Direct Marketing Association's Government Affairs Annual Spring Conference
Remarks of FCC Commissioner Kathleen Q. Abernathy

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As prepared for delivery.

Thank you for inviting me to be here with you today. I believe your invitation could be based on either of two things – (a) you are interested in my views as an FCC Commissioner on various regulatory issues that touch on direct marketing OR (b) you are curious about what motivates my shopping habits. Although (b) has the potential to be far more fun and interesting – since it is a workday I thought I would focus on (a).

At the Commission we are charged with regulating in the public interest. I have equated this charge with attempting to do the maximum good for the maximum number. This is no easy task – and in my years in the private sector in the wireline, wireless and satellite industries I have found that government is generally pretty ineffective at encouraging the types of new services, innovation, and lower prices that consumers desire.

Therefore, I have been a strong advocate for regulatory restraint – for allowing markets to be born, and die, to thrive and evolve. That is the beauty of our economic system and too often regulators are tempted to think that they know better – that they can, through regulation enable new services and products for consumers– and they are virtually always wrong about that.

At the FCC, we do not have a specific mandate to regulate advertising of communications services; nor do we have the expertise to do so. Thus while I favor vigorous FCC action to enforce our statutory mandates, I do not favor intrusive extra-statutory intervention in the market to correct perceived wrongs.

I have faith in the ability of competitive markets to deliver innovation, expand service, and drive down costs more rapidly than regulation – BUT the effectiveness of functioning markets does depend on the ability of the system to limit externalities and facilitate informed consumer decision-making. Congress has recognized these limitations by crafting a number of statutory obligations that I believe the Commission has a responsibility to enforce vigorously.

I. Statute

As a regulator, the first question I ask whenever I have a policy issue before me is: "What's the relevant statute?" I am not elected. I was appointed to an independent commission to carry out the laws created by the elected officials in Congress.

As you are well aware, when it comes to direct marketing, legislators have given the FCC significant responsibilities. Laws that the Commission is charged with implementing that specifically address direct marketing include: 1) the Telephone Consumer Protection Act, which addresses telemarketing practices and unsolicited faxes, and 2) Section 222 of the 1996 Act, which restricts a telecommunications carrier's use or disclosure of customer proprietary network information. Much of Congress's intentions are made clear in these statutes.

However, sometimes I have to interpret what the law means, and when I do, in the first instance, I attempt to ensure that any statutory interpretation is consistent with the Constitution. In addressing marketing practices, in particular, time and again, I return to the First Amendment.

If we at the Commission do not pay adequate attention to the Constitution, the courts will make sure we do. For example, in 1998, the Tenth Circuit vacated the Commission's CPNI order. It found that the Commission did not show that the opt-in form of consent was sufficiently narrowly tailored to protect privacy and promote competition consistent with the First Amendment. I am disappointed that we have not moved more promptly to respond to the court's remand – *but* I am looking forward to a report and order on this matter in the near future.

Returning to the larger issue, how does the First Amendment relate to commercial speech? Our founding fathers believed that commercial speech was an essential element of our First Amendment rights. Benjamin Franklin wrote his early defense of a free press in support of his decision to run an advertisement for trips to Barbados, and the First Amendment was adopted in part to bar stamp acts that taxed advertising.

As noted in recent DMA Supreme Court amicus briefs, the First Amendment value of commercial speech was recognized by the early practices of state legislators during the time the Bill of Rights was ratified. They only intervened to restrict advertising when it promoted unlawful activities.

The courts began to distinguish between commercial and noncommercial speech emerged just in the 20th Century. It was in that era that legislators increased their limits on advertising, and courts reaffirmed these views by analyzing the constraints solely as economic regulations.

More recently, though, the courts have begun to swing the pendulum back and recognize that restrictions on advertising contradict the long accepted practices of the American people. An indication of this shift can be found in a Supreme Court decision released on Monday in *Thompson v. Western States Medical Center*. The case revolved around whether the government could prohibit advertising for certain drugs. In its ruling, the Court utilized the Central Hudson test to strike down the restriction because the government had failed to demonstrate that alternatives less restrictive of speech were unavailable. Also significantly, the Court observed that even if the statute could be justified as a limitation, the "amount of beneficial speech prohibited" rendered the regulation unconstitutional. The *Thompson* decision serves as another reminder for the FCC to tailor its regulations narrowly so as to avoid the suppression of truthful commercial speech.

II. Markets

My emphasis on free and open speech is also derived from my belief that fully functioning markets invariably make better decisions than regulators do. My general policy preference is to place trust in market forces. And marketing is – at a fundamental level – about effective markets. Marketing provides information that allows markets to function, which is essential to consumer welfare.

As a teenager, I spent my summers working in a clothing store, and I quickly learned that a good saleswoman makes maintaining a friendly relationship with customers her number one priority. Sometimes that meant leaving customers alone; sometimes that meant being at their beck and call. I made sure their needs were met, and when I did, I made more sales. And I know responsible and effective direct marketers do the same.

Thus, while there are those who fail to respect consumer rights, I believe responsible marketers and consumers share common goals – expanding consumer information and facilitating effective markets that maximize value. The DMA recognizes these common goals. In this regard, I want to applaud the DMA's efforts to create a do-not-call list for its members. To your credit, it is not an easy feat to offer a do-not-call list on a national scale.

In addition, I applaud the DMA's willingness to keep its members current on how consumer-friendly rules affect them. Whether it is through a message board or an issue brief, the DMA lets its members know what the rules are, and how to comply with them. For those businesses that still may not know the rules related to direct marketing, it is very important that their peers, as well as the government, let them know about their responsibilities.

A practice I want to draw your attention to is predictive dialing, which is when a telemarketer's automatic dialer simultaneously dials many more numbers than the telemarketer can handle if all of the called parties pick up at the same time. Typically, the first to pick up are connected to the telemarketer, while the rest are disconnected. Our complaint records indicate that this practice annoys and frustrates many consumers. So in order to fend off regulatory intervention, direct marketers may want to consider taking steps to lower the number of resulting unanswered calls and automatic disconnects. I do not believe it is my role to tell you how to fix a problem – you know the business far better than I do or ever will – but I believe I do have a responsibility to flag issues of importance to consumers and areas that warrant attention before they rise to the level of prompting government intervention in the marketplace.

Irresponsible action ultimately spurs regulators to act, imposes costs on many innocent actors, and often the resulting regulations may not even stop the bad actor. So I believe responsible private sector education and best practices can go a long way towards eliminating the actual or perceived need for intrusive government regulation.

Ultimately, whenever possible, I want consumers to be able to have easy access to competitive information and that means facilitating direct marketing.

III. Enforcement

I'd like to turn now to the issue of enforcement. In discussing arms control with the Soviet Union, Ronald Reagan used to say "Trust but verify." I have that same trust in markets – I do trust in them when they are allowed to work – but I believe my responsibility as a regulator is to verify that market actors are not interfering with market functioning through imposing externalities or irresponsible and illegal acts. Thus, my enthusiasm for markets is constrained by a vigorous commitment to enforcement.

And the FCC has begun to step up to the enforcement plate.

The FCC has created rules to stop slamming, the illegal practice of changing a customer's telephone service without permission. We have had considerable trouble with carriers that have failed to adhere to our rules. In the past year, the Commission has levied more than $13 million worth of fines and consent decrees on slammers. The $13 million in enforcement action is more than the total of all prior FCC slamming enforcement actions combined. We will continue to be vigilant of these practices and will not hesitate to impose significant forfeitures if we continue to see problems.

Another place where we are increasing enforcement is the Telephone Consumer Protection Act. In 2001, the FCC received more than 16,500 consumer inquiries and more than 3,500 informal complaints about TCPA-related issues, including unsolicited faxes and telemarketing. I have taken a particular interest in areas of consumer marketing enforcement, like these, that I believe have not received sufficient attention in the past. Fortunately, Enforcement Bureau Chief David Solomon has a similar philosophy, and he has begun to tackle these problems head-on. David should be praised for these efforts, and I look forward to continuing to work with him.

Unsolicited faxes are an example where I believe we are doing better. In January of this year, the FCC imposed a fine of more than one million dollars on 21st Century Faxes. It was the largest single fine ever imposed by the Commission for violation of unsolicited faxing rules, and it had my unconditional support. The marginal costs imposed by unsolicited faxes on each consumer are small – but taken together these costs are significant and an illegal imposition of externalized costs by irresponsible marketers.

We also will be stepping up our enforcement activities of our telemarketing rules. As an initial matter, we will not allow companies to skirt around our existing regulations. When it comes to do-not-call requests, we will not put up with gaming of the rules. Let me be clear: there are *no magic words*. A consumer does not have to say, "Quote: Place me on your do-not-call list." Our regulations say that direct marketers must maintain "a record of a callers' request not to receive future telephone solicitations." So if a consumer says, "please don't call me again" that is just as much a do-not-call request as asking explicitly to be placed on a do-not-call list. It's the right thing to do, it's required by the statute, and that makes it good business.

In addition, as you know, the Federal Trade Commission has proposed the creation of a national do-not-call registry. We at the Commission will be following these proceedings closely. And the FCC will be participating in an upcoming FTC public forum on this issue in June.

Moreover, the Commission will do more regarding prerecorded sales calls. In particular, we are getting more and more complaints regarding use of prerecorded sales calls to residential telephone lines, and we are responding to these complaints. In December, we issued our first citation related to such calls, and we have continued to issue more since then.

In addressing these issues, we have issued citations based on a *single* complaint, and we will do so again. We stand ready to investigate and take appropriate enforcement action on every complaint that comes to us. I support these efforts and I believe we owe it to the market to devote the necessary resources to taking appropriate enforcement action.

In addition to taking enforcement action, I also believe it is my role as a Commissioner to use my office to educate American consumers about their rights against illegal marketing practices and about the tools available to protect those rights. We know these efforts do attract consumer attention: the FCC posted a revised fact sheet about unwanted telemarketing calls on its website in February of this year, and already it has received more than 170,000 hits, more than any other fact sheet ever posted. The Consumer and Governmental Affairs Bureau, under the extraordinary leadership of Dane Snowden, has made great strides in improving our consumer education efforts. And as a Commissioner, I take the responsibility to educate consumers personally, as I post my bimonthly consumer newsletter Focus on Consumer Concerns on my website. A previous edition of Focus on Consumer Concerns discussed the Commission's telemarketing rules and do-not-call lists, including the one offered by the DMA. In addition, as I travel around the country, I will be meeting with consumers and the media in order to call additional attention to these issues.

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In conclusion, I want to say that I know that most telemarketers are following the rules, and with positive results for consumers. There is no doubt direct marketing is a valuable part of our economy. Free flow of information is essential for the operation of fully functioning markets. And I applaud the proactive steps the DMA has taken to root out irresponsible telemarketers, because that is the sort of activity we are going to need to see if we continue to place our initial trust in the power of markets and the private sector rather than regulation.

I look forward to continuing to work with you toward a rational, limited, and effective role for government in direct marketing. However, irresponsible marketers should be aware that this FCC is stepping up its commitment to enforce our rules, and will take our responsibility to regulate and enforce these rules seriously.

Thanks again for the invitation – I'd be happy to take any questions.