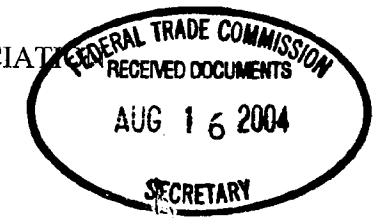
Comment #: 41

COMMENTS OF THE DIRECT MARKETING ASSOCIATION



Before

FEDERAL TRADE COMMISSION

On

FACT Act Affiliate Marketing Rule, Matter No. R411006

August 16, 2004

The Direct marketing Association (The DMA) appreciates the opportunity to comment on the proposed rule in the matter of FACT Act Affiliate Marketing Rule, Matter No. R411006. The DMA represents over 4,500 companies that engage in marketing directly to customers or that supply those companies. The DMA membership includes companies from over 50 industry segments, including financial services. Our members have filed comments concerning the specifics of their operations and the proposed rule. The DMA will focus its comments on the more general policy considerations inherent in the proposal.

Timing of Notice and Clear and Conspicuous:

The proposal allows flexibility for the marketer and its affiliate of when to provide notice to the consumer of his/her options concerning the sharing of eligibility information. The rule proposes that a notice may be given in an Internet transaction at the time of the transaction *provided* the consumer must chose whether or not to allow information sharing. Section 680.22 (b) (3). In essence, the proposed rule allows notice at the time of transaction only if there is affirmative consent. That is not an opt-out as the statute directed. The DMA believes that the key in these instances should be whether or not the notice given the consumer is clear and conspicuous. If the notice is, when it is given (provided information is not shared prior to an opportunity to opt-out) is not relevant. If the notice is not clear and conspicuous, the timing of the notice similarly is not relevant.

The Commission also wanted comments on whether or not oral notice would be adequate. Of course, in every situation under the proposed rule the circumstances would have to be considered. The DMA believes that an adequate notice could be given orally, especially at the time of the transaction. Thus, that notice should be permitted. It is unclear how many marketers might choose an oral notice, but it is an option that should be available. In addition, an oral notice would provide the consumer with an immediate and simple means to opt-out.

The Commission should broaden the flexibility given marketers and their affiliates to provide notice with the clear and conspicuous requirement being the linchpin. The DMA also believes that there is a significant body of law surrounding the term, "clear and conspicuous". The proposed rule should not alter that body of law. Businesses have been working under and understanding those rules for quite a while—they should not be changed in this rule.

Section 680.22 (b) (2) requires an acknowledgement of receipt of the notice if sent *via* electronic means. This creates an additional burden on electronic commerce and is not required by the statute. Acknowledgement also places an additional burden on the consumer. Burdening e-commerce in this manner requires a much greater inquiry than the Commission has presented or undertaken.

Eligibility Information:

The Commission requested comments on whether or not the term, "eligibility information", should "reflect[ ] the scope of coverage, or ...track the more complicated language of the statute...." The DMA believes that the language should track the language of the statute. Again, businesses have worked under the statute for some time and are familiar with it. These regulations are a mandatory roadmap for businesses and the proposal offers no reason why this business regulation should differ from the language of the statute, especially since that language is being followed under other statutory regimes. The consumer will receive clear notice—the business should receive consistent regulation.

Opt-In:

Section 680.22 (b) (5) provides that providing an opt-in is a "reasonable opportunity to opt out." The DMA believes that this section is not necessary. Moreover, it blurs the distinction between an "opt-out" and an "opt-in"—a distinction discussed above in the electronic notice comment. If an individual has chosen to receive marketing material, that is an exception to the notice requirement in section 680.20 (c) (4). This example should not be included in the rule since it is not necessary and it blurs an important distinction. The explanation of a pre-selected box—with which The DMA agrees—could be included elsewhere in the rule.

680.20:

Section 680.20 (d) (2) (ii) provides an example of a call initiated by an affiliate in which the affiliate leaves a message for the consumer to call back. If a consumer calls back, that call is not consumer initiated and does not create and established business relationship. The DMA agrees with that example as far as it goes. However, to avoid confusion, The DMA believes that the Commission should expand the example to include the situation wherein the consumer asks for information or purchases a product in that call. In the extended example, the consumer now has an established business relationship with the affiliate under the rule.

For section (a) (iii) The DMA suggests that the wording be changed to "The consumer has not exercised the opt-out". We believe that this change is more consistent with opt-out.

Miscellaneous:

For section 680.24 (b) (2) (ii) The DMA believes that the rule should specify that if a consumer has ordered or requested information *via* the Internet and has supplied an e-mail address, that constitutes agreement to receive the notice *via* e-mail.

For section 680.24 (d) (1) (vii) there should be included clarification that if the joint consumers have the same address (electronic and/or physical) and/or telephone number, use of that information for the consumer who has not exercised the opt-out is allowed.

For section 680.25 (d) there should be clarification on what constitutes termination of a relationship.

On a final note, The DMA requests that the Commission not use the term "junk" in connection with marketing messages. Over 12 million American jobs are connected to direct marketing, including over 700,000 postal employees. Direct marketing contributes over $ 1 trillion to our economy. The term was created by a competing advertising channel, and the Commission should avoid using it.

Respectfully submitted,

The Direct Marketing Association

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