BEFORE THE

SENATE COMMITTEE ON COMMERCE, SCIENCE & TRANSPORTATION

HEARING ON

OVERSIGHT OF TELEMARKETING PRACTICES

JULY 31, 2007

TESTIMONY OF

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I. Introduction & Summary

Good morning Mr. Chairman and members of the Committee. I am Jerry Cerasale, Senior Vice President for Government Affairs of the Direct Marketing Association, and I thank you for the opportunity to appear before the Committee today to discuss telemarketing registry fees and responsible practices for compilers of marketing lists.

The Direct Marketing Association, Inc. ("DMA," www.the-dma.org) is the leading global trade association of businesses and nonprofit organizations using and supporting multichannel direct marketing tools and techniques. DMA advocates industry standards for responsible marketing, promotes relevance as the key to reaching consumers with desirable offers, and provides cutting-edge research, education, and networking opportunities to improve results throughout the end-to-end direct marketing process. Founded in 1917, DMA today represents more than 3,600 companies from dozens of vertical industries in the U.S. and 50 other nations, including a majority of the Fortune 100 companies, as well as nonprofit organizations. Included are catalogers, financial services, book and magazine publishers, retail stores, industrial manufacturers, Internet-based businesses, and a host of other segments, as well as the service industries that support them.

DMA and our members appreciate the opportunity to present our views as the Committee considers permanently funding the do-not-call registry, setting fees for telemarketers to access the registry, and issues related to the operation of the registry. In addition, we would like to address issues relating to list compilers raised by Senator McCaskill and, in that context, describe DMA's list compiler guidelines.

II. Fees Paid by Telemarketers to Access the Do-Not-Call Registry

DMA strongly supports capping fees imposed on telemarketers to access the do-not-call registry. We thank Senator Pryor for his leadership in this area. Current fees are sufficient and, in fact, we believe, higher than necessary to administer the do-not-call

registry. Fees collected from telemarketers should be used to operate the registry and not for broader enforcement of the telemarketing rules or other purposes. Finally, we believe that the operator of the registry should improve the hygiene of the list to ensure it does not include changed telephone numbers.

A. Current Fees are Sufficient and, in Fact, Higher than Necessary to Administer the Do-Not-Call Registry and Should be Capped

The level of increase in do-not-call registry access fees seen in the last few years makes it clear that Congress needs to establish a cap on the cost for access. In addition, any necessary fee adjustments should be tied to a fixed index such as the consumer price index or the rate of inflation. The Federal Trade Commission ("FTC" or "Commission"), in 2002, proposed to cap the maximum annual fee per telemarketer to obtain access to the entire registry at $3,000.[1] By the time the Commission made the registry available in 2003, the cost for access had already increased to $7,375, a 145% increase.[2] Less than a year later, the Commission increased fees 67% to $11,000.[3] The following year, the Commission increased fees by 40% to $15,400.[4] In 2006, the Commission increased fees to $17,050.[5] That was an 11% increase. This amounts to a 263% increase in four years.

DMA has a great deal of experience in operating its own telemarketing suppression list, the Telephone Preference Service ("TPS"), as well as in administering the state lists of Pennsylvania, Maine, and Wyoming.[6] This experience also indicates a much less costly means of running a registry. DMA's entire list was available for entities to purchase for $700 per year. While the Commission's registry contains many more numbers than does the TPS, we do not believe that the $17,050 fee—more than 24 times the cost of the TPS—is justified by the incremental costs that correspond to the increased amount of numbers on the registry.

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[1] *Telemarketing Sales Rule User Fees, Notice of Proposed Rulemaking, 67 Fed. Reg. 37362, at 37364 (May 29, 2002).*
[2] *Telemarketing Sales Rule Fees, Final Rule*, 68 Fed. Reg. 45134, at 45141 (July 31, 2003).
[3] *Telemarketing Sales Rule Fees, Final Rule*, 69 Fed. Reg. 45580, at 45584 (July 30, 2004).
[4] *Telemarketing Sales Rule Fees, Final Rule*, 70 Fed. Reg. 43273, at 43275 (July 27, 2005).
[5] *Telemarketing Sales Rule Fees, Final Rule*, 71 Fed. Reg. 43048 (July 31, 2006).

B. Fees Collected from Telemarketers should be Used Solely to Operate the Registry and not for Broader Enforcement of the Telemarketing Rules or Other Purposes

DMA believes that fees collected for providing access to the registry should be used solely to administer the operations of do-not-call registry. An analysis of the costs to run the registry and the amounts collected by the Commission suggest that a significant amount of the money spent is on enforcement and other costs. DMA does not believe that the registry fees should be used for telemarketing enforcement based on fraud or other violations of the Telemarketing Sales Rule, even where there may also be an incidental violation of the registry. Prior to the establishment of the registry, such enforcement actions were funded from the Commission's general appropriations. DMA does not believe that legitimate, law-abiding telemarketers should bear the burden of funding enforcement against bad actors. This is not the case for other laws administered by the FTC. For example, Internet sites that are targeted to children, which are subject to the Children's Online Privacy Protection Act, do not fund the Commission's enforcement against entities that violate that law. We are very supportive of increased budgets for enforcement by the FTC in telemarketing, as well as other areas such as spam and identity theft. We believe, however, that such additional funding should come from the normal FTC appropriations and not in fees collected from users of the registry.

C. The Operator of the Registry Should Improve the Hygiene of the List to Ensure it does not Include Changed Telephone Numbers

Finally, DMA would like to bring one additional issue regarding the "hygiene," or accuracy, of the do-not-call registry to the Committee's attention. We are told by our members that 30% to 40% of the telephone numbers on the registry are included incorrectly, such as dropped numbers, fax numbers, and wireless numbers. We believe that this, in part, results from the fact that there is a significant time lag from when an individual moves and changes their telephone number to the time when that number is removed from the registry. This time period is longer than the amount of time it takes for

[6] While DMA no longer adds new names to the TPS list, we will continue to operate the list for five more years. DMA, however, does continue to administer the state lists for Pennsylvania, Maine, and Wyoming.

the phone company to reassign the number. As a result, there are telephone numbers on the registry for households that did not register to be included on it.

This is particularly problematic because many reassigned telephone numbers are given to subscribers who recently have moved to new geographic regions and are, therefore, most likely to respond to telemarketing calls for items such as home security systems, home insurance, lawn care, and newspaper delivery. For this reason, DMA believes that telephone numbers should be removed from the registry as soon as they are dropped by the consumer and before they are reassigned. This would make for a much more accurate list recognizing the desires of consumers and preserving the ability to call households that have not placed their numbers on the registry. We have raised this issue with the FTC and believe that they understand and appreciate our concern. We hope that this concern can be addressed going forward.

III. Responsibilities of List Compilers

The Committee has asked us to discuss issues related to list compilers. In particular, the Committee requested testimony on this issue in response to a May 23, 2007 letter that Senator McCaskill sent to the Chairman regarding a May 20, 2007 *New York Times* article entitled "Bilking the Elderly, With a Corporate Assist." We completely agree with the Senator's concerns about the types of practices alleged in the article.

DMA fully supports responsible practices by compilers of marketing lists, and has long been a leader in establishing comprehensive self-regulatory guidelines for its members on important issues related to telemarketing, among many others. Understanding the importance of standards and best practices in protecting consumer welfare, DMA, in June 2007, working with its members, adopted guidelines for database compilers as part of our Guidelines for Ethical Business Practice ("Guidelines").[7]

[7] Responsibilities of Database Compilers, DMA Guidelines for Ethical Business Practice, Article #36, (attached).

These guidelines were developed over the course of the past year through the DMA process for guideline establishment. We believe that these guidelines will go a long way to prevent illegitimate marketing practices that threaten to undermine relationships between consumers and marketers. In our experience, industry guidelines are the most effective way to address evolving marketing practices while being sensitive to consumer welfare. Such guidelines are flexible and adaptable in a timely manner so as to address bad practices and not unintentionally or unnecessarily cover legitimate actors.

In her letter, Senator McCaskill expressed concern about the use of seniors' personal information for fraudulent purposes to exploit seniors for financial gain. We could not agree more with the Senator that seniors and other groups of individuals should not be exploited based on such vulnerabilities. Our guidelines have always prohibited such conduct, and we believe that our list compiler guidelines directly address concerns about seniors by further clarifying that such lists must only be used for appropriate purposes and defining new duties for list compilers.

Specifically, as I will describe in more detail below, these guidelines require that for sensitive marketing data, which includes data pertaining to children, older adults, health care or treatment, account numbers, or financial transactions, compilers should review materials to be used in promotions to help ensure that their customers' use of the data is both appropriate and in accordance with their stated purpose.

This list compiler guidelines define additional appropriate standards for companies that assemble personally identifiable information about customers for the purpose of facilitating renting, selling, or exchanging information to non-affiliated third-party organizations for marketing purposes. These guidelines require, among other things, as a condition of DMA membership, that companies that compile and sell marketing lists adhere to the following practices:

- establish contractual agreements with customers that define the rights and responsibilities of the compiler and customer with respect to the use of marketing data;

- suppress the consumer's information, upon request, from the compiler's database;

- prohibit an end-user marketer from not divulging the database compiler as the source of the marketer's information;

- explain to consumers the nature and types of sources they use to compile marketing databases;

- include language in their contractual agreements that requires compliance with applicable laws and DMA guidelines;

- require customers to state the purpose for which the data will be used;

- use marketing data only for marketing purposes; and

- monitor, through seeding or other means, the use of their marketing databases to ensure that customers use them in accordance with their stated purpose.

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Thank you for your time and the opportunity to speak before the Committee. I look forward to your questions, and to working with the Committee on these issues.

Attachment to Testimony of the Direct Marketing Association, Inc.

RESPONSIBILITIES OF DATABASE COMPILERS

Article #36

For purposes of this guideline, a *database compiler* is a company that assembles personally identifiable information about consumers (with whom the compiler has no direct relationship) for the purpose of facilitating renting, selling, or exchanging the information to non-affiliated third party organizations for marketing purposes. *Customer* refers to those marketers that use the database compiler's data. *Consumer* refers to the subject of the data.

Database compilers should:

- Establish written (or electronic) agreements with customers that define the rights and responsibilities of the compiler and customer with respect to the use of marketing data.

- Upon a consumer's request, and within a reasonable time, suppress the consumer's information from the compiler's and/or the applicable customer's database made available to customers for prospecting.

- Not prohibit an end-user marketer from divulging the database compiler as the source of the marketer's information.

- At a minimum, explain to consumers, upon their request for source information, the nature and types of sources they use to compile marketing databases.

- Include language in their written (or electronic) agreements with DMA member customers that requires compliance with applicable laws and DMA guidelines. For non-DMA member customers they should require compliance with applicable laws and encourage compliance with DMA's guidelines. In both instances, customers should agree *before* using the marketing data.

- Require customers to state the purpose for which the data will be used.

- Use marketing data only for marketing purposes. If the data are non-marketing data but are used for marketing purposes, they should be treated as marketing data for purposes of this guideline.

- For sensitive marketing data, compilers should review materials to be used in promotions to help ensure that their customers' use of the data is both appropriate and in accordance with their stated purpose. Sensitive marketing data include data pertaining to children, older adults, health care or treatment, account numbers, or financial transactions.

- Randomly monitor, through seeding or other means, the use of their marketing databases to ensure that customers use them in accordance with their stated purpose.
- If a database compiler is or becomes aware that a customer is using consumer data in a way that violates the law and/or DMA's ethics guidelines, it should contact the customer and require compliance for any continued data usage, or refuse to sell the data and/or refer the matter to the DMA and/or a law enforcement agency.