



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

January 31, 2011

By Email

Mr. Ntutuzelo Vananda
Department of Trade and Industry
Republic of South Africa
77 Meintjies Street
Sunnyside, Pretoria, 0002
South Africa

Re: United States Federal Trade Commission Staff Comments on Proposed Consumer Protection Regulations, 2010; Notice 1099 of 2010

Dear Mr. Vananda:

United States Federal Trade Commission (“FTC”) staff submits the following comments on South Africa’s Proposed Consumer Protection Regulations, 2010.¹ Our comments focus on how the FTC’s general approach to consumer protection may be helpful to you as you consider how best to craft these regulations. We also share our experience and perspectives on four issues in particular: franchises; disclosures about reconditioned and grey market goods; direct marketing; and choice of law provisions in contracts.

We appreciate the opportunity to provide these comments, and hope you find them useful. We are mindful that our markets differ from yours in various ways, and thus the best way to address certain problems may vary in many ways too. We therefore do not try to address every subject covered by your regulations, but instead emphasize those aspects of our experience that we believe are most relevant and helpful given your environment.

I. Executive Summary

The FTC has extensive experience in many areas covered by South Africa’s proposed Consumer Protection Regulations. The main areas we have chosen to comment on here include: franchising; product labeling and disclosure of reconditioned or grey market goods; mechanisms to block direct marketing communication; and choice of law in consumer contracts.

¹ These comments represent the views of the staff of the Federal Trade Commission, and not necessarily the views of the Federal Trade Commission itself or any individual FTC commissioner.

- Your proposed Regulations 2 and 3 address franchise agreements. Our main suggestion is that you may wish to consider the way in which information must be disclosed, including whether you should specify the exact language of some of the disclosures.
- Your proposed Regulations 8 and 10 appear to mandate specific disclosures with respect to certain textiles, clothing, shoes and leather goods, and reconditioned or grey market goods. These disclosure requirements are designed to ensure that consumers are able to make informed purchase decisions, but appear to vary with respect to the placement or prominence of the required disclosures. You may wish to consider modifying the way these disclosures are made.
- Proposed Regulation 4 aims to protect consumer privacy by providing ways to block direct marketing from a variety of different sources -- telephone, facsimile, and email -- and contemplates a registry where consumers could submit their personal information to place a preemptive block on marketing inquiries. In light of the scope of the proposed regulation, you may want to consider having different rules for different modes of communication or categories of information, streamlining the operation of the registry, and limiting the amount of information maintained in the registry.
- Finally, Section 56(3)(dd) of proposed Regulation 56 restricts the choice of law in consumer agreements to South African law. The issue of applicable law, particularly in e-commerce contracts, has proven complex and controversial. You may wish to consider the impact of this proposed provision on the development of South African e-commerce and the practical benefits and burdens to consumers resulting from such restrictions.

II. Interest and Experience of the Federal Trade Commission

The FTC, created in 1914, is an independent administrative agency of the United States government that is charged with promoting competition and protecting consumers. The FTC advances this mission in various ways. It pursues enforcement through administrative and court actions; promotes consumer interests by sharing perspectives and experience with domestic and foreign counterparts; develops policy and research tools through hearings, workshops, and conferences; and creates practical programs for consumer and business education.

The FTC's mandate covers a wide range of businesses and business practices, including advertising, marketing, billing, and collection. The keystone of the FTC's law enforcement mission is Section 5 of the FTC Act, which prohibits "unfair methods of competition" and "unfair or deceptive acts or practices."²

2 *See* 15 U.S.C. § 45(a)(2):

The FTC uses its authority to protect consumers by working to combat fraud, deception, and unfair practices in the marketplace. To provide greater understanding as to how the FTC will interpret and enforce its Section 5 authority, the FTC has issued policy statements in areas such as deception, substantiation, and unfair practices. Thus, the FTC's Deception Policy Statement provides that the agency will treat an advertisement as deceptive if it contains a representation, omission, or practice that is likely to mislead consumers acting reasonably under the circumstances, to their detriment.³ Although deceptive claims are actionable only if they are material to consumers' decisions to buy or use products, the FTC need not prove actual injury to consumers. Additionally, the FTC's Policy Statement Regarding Advertising Substantiation requires advertisers to have a "reasonable basis for advertising claims before they are disseminated."⁴ The FTC's Unfairness Policy Statement provides that an advertisement or trade practice is unfair if it causes or is likely to cause substantial consumer injury which is not reasonably avoidable by consumers themselves and which is not outweighed by countervailing benefits to consumers or competition.⁵

The overall approach reflected in the FTC Act and its interpretation is similar to what we understand to be the underlying goal of your enabling legislation:⁶ to provide the information

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of Title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C.A. § 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C.A. § 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

The FTC Act is available at <http://www.ftc.gov/ogc/ftcact.shtm>.

3 See Deception Policy Statement, appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984), cited with approval in *Kraft, Inc. v. FTC*, 970 F.2d 314 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993). The FTC's Deception Policy Statement is available at <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>.

4 The FTC's Substantiation Statement is available at <http://www.ftc.gov/bcp/guides/ad3subst.htm>. For a recent application of the FTC substantiation doctrine in the context of health claims, see, e.g., *In the Matter of Nestlé HealthCare Nutrition, Inc., a corporation*, available at <http://www.ftc.gov/opa/2011/01/nestle.shtm>.

5 See Unfairness Policy Statement, appended to *International Harvester Co.*, 104 F.T.C. 949, 1070 (1984). The Unfairness Policy Statement is available at <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>. The unfairness standard was subsequently codified into the FTC Act. See 15 U.S.C. § 45(n).

6 South African Consumer Protection Act, 2008 (Act No. 68 of 2008). The preamble of the Act outlines the goals of the legislation which are "[t]o promote a fair, accessible and sustainable marketplace for consumer products and services and for that purpose to establish national norms and standards relating to consumer protection, to provide for improved standards of consumer information, to prohibit certain unfair marketing and business practices, to promote responsible consumer behavior, to promote a consistent legislative and enforcement framework relating to consumer transactions and agreements, to establish the

consumers need to make meaningful choices among the products and services available in the marketplace.

We note there are also similarities between this approach and that outlined recently in the Organisation for Economic Cooperation and Development's *Consumer Policy Toolkit* (2010).⁷ The Toolkit examines how consumers and markets have evolved in recent years and explores how policy approaches are being adapted in light of new insights gained from research on information and behavioral economics. It also provides a step-by-step analytical framework for implementing consumer policy, a framework that benefits from an analysis of available policy instruments and many examples contributed by a wide array of countries. You may find the Toolkit useful to you as you implement your new Consumer Protection Act and the associated regulations.

The FTC also enforces a variety of other consumer protection statutes,⁸ and has promulgated a number of industry-wide trade regulation rules. Among the rules it has adopted to combat fraud are: a rule which places restrictions on telemarketing activity and allows consumers to opt out of receiving telemarketing calls;⁹ a rule requiring a cooling-off period for door-to-door sales;¹⁰ rules regulating disclosures for franchise and business opportunities;¹¹ and rules against sending unsolicited commercial emails.¹²

Finally, we note that the FTC places considerable emphasis on enforcement. From March 2009 through March 2010 the FTC filed 80 consumer protection actions in U.S. Federal District Courts and obtained 83 judgments and orders requiring the payment of more than \$393 million dollars in consumer redress or disgorgement of ill-gotten gains.¹³

National Consumer Commission”

7 Information on the OECD Consumer Policy Toolkit is available at http://www.oecd.org/document/1/0,3746,en_2649_34267_44074466_1_1_1_1,00.html.

8 See, e.g., Truth in Lending Act, 15 U.S.C. §§ 1601-1667f; Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681(u); Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692o; Credit Repair Organizations Act, 15 U.S.C. §§ 1679-1679j; Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501-6506; Textile Fiber Products Identification Act, 15 U.S.C. §§ 70-70k; and Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f.

9 The Telemarketing Sales Rule, 16 C.F.R. § 310.

10 The Rule Concerning Cooling-off Period for Sales Made at Home or at Certain Other Locations, 16 C.F.R. § 429.

11 See Disclosure Requirements and Prohibitions Concerning Franchising (“Franchise Rule”), 16 C.F.R. § 436; and Disclosure Requirements and Prohibitions Concerning Business Opportunities (“Business Opportunity Rule”), 16 C.F.R. § 437.

12 See 16 C.F.R. §§ 316.1-316.6.

13 FTC Annual Report, April 2010 at p. 25. The most recent FTC cases charging individuals or

III. Franchise Regulations and Proposed Regulations 2 and 3

In offering some comments on your proposed franchise regulations, we note that the FTC has had extensive experience in regulating franchise agreements and business opportunities.¹⁴ For a time, both types of business arrangements were regulated under one rule, known as the Franchise Rule.¹⁵ Since 2006, however, the FTC has treated franchise agreements and business opportunities under separate rules.¹⁶ This change reflected the fact that franchises typically are expensive, involve complex contractual relationships, and can include the right to use a trademark or other commercial symbol. In contrast, business opportunities often are less costly, and involve simpler purchase agreements. In October 2010, , FTC staff proposed changes to the Business Opportunity Rule that, if adopted, would broaden the scope of what is defined as a business opportunity to include work-at-home opportunities such as envelope stuffing, medical billing, and product assembly, many of which had not previously been covered. It would also streamline the disclosure requirements to make the disclosures easier to understand and to ease the compliance burdens on those offering business opportunities.¹⁷

Your proposed Regulations 2 and 3 address franchise agreements as defined in South Africa's Consumer Protection Act of 2008. As we understand it, proposed Regulation 2 requires franchise agreements to contain certain provisions and requires that the franchisor disclose certain information in the franchise agreements. Proposed Regulation 3 requires that the franchisor disclose certain additional information in a separate disclosure document for prospective franchisees.

Our main suggestion is that you may wish to consider the way in which information must be disclosed, including whether you should specify the exact language of some of the disclosures. Our comments will first address these questions, and then suggest drafting revisions to specific

companies with deceptive or unfair practices can be found at <http://business.ftc.gov/legal-resources/all/35>.

14 Since 1995, the Commission has brought more than 245 cases against business opportunity sellers, and conducted more than eighteen law enforcement sweeps to combat persistent business opportunity frauds violating the Franchise Rule, such as those involving the sale of vending machines, rack displays, public telephones, and Internet kiosks, among others. Brief summaries of various franchise and business opportunity enforcement cases from 1996-2003 can be found at <http://www.ftc.gov/bcp/franchise/caselist.shtm>.

15 43 Fed. Reg. 59, 614 (Dec. 21, 1978).

16 See note 11 *supra*.

17 The reasons for these proposed changes can be found in the FTC Staff Report, *Disclosure Requirements and Prohibitions Concerning Business Opportunities*, and the Proposed Revised Trade Regulation Rule. See 16 C.F.R. § 437, available at <http://www.ftc.gov/os/fedreg/2010/october/101028businessopportunitiesstaffreport.pdf>. The Commission's final determination in this matter will be based upon the record taken as a whole, including the Report and comments on the Report received during the 75-day period after the Report was placed on the public record.

provisions that you may wish to consider.

First, you may wish to consider adding a requirement that disclosure provisions appear in a certain order. Some unscrupulous franchisors may attempt to hide important information by burying it in the body of the disclosures. The proposed regulations may further complicate this because they require certain information to be disclosed in the agreement and other information to be disclosed in the disclosure document, but not necessarily in both places.¹⁸ To make the required information more prominent, the proposed regulations could require that the franchise disclosure document include a table of contents and that the disclosures appear in the order that they appear in the table of contents. Important information required in the agreement could then be moved to, or required to appear again in, the disclosure document. Then, care should be given to moving the more relevant disclosures to the beginning.

Second, where the proposed regulations require that specific disclosures be made, you may wish to include the mandated disclosure language in the regulations themselves. For instance, proposed subregulation 2(2)(a) refers to language in the Franchise Act that must be included in the franchise agreement. Rather than referencing language appearing elsewhere, it would be easy to simply repeat the required language in the regulation:

A franchisee may cancel a franchise agreement without cost or penalty within 10 business days after signing such agreement by giving notice to the franchisor.

Including such language in the regulation itself should help avoid confusion, increase compliance, and reduce the chance for mistakes.

You may also wish to consider the disclosures that the FTC Franchise Rule requires, but which your proposed regulations do not, to determine if any of those requirements would be worth the additional costs of requiring them in your marketing environment. For instance, potential franchisees may find it useful to know that the franchise disclosure document itself is not a contract. Part 436.3(2) of the FTC's Franchise Rule (16 C.F.R. § 436.3(2)) requires the franchisor to include the following statement in the franchise disclosure document:

The terms of your contract will govern your franchise relationship. Don't rely on the disclosure document alone to understand your contract. Read all of your contract carefully. Show your contract and this disclosure document to an advisor, like a lawyer or an accountant.

¹⁸ Subregulation 2(3)(q), for instance, requires that a franchise agreement disclose the complete name and address of the franchisor, but subregulation 3 does not require that the disclosure document contain the same information.

The FTC's Franchise Rule mandates 23 specific disclosures which you may wish to consider.¹⁹ Among those disclosures are the following:

- A disclosure informing potential franchisees how long the franchisor has been in operation, and whether it has previously sold other franchises;
- A disclosure informing potential franchisees of any legal actions taken against the franchisor, its officers, or against any other key personnel over an appropriate period of time, such as the previous ten years, and a statement disclosing any legal actions relating to the franchisor – franchisee relationship;
- A statement that it is a violation of the regulations to make any statement or claim, orally or in writing, contradicting any information disclosed in the disclosure document; and
- A requirement that the disclosure document be updated on a regular basis, such as every year.

In addition to these suggested changes, you may also wish to consider making the following specific changes to the language of the proposed subregulations:

- 2(2)(d)(i) prohibits the “unreasonable overvaluation of fees” This is a very broad provision and it provides no guidance as to how such a determination can be made. Without guidance as to how to determine whether fees are unreasonably overvalued it may be difficult for businesses and consumers alike to understand, and also difficult to enforce. You may wish to consider revising or eliminating this requirement;
- 2(2)(f)(i) exempts current franchise agreements from the disclosure requirement provided they are amplified by an annexure. The provision may be improved by adding a requirement that the annexure meets the requirements of the proposed regulations;
- 2(3)(e) requires a disclosure of direct or indirect consideration payable by the franchisee to the franchisor. This provision could be broadened to add requirements that the purpose and timing of such payments also be disclosed;
- 2(3)(y) requires the full particulars of the franchisee's financial obligations. Subsection (ii) of that subregulation includes a disclosure of all funds required to establish the franchised business, and it could be broadened to include a disclosure of when the payments will be required to be made and to whom. Subsection (viii) requires a disclosure of information relating to ongoing payments, and it could be

¹⁹ See generally 16 C.F.R. § 436.5 (Disclosure items).

broadened to include a disclosure of the purpose of those payments; and

- 3(d)(i) requires that the franchise disclosure include a list of “current franchisees.” The provision could be enhanced by requiring a list of “all current franchisees,” thereby guarding against franchisors providing some selective list that is not representative of the entire franchisee base. The FTC requires the disclosure of all current franchisees.²⁰ Our experience has been that sometimes franchisors are steered to particular franchisees, or even to confederates of the franchisor, who give unrepresentative or even misleading accounts of their experience.²¹

IV. Information Disclosure and Proposed Regulations 8 and 10: Product Labeling and Disclosure of Reconditioned or Grey Market Goods

As recognized in our Deception Policy Statement the omission of material information may lead to deception. Where a disclosure is necessary to prevent deception the FTC requires that the disclosure be “clear and conspicuous.” Many factors can influence whether the information is “clear and conspicuous,” including the prominence, presentation (including word choice and format), placement, and proximity of the disclosure. The FTC’s “clear and conspicuous” standard is intended to assure that the disclosure will be seen, read and understood by consumers. In promulgating disclosure rules, you may wish to consider adopting a similar “clear and conspicuous” approach to maximize the value of required disclosures.²²

The FTC has specific laws, regulations and guidelines pertaining to textiles and reconditioned goods.²³ Thus in certain industries such as the automotive industry, these laws, regulations and guidelines provide that it is unfair or deceptive to offer for sale or sell any industry product unless a clear and conspicuous disclosure that such product has been used or contains used parts is made in advertising, sales promotional literature and invoices, and on product packaging.

As we understand them, your proposed Regulations 8 and 10 would mandate specific disclosures with respect to certain textiles, clothing, shoes and leather goods, and reconditioned or

20 16 C.F.R § 436.5(t)(4).

21 *See, e.g., F.T.C. v. Wolf*, 1997-1 Trade Case P 71,713 (S.D. Fla. 1996) (the defendants paid related third parties who were not franchisees to represent that they had favorable experiences with the franchisor).

22 For further discussion of the “clear and conspicuous” standard, *see e.g., Dot Com Disclosures: Information About Online Advertising*, available at <http://business.ftc.gov/documents/bus41-dot-com-disclosures-information-about-online-advertising>. Some Commission rules and guides, as well as some FTC cases, use the synonymous phrase “clear and prominent.” *See, e.g., Guides for the Jewelry, Precious Metals, and Pewter Industries*, 16 C.F.R. § 23.1 n.2 (“To prevent deception, any qualifications or disclosures, such as those described in the guides, should be sufficiently *clear and prominent*.” (Emphasis added)).

23 *See, e.g., Textile Fiber Products Identification Act*, 15 U.S.C. § 70 *et seq.*; and *Guides for the Rebuilt, Reconditioned and Other Used Automobile Parts Industry*, 16 C.F.R. Part 20.

grey market goods. Sellers of covered textiles, clothing, shoes and leather goods would be required to disclose, among other things, when these goods are reconditioned. Sellers of other reconditioned or grey market goods would also be required to disclose that such goods have been reconditioned, rebuilt or remade, as the case may be.

These disclosure requirements are consistent with the FTC's disclosure requirements of ensuring that consumers are able to make informed purchase decisions. However, the regulations appear to differ with respect to the placement or prominence of the required disclosures. Regulation 8 requires the disclosure to be "conspicuous and easily legible" to the consumer. Regulation 10, on the other hand, merely requires that the disclosure be placed where the consumer is "likely to see" it and in an "easily legible size and manner." You may wish to adopt a uniform "clear and conspicuous" standard for all disclosures.

V. Proposed Regulation 4: Mechanisms to Block Direct Marketing Communication

Proposed Regulation 4 is aimed at protecting consumer privacy, which is a core part of the FTC's consumer protection mission. The proposed regulation acknowledges that consumers may want to block direct marketing from a variety of different sources -- e.g., telephone, facsimile, and email -- and contemplates the operation of a registry where consumers could submit their contact and personal identification information to place a preemptive block on marketing inquiries. As discussed below, in light of the breadth of the proposed regulation, you may want to consider having different rules for different modes of communication or categories of information, streamlining the operation of the registry, and limiting the scope of information maintained in the registry.

A. Application of Legal Framework to All Communications

In the United States, there have been similar efforts to protect consumers from unwanted communications sent via email, facsimile, and telephone. However, the legislative and regulatory schemes have differed based on the medium of the communication used to contact consumers. For example, the CAN-SPAM Act of 2003 permits the sending of unsolicited commercial emails so long as the transmission information is not false or misleading, but it also prohibits email marketers from sending commercial emails to consumers who have requested to opt out of receiving future emails.²⁴ However, pursuant to regulations implementing the same law, the sending of mobile service commercial messages is prohibited without express prior authorization.²⁵ The term "mobile service commercial messages" refers to commercial email messages sent to addresses with Internet domains on wireless devices.²⁶ In fashioning a different rule for mobile service commercial messages, the U.S. Federal Communications Commission (FCC) considered the unique aspects of mobile devices, including the different expectations consumers have in the mobile context, the intrusive nature of

24 See the CAN-SPAM Act, 15 U.S.C. § 7704.

25 See 47 C.F.R. § 64.3100(a).

26 See 47 C.F.R. § 64.3100(c)(7).

such messages, and the potential cost for receiving the messages.²⁷

In addition, the United States has adopted a different approach for marketing directed at fax numbers than it has for email. The Telephone Consumer Protection Act of 1991 and the FCC's implementing rules, as amended by the Junk Fax Prevention Act of 2005, prohibit all commercial solicitations to fax numbers unless there is an established business relationship or prior express consent.²⁸ The prohibition applies to fax numbers used for personal and/or business purposes. As to telephone calls -- for both residential lines and mobile telephone numbers -- consumers may opt out of receiving telemarketing calls by placing their residential or mobile number in the National Do Not Call Registry.²⁹ However, there are important exceptions, including political calls, calls where the marketer has an established business relationship with a consumer, or calls seeking charitable solicitations.³⁰ Business telephone numbers and fax numbers are not eligible for inclusion in the National Do Not Call Registry.³¹ The FTC launched the Registry in 2003, and there are now more than 200 million registered numbers.³²

Thus, the U.S. legal framework, while protecting consumers from unwanted communications, recognizes that different considerations are implicated by different media. In the proposed regulations, the same framework is applied to all types of communications and personal information, likely because section 11 of the Consumer Protection Act extends the right of privacy to the ability to block any form of communication. It may be worthwhile for you to consider whether the circumstances of a particular type of communication or access to certain categories of personal information warrant the application of a more particularized rule.

27 See Rules and Regulations Implementing the CAN-SPAM Act and Telephone Consumer Protection Act, 69 Fed. Reg. 55767 (Sept. 16, 2004).

28 See 47 U.S.C. § 227; 47 C.F.R. § 64.1200.

29 See 16 C.F.R. § 310.4(b)(1)(iii)(B); see <http://www.donotcall.gov>.

30 See 16 C.F.R. §§ 310.2(dd); 310.4(b)(1)(iii)(B)(ii); 310.6(a). However, in addition to placing telephone numbers on the National Do Not Call Registry, consumers may still make entity specific opt-outs by stating that they do not wish to receive telephone calls made by or on behalf of the seller whose goods or services are being offered or made on behalf of a charitable organization for which a charitable contribution is being solicited. 16 C.F.R. § 310.4(b)(1)(iii)(A).

31 See, e.g., 16 C.F.R. § 310.6(b)(7)..

32 As of fiscal year 2009, there were 191 million active registrations in the National Do Not Call Registry. FTC, National Do Not Call Registry Data Book for Fiscal Year 2009, at 3 (Nov. 2009), available at <http://www.ftc.gov/os/2009/12/091208dncadatabook.pdf>. There were over 1.8 million Do-Not-Call complaints in fiscal year 2009. *Id.* at 4. The FTC, FCC, and states enforce violations of Do-Not-Call laws.

B. Operation of National Registry

Proposed Regulation 4 also sets forth the guidelines for the operation of a registry where consumers could submit their contact and personal identification information to place a preemptive block from marketing inquiries. As we understand the requirements of proposed Regulation 4(3)(f), marketers must assume that all consumers have opted to block all marketing communications. To overcome that presumption, proposed Regulation 4(3)(e) requires marketers to ask the registry administrator, in writing, whether a consumer permits the type of marketing that they would like to perform. Pursuant to the same provision, the registry administrator is allowed to confirm or deny the request to block the marketing, and provide no other information. According to proposed Regulation 4(3)(g), the registry administrator must then send copies of the applications submitted by the marketers and the registry's reply to the consumers.

The operation of the registry, as outlined in the proposed regulations, could be very complex and could impose several burdens on companies attempting to comply with the requirements, including imposing time delays, the need to expend significant resources on frequent registry inquiries, and the need to compile more comprehensive data about consumers. For example, if a marketer would like to send direct mail to the residents of Cape Town, it would first need to consult the administrator of the registry to determine if there are blocks on any of the physical addresses. Since the direct mail campaign could include millions of names, the time the company must wait for a reply from the administrator could be lengthy, as it is unclear whether the administrator could employ technology that could match this information quickly. Once the company receives the reply, it would then have to take additional time to merge its mailing lists. If the company would also like to contact the consumer via email and telephone, it would triple the number of checks the registry would have to make, thereby prolonging the time period before the company can verify the blocks and distribute its marketing materials.

Given that the proposed regulations do not set forth how often companies must consult the registry, one interpretation is that companies must consult the registry each time before it sends marketing materials, which could be on a daily basis, or even multiple times a day. The frequency of registry inquiries could become burdensome, especially on smaller companies. In the United States, marketers are required to update their call lists with the National Do Not Call Registry every 31 days.³³

Further, section 4(3)(f) of the regulations provides that companies must assume that a consumer has placed a comprehensive block for all categories of information maintained in the registry. However, it is unclear whether companies would have sufficient information in their own databases to comply. For example, as we understand it, if a consumer registers a cellular telephone number, the company must assume that the consumer also blocked his identification number, email address, passport number, fax number, etc., until it receives confirmation from the registry that no comprehensive block is in place. However, if the company only has the cellular telephone number, it has no basis for linking the number to a specific consumer or his physical address and

33 16 C.F.R. § 310.4(b)(3)(iv).

identification information. Although the provision is aimed at protecting privacy, it could potentially have the unintended effect of encouraging companies to compile more comprehensive databases containing sensitive data about consumers.

In addition, the proposed regulations could make it difficult for an entity to comply with the requirements to become the administrator of a registry, at least not without the expenditure of considerable resources. Each of the steps the registry would have to take would be difficult and expensive to accomplish, especially given the complexity of the data that consumers are allowed to submit. For example, the proposed regulations require consumer notification for each application inquiring whether the consumer's information is blocked. If each marketing campaign implicates millions of consumers, the administrator would expend significant resources on millions of daily customer notifications for each application. Thus, you may want to consider removing the consumer notification requirement for each marketing inquiry. In addition, as referenced above, if the registry contains a consumer's identification number, the registry would have to devise a mechanism for determining whether a single piece of identifying information is linked to other information submitted by the same consumer. In so doing, the registry would likely have to collect more comprehensive sensitive data from consumers attempting to register only one piece of information. To avoid this result, one option would be to limit the scope of information maintained in the registry, which is discussed below in further detail.

C. Scope of Information Included in National Registry

Section 11(3) of the Consumer Protection Act provides: "The Commission may establish, or recognise as authoritative, a registry in which any person may register a pre-emptive block, either generally or for specific purposes, against any communication that is primarily for the purpose of direct marketing." Proposed Regulation 4(3)(c) would allow consumers to register their name, identification number, passport number, telephone number, facsimile number, email address, postal address, physical address, and a website in a national registry to create a preemptive block on marketing. Although the Consumer Protection Act recognizes a right of privacy for every person to preemptively block communications from others, the statute also authorizes the use of discretion in creating a registry where consumers could register preemptive blocks from any communication. Although proposed Regulation 4(3)(n) would require the administrator to implement security arrangements to prevent the manipulation, theft, or loss of registry data, it is unclear whether adequate security protections exist to protect such sensitive data, especially passport numbers. Although a national registry may be effective for certain types of information, the scope of information included in the proposed regulations could impose significant security and privacy risks. As a result, you may want to consider whether to exercise your discretion and limit the information collected by the registry.

In the United States, the FTC concluded that it could manage a secure National Do Not Call Registry that provided limited consumer data to marketers accessing the registry to remove registered residential and mobile telephone numbers from their call lists. In addition, the FCC successfully created a list of Internet domains used by wireless carriers to help marketers identify wireless subscribers by domain name so that they could avoid sending mobile service commercial

messages to those domains.³⁴ In so doing, the FCC noted that the burden on wireless providers to supply the domains for the directory would be minimal, the list would be relatively small and static, no burden would be placed on wireless subscribers, and no personal information would be collected from wireless subscribers.³⁵

We note that the U.S. Congress considered a registry similar to the National Do Not Call Registry in the email context.³⁶ The FTC advised Congress in 2004 that the creation of a Do-Not-Email Registry would not be feasible because of security, privacy, and enforcement challenges.³⁷ In particular, the FTC found that a registry of email addresses could serve as a treasure trove for spammers, providing them with a list of millions of valid email addresses. Consumers who placed their email addresses on such a registry would likely receive more spam. And, because of the difficulty in tracking down the sender of an email, the FTC would have a difficult time identifying the spammers. These concerns were particularly acute with respect to children's email accounts, which could be accessed and used by pedophiles to target vulnerable children. Prior to including email addresses in the registry, you may wish to explore whether advancements in technology can make a registry less susceptible to abuse by spammers.

The rationale for declining to create a Do-Not-Email Registry could also be extended to the other types of information that the registry in your proposed regulations would cover. In particular, the value of a national database with identification and passport numbers would likely make it much more vulnerable to attempted theft or hacking than a database that only contains telephone numbers. Further, the harm that could occur in the event of the loss or theft of the data would be significantly greater. In the United States, there have been several efforts to limit the collection of personal identification information, such as social security numbers, to enhance data security.³⁸ The President's Identity Theft Task Force, which the FTC co-chaired, implemented several recommendations aimed at protecting consumer data in the public sector and limiting the overuse of Social Security numbers.³⁹ The Identity Theft Task Force also encouraged similar data security efforts in the private sector by launching policymaking, outreach, and enforcement initiatives.⁴⁰ In

34 See note 27 *supra* at 55768.

35 See *id.*

36 See 15 U.S.C. § 7708.

37 See FTC, *National Do Not Email Registry, A Report to Congress* (2004), available at <http://www.ftc.gov/reports/dneregistry/report.pdf>.

38 See President's Identity Theft Task Force, *Combating Identity Theft, A Strategic Plan*, at 25-26 (April 2007), available at <http://www.idtheft.gov/reports/StrategicPlan.pdf>.

39 See President's Identity Theft Task Force, *The President's Identity Theft Task Force Report* (Sept. 2008), available at <http://www.idtheft.gov/reports/IDTReport2008.pdf>.

40 See *id.*

so doing, the Identity Theft Task Force and other interested stakeholders recognized that curtailing the ability to access sensitive consumer data was critical to reducing the incidence of fraud and identity theft.

In addition, the registration of websites raises several important questions. For example, it is unclear whether the consumer registering the website has to be the domain name registrant. If not, another consideration would be whether the consumer could submit the URL of a third party social media site to block targeted advertisements used by the site. If this is permissible, it raises the question of whether all online advertisers would be required to consult the registry to see if certain websites were blocked. If so, the inclusion of websites in the registry may create a number of unintended consequences and impose significant burdens on legitimate marketers across a broad range of sectors.

D. Block on Postal Delivery

Section 4(1) of the proposed regulations provides that if a consumer has informed any other person in writing or placed a communication or sign on a postal box indicating that he does not want to receive direct marketing materials, no one can place marketing materials in or near the postal box. Although no similar rule exists in the United States,⁴¹ it may be worthwhile to highlight the potential application of this provision. One arguable interpretation is that if a consumer has informed his neighbor (i.e., a “person”) that he does not wish to receive “junk mail” but opts not to place a sign on the postal box, a mail carrier or any other third party without knowledge of the consumer’s election not to receive direct marketing materials might violate the regulation. Similarly, a postal carrier may have difficulty ascertaining what constitutes “junk mail” and what does not. Perhaps a more narrow construction would be useful here to avoid imposing legal liability on third parties who have not been notified of the consumer’s decision to opt-out of receiving directing marketing by mail.

VI. Proposed Regulation 56(3)(dd): Choice of Law

Section 56(3)(dd) of proposed Regulation 56 restricts the choice of law in consumer agreements. Specifically Section 56(3)(dd) provides that the term of a consumer agreement generally is deemed to be unfair if it has the purpose and effect of “providing that a law other than the law of the Republic applies to a consumer agreement concluded and implemented in the Republic, where the consumer was residing in the Republic at the time when the agreement was concluded.”

We note that in the United States businesses and consumers generally may choose the

⁴¹ In some instances, industry self-regulatory initiatives in the United States provide consumers the ability to stop receiving unwanted mail. For example, the Direct Marketing Association (“DMA”), a trade association for businesses and nonprofits engaged in direct marketing, operates a self-regulatory program called Commitment to Consumer Choice, which requires DMA members engaged in direct mail marketing to notify consumers of the opportunity to modify or opt out of future mail solicitations. *See* <http://www.dmaccc.org/>.

contract law applicable in consumer agreements, subject to certain mandatory protections. The issue of applicable law, particularly in e-commerce contracts, has proven complex and controversial. It has been recognized as an area deserving of careful further study.⁴² You may wish to consider the impact of this proposed provision on the development of South African e-commerce and the practical benefits and burdens to consumers resulting from such restrictions.

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We very much appreciate the opportunity to provide these comments and hope you find them helpful in your marketing environment. We would welcome the opportunity to discuss these issues further. Any questions or comments can be directed to Hugh Stevenson, Deputy Director, Office of International Affairs at the U.S. Federal Trade Commission, hstevenson@ftc.gov, 202-326-3511, or to Deon Woods Bell, Counsel for International Consumer Protection, Office of International Affairs at the U.S. Federal Trade Commission, dwoodsbell@ftc.gov, 202-326-3307. Thank you.

42 OECD Background Report, *Empowering E-Consumers: Strengthening Consumer Protection in the Internet Economy*, December 2009, Washington, D.C., available at <http://www.oecd.org/dataoecd/44/13/44047583.pdf>.