticals, (e.g., financial services), the generation of considered comparisons requires consumer-specific attributes. Moreover, in some verticals (e.g., auto insurance), many consumers prefer a portion of the information exchange process to take place offline (e.g., via contact center or in a local agent's office), and consumer contact information constitutes personally identifiable information ("PII"). Finally, high-touch verticals typically require consumer-vendor engagement beyond the initial search or match, and so consumer filtering and data transfer practices have arisen to meet this preference as well.[5]

Quality vs. Quantity. In recent years the online lead generation paradigm has shifted to a focus on quality. Initially, technological and other barriers limited the ability to differentiate between traffic sources, let alone monitor each source over time with respect to advertising and editorial content. In addition, vendors were initially unwilling to share conversion data with third parties. As a result, it was neither practical nor economic to distinguish quality on a per-lead, per-source basis. This led to the sale and purchase of bundled leads with varying degrees of quality at fixed, average prices.

With access to conversion data, technology now permits quality to be measured at multiple points in the consumer engagement cycle.[6] Traffic sources can be better segmented and identified. Taken together, this has enabled "right-pricing" of leads and clicks. Where permitted by regulation, right-pricing can be based upon multiple events in the consumer engagement cycle (e.g., application start, loan closing).[7]

II. Required Skillsets for Online Marketing

Vendor marketing organizations require a wide range of expertise. Individual marketing mechanisms, such as search engine marketing and optimization, require specialized skill sets. Increasing requirements for data-driven marketing and analytics creates incremental demand for skill sets that may be in short supply, or difficult to fully utilize within a single-vendor organization.

Vendor marketing organizations may also be technology-deprived, or saddled with legacy technologies. While marketing automation tools provide a partial solution, the integration of these technologies may not be a high priority for vendor technology development resources focused on product and other initiatives.

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[5] Consumer comfort with predominantly online purchase experience for particular products will continue to evolve. See, e.g., *Consumers Likely to Purchase Auto Insurance Online in the Future Grows Each Year* https://www.comscore.com/Insights/Press-Releases/2014/11/comScore-Releases-2014-US-Online-Auto-Insurance-Shopping-Report

[6] Improvements in technology and data analytics have also enabled vendors to optimize their external and internal costs-per-closing across multiple marketing channels, which is particularly important for high-touch vendors.

[7] The hallmark of performance marketing is pay-for-performance. Performance is typically defined by the vendor, and varies by industry. In some cases regulations restrict payment based upon certain performance outcomes (e.g., gainful employment).

Outside service providers can help address all of the above issues. In addition, by serving multiple vendors, service providers develop best practices, including with respect to process flows, data capture and analysis[8]. Being able to spread the investment in the required expertise across multiple vendors and verticals creates scale for service providers that will be difficult for many individual vendors to match. As a result, vendors are increasingly looking to partner with service providers who can provide platforms for campaign management, consumer matching and engagement reporting[9].

III. Compliance Requires Scale

Compliance is a process, not a state. No network has 100% availability.[10] An online network involving multiple vendors and publishers, exposed to consumers having various degrees of sophistication, will face challenges in striving for 100% compliance.

In addition, advertising necessarily involves subjective consumer experience, and establishing the expectations of all potential consumers in all possible contexts in advance is impracticable.[11] Compliance issues are therefore inevitable, and so vendors must not only seek to minimize the volume of incidents but also adopt effective mechanisms for remediating the underlying causes.

This requires a level of technological and other investment that will be uneconomic for most vendors to develop internally. Third-party software vendors can help address this gap. Although software products have improved over time, challenges remain with false positives and source opacity. As a result, individual vendors must grapple with high volumes of flagged items of uncertain provenance. Remediation of underlying causes may also require action by sources with which the vendor does not have a direct relationship.

Faced with these facts, vendors have adopted a variety of approaches. At one extreme, vendors can decline to advertise via the lead generation channel. This

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[8] This includes protocols for data hashing and storage so as to permit analytics while minimizing both authorized and unauthorized access to consumer data, including PII.

[9] Publishers are also increasingly looking to partner with third parties for assistance with monetization and other aspects of online marketing.

[10] Availability is typically expressed as the amount of uptime in a given year; see, e.g., https://en.wikipedia.org/wiki/High_availability. Accordingly, even a network with "two nines" (99%) availability would be expected to be down almost four days per year, or approximately 14 minutes per day.

[11] See F*low & Willis* II at http://www.jdsupra.com/legalnews/is-online-lead-generation-inherently-15533/ noting that "a "reasonable expectations" standard, while reasonable-sounding is likely to be unreasonable and unworkable in practice . . . [and] would likely devolve into a "least sophisticated consumer" standard . . . which creates uncertainty and increases costs for consumers and businesses alike."

approach, however, will not only frustrate consumers' desire for considered comparisons, but also may adversely impact vendor economics.[12]

The alternatives include engaging with intermediaries, including via Vendor Requirements, to meet compliance obligations. Due to the ability to scale technology and other resources across multiple vendors (and in some cases multiple industry verticals), as well as a multi-vendor view of Vendor Requirements, intermediaries may be well positioned to coordinate compliance across a broad network of vendors and traffic sources.

IV. Definitions of Compliance

Lead generation is a subset of online advertising, which is in turn a subset of advertising generally. Accordingly, as with all advertising, context is important to analyzing whether a given ad or user experience is unfair or deceptive.[13]

Advertisers and their service providers are mindful of not only generally applicable principles of consumer protection but also industry-specific requirements, including with respect to ad placement and ranking. Each vendor typically publishes a description of the rules, regulations and industry standards applicable to it, as well as its related marketing and branding guidelines (collectively, "Vendor Requirements"). Vendor Requirements are made binding via vendor contract.

While publishers and aggregators are typically subject to liabilities in addition to termination (i.e., indemnification), other service providers typically are not.[14] Accordingly, lead generation intermediaries may face greater incentives than ad agencies, software vendors and ad networks to assist vendors and publishers in ensuring a compliant consumer experience.

V. Conclusion

Considered comparisons at points of aggregation involving consumer data is likely to be a preferred mode of engagement between consumers and vendors in many verticals for the forseeable future. Legitimate vendors and other industry participants will strive to meet compliance and other requirements as consumer preferences, technology and the regulatory environment continue to evolve.

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[12] Considered comparisons and related multi-matching lowers the media cost that would otherwise be faced by individual vendors. Moreover, in verticals where consumers prefer online considered comparisons, vendors who rely primarily on branded advertising effectively drive consumers to an online shelf where the vendor's products do not appear.

[13] See *Flow & Willis III* at http://www.jdsupra.com/legalnews/is-online-lead-generation-inherently-15533/. The authors conclude it is not.

[14] Note that click ad networks, which are a form of lead generation, are not typically subject to Vendor Requirements. Such networks generally disclaim responsibility for advertising context via their terms of service.

VI. Other Workshop Items

In addition to the general themes highlighted above, I have included below supplemental observations about certain specific items raised at the Workshop.

PII. As discussed at the Workshop, PII *per se* is relatively unimportant in lead generation.[15]. This submission notes that the collection of PII at various points in a consumer's engagement may be required to generate considered comparisons or to complete requested consumer contact.

Consumer Expectations with Respect to Data. When and how consumer data is collected will vary based upon consumer preferences, applicable regulations and the resulting business models.[16] Data collection is regulated across all industries by the Commission and other consumer protection agencies, including state attorneys general.[17] In addition, vendors face industry-specific regulation with respect to the types of consumer attributes that can be targeted, what data may be collected and how that data may be transferred. Each vendor's determination with respect to these matters is reflected their respective Vendor Requirements.[18]

In contrast with search, social media and ad networks, online lead flows typically gather consumer data as the result of affirmative, real-time volitional user activity (e.g., completion of online forms, engagement in online chat, or via call center). In the lead generation context this may mitigate the general contention that consumers do not always understand how their data is gathered and used online.[19]

Remnants. Certain panelists described the practice of reselling "remnant" consumer contact information and other attributes. Please note that in legitimate lead generation, resale of user data by vendors is generally prohibited by contract. In addition, Vendor Requirements set standards for the vetting and monitoring of publisher practices, and lead sellers typically vet lead buyers, particularly in regulated verticals. Use of data submitted online is also subject to privacy policies and restricted via contract. Moreover, the use of consumer data other than in the

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[15] As discussed at the panel, while a publisher could deliver the consumer information set forth in the publicly-available white pages to a vendor, but such "leads" would be worthless.

[16] See Flow and Willis II for a discussion of the role of disclosures in lead generation at https://www.cfpbmonitor.com/2015/11/20/disclosure-confusion-in-the-online-lead-generation-industry/

[17] The initiatives of the Commission and other regulatory bodies with respect to data privacy, data brokerage and the data transfer, including in the growing segments of mobile, app and social media marketing are well noted, but are outside the primary focus of the Workshop.

[18] Within an industry vertical vendors face the same applicable laws, regulations and industry standards. Yet their respective interpretations of same may vary, and so multi-vendor lead sellers must develop technology and processes to meet each respective Vendor Requirement, including the ability to terminate sources by vendor.

[19] Consumer expectations for pre-population of attributes, particularly in the mobile context, will likely spawn a new series of issues for vendors, service providers and regulators to contend with.

context in which it was provided will generally result in poor quality; data without context has little value. While it appears from some fact patterns discussed at the description at the Workshop that remnant sales do occur, they are not generally a feature of legitimate lead generation.

Third party publishers. Some panelists suggested that third party publishers were inherently noncompliant. As discussed above, while online compliance creates scale issues, technology and other resources can applied to contend with high-volume, multi-sourced traffic. Moreover, consumers making considered comparisons will generally disfavor attempts to keep them within walled gardens (whether branded or otherwise), and so third party publishers will inevitably become sources of potential information. Absent large-scale adoption of subscriber or other business models, online advertising will continue to be the dominant business model for publishers, and so publisher network compliance will continue to be important to delivering preferred consumer experiences.

Discrimination. It was suggested that online advertising presented a unique opportunity to engage in discrimination, although the mechanism was unclear.

As described above, legitimate lead sellers vet lead buyers prior to engaging with them, and adhere to applicable Vendor Requirements during that engagement. The Vendor Requirements often include the considered judgment of legal counsel as to what filters, queries and activities are appropriate.[20] In addition to breach and indemnification liabilities that may arise from violating Vendor Requirements, headline risk creates an additional aversion to engaging in activities beyond those set forth in Vendor Requirements. Accordingly, legitimate vendors, publishers and service providers are unlikely to engage in impermissible discrimination.[21]

Search and Click Marketing. One panelist suggested that collecting user data at a point of aggregation was "unnecessary." The contention appeared to be that for certain consumers and vendors online search followed by click-based engagement would suffice.[22] This may be the case for a subset of consumers and vendors, and where applicable this business model may work. In general, however, considered comparisons not only reflect consumer preferences, but also enable

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[20] For example, a CA-licensed mortgage broker may only be able to make mortgage offers to CA-based consumers. Some relevant attributes can be estimated from the consumer's previous search history or device location (e.g., geography). In a lead generation context, however, substantially all consumer information is volitionally input by the consumer in response to a series of online or other prompts ("form flow")

[21] Note that in some verticals (e.g., insurance), pricing may vary with characteristics such as gender. The permissibility of this type of regulated economic discrimination is generally highly regulated, and changes to those regulations are reflected in Vendor Requirements.

[22] The assumption appeared to be that the consumer would already have gathered enough information elsewhere (including via comparison sites) such that clicking through to a single branded site would suffice. It was also unclear whether the hypothesized choice was an organic or paid result. Both would in any event be forms of lead generation.

consumer savings.[23] This is in part why other online advertising industry participants are developing their own lead generation sites and comparison widgets. [24]

Industry self-regulation. Increased industry self-regulation may be part of the solution to both further minimize the volume of compliance issues and provide consumers, advocates and regulators a primary resource to direct requests for escalation and remediation.

The challenges to industry self-regulation include the typical hurdles to inter-industry coordination, including competitive, antitrust and other concerns triggered by collective behavior and standard-setting. This may be even more difficult in highly regulated verticals such as financial services and education, which involve federal, state and local sources of regulation and accreditation.

Second, setting and policing standards will be difficult due to the variety of vendors, publishers and service providers, each of whom may use multiple marketing techniques (e.g., search, social media, leads, clicks and calls), to engage in lead generation.

Finally, due to the highly regulated nature of certain verticals, as well as the aversion of at least large publishers and other intermediaries to headline risk, it is likely that legitimate vendors and their service providers have already adopted many of the standards that would likely be set.[25] Accordingly, standard-setting with regulator involvement may primarily enable resource-intensive enforcement efforts to be focused on industry participants who elect not to meet the standards.

Fraud. No industry, vertical or content-delivery mechanism is immune from the potential for fraud. In the case of online lead generation, this includes identifying fraudulent contexts and traffic, and mitigating the risk of such traffic being funded by legitimate commercial networks. The relative volume of fraudulent lead flow traffic is likely impossible to measure, but the sense of most industry participants is that it is small and shrinking, for the reasons described below.[26]

Again, online lead generation generally involves the gathering of user information in context to match high-quality prospective consumers with appropriate vendors. One of the characteristics of fraudulent traffic, however, is

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[23] To paraphrase a familiar marketing slogan, when vendors compete, consumers win. For an independent assessment of this phenomenon, see http://web.stanford.edu/~rehall/DiagnosingConsumerConfusionJune2012

[24] See http://www.insurancejournal.com/news/national/2015/11/23/389264.htm

[25] Multi-vendor service providers already have a view across individual Vendor Requirements (although cannot impose common requirements as industry standards).

[26] For a recent article on the prevalence of online click fraud see http://www.bloomberg.com/features/2015-click-fraud/

that it will tend to be low-quality; information gathered out of context is unlikely to evince high consumer interest or intent. The continuing trend toward quality, particularly in high touch verticals, will thus tend to eliminate low quality traffic from the network. Over time, the business opportunities for fraudulent traffic providers will accordingly decrease.

Enforcement will continue to be an important tool to combat fraud. With respect to online lead generation, however, it may be that business imperatives, coupled with evolving technological capabilities, operated at scale, will enable the private sector to do the lion's share of the work.

Sincerely,

/s/ MJC

Martin J. Collins[27]

[27] Senior Vice President of Legal, Compliance and Business Development at, and General Counsel of, QuinStreet, Inc. The views expressed in this submission are those of the author based upon personal experience, and not those of his employer, fellow employees, directors, commercial counterparties or other industry participants.