

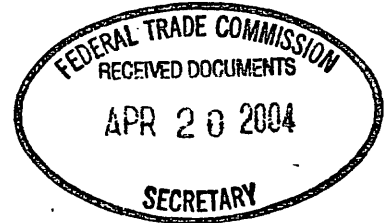
IAC / InterActiveCorp

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April 20, 2004

VIA HAND DELIVERY

Mr. Donald S. Clark
Secretary
Federal Trade Commission
Room 159-H
600 Pennsylvania Ave. NW
Washington, DC 20580



Re: *CAN-SPAM Act Rulemaking, Project No. R411008*

Dear Secretary Clark:

InterActiveCorp ("IAC") submits these comments to the Federal Trade Commission pursuant to the FTC's March 11, 2004 Advance Notice of Proposed Rulemaking regarding Definitions, Implementation, and Reporting Requirements Under the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the "CAN-SPAM Act" or "Act").¹ IAC strongly supports the Act's goals of curbing the onslaught of unsolicited commercial electronic mail and restoring consumer privacy and choice, while preserving the usefulness and efficiency of electronic mail as a means of communication for legitimate businesses such as IAC. To that end, IAC respectfully requests that the Commission promulgate rules clarifying several aspects of the Act.

¹ 69 Fed. Reg. 11776 (2004).

BACKGROUND

I. IAC AND ITS BUSINESSES

IAC is the world's leading multi-brand interactive commerce company, whose operating Businesses provide a broad array of products and services to consumers worldwide. IAC's Businesses operate in such areas as travel services (Expedia, Hotels.com, Interval International, Hotwire.com), electronic retailing (Home Shopping Network), event ticketing (Ticketmaster), personals and networking (Match.com, uDate, ZeroDegrees), financial services and real estate (LendingTree), and local and media services (Entertainment Publications, Evite, Citysearch).

Most IAC Businesses offer many of their products and services online, and operate full-service websites for their customers, members, subscribers, and visitors. In many cases, the service that the Businesses provide is to facilitate a transaction that a consumer voluntarily enters into with a third-party seller. For example, Expedia and Hotwire.com enable individuals to make travel arrangements with airlines, hotels, and car rental agencies. Hotels.com offers a one-stop shopping source for hotel pricing, amenities, and availability, specializing in providing travelers with accommodations for sold-out periods. Ticketmaster acts as the exclusive ticketing service for hundreds of leading arenas, stadiums, performing arts venues, and theaters. LendingTree is the leading online lending exchange that connects consumers, lenders, real estate professionals, and related service providers. Entertainment Publications, through its Entertainment® book and website, provides merchant promotions and consumer savings on daily activities – from dining out to movies to grocery shopping to car repairs – and vacation accommodations. And Evite offers free online social planning, enabling users to coordinate get-togethers for private and public events, as well as other activities.

II. THE IMPORTANCE OF ELECTRONIC MAIL TO THE BUSINESSES

For IAC's Businesses, electronic mail is an essential tool in facilitating transactions, communicating with customers, and providing relevant additional information to customers and other consumers. IAC's Businesses routinely send a confirming e-mail to customers immediately after they have engaged in a transaction. In many cases – such as an airline reservation through Expedia or a party invitation through Evite – the Business will send a follow-up e-mail as a reminder closer in time to the departure or the event; those e-mails may contain additional relevant information, including promotions for related products and services. For example, an individual who purchased an airline ticket through Expedia may receive a follow-up e-mail before his or her flight with information about the weather conditions in the destination city, as well as about special hotel offers in that city which he or she may find of interest.

Many of the Businesses also send electronic newsletters to their customers or members as an added benefit of using the company's website. Ticketmaster, for example, sends weekly "Ticket Alerts" to its customers to inform them about upcoming events that may be of interest because of the individual customer's location, purchase history, or expressed preferences. The Businesses that provide travel and local services – such as Expedia, Hotels.com, Hotwire.com, and Entertainment Publications – often e-mail their members to update them on special promotions and discounts being offered by the third parties whose products and services those Businesses feature. In many cases, the ability to receive these special promotions is a primary reason that an individual has become a member or subscriber of an IAC Business. Indeed, Entertainment's core business is just that – offering special discounts from third-party merchants to its members.

The Businesses also advertise their own products and services by electronic mail in a variety of ways. An IAC Business may send e-mail (either directly or through a list broker) to its own members or customers with information about promotions offered on its website, or may advertise in messages sent by another IAC Business to that Business' members or customers; because of the overlapping products and services offered by several of the Businesses, consumers who are interested in one IAC service (such as discount hotel rooms from Hotels.com) may also wish to sign up for a related service (such as travel specials offered by Expedia). Some of the Businesses enable or even encourage their members or customers to forward the messages that they receive to friends who may be interested in the products or services that the Businesses offer. And IAC Businesses may promote their products or services in messages containing advertisements for multiple companies that are sent by third parties to those third parties' own subscribers or members of a mailing list.

ANALYSIS

Any rulemaking with respect to the CAN-SPAM Act should strive to effectuate the intent of Congress in enacting that statute. As Congress explained, the purpose of the Act is to preserve “[t]he convenience and efficiency of electronic mail,” which have been “threatened by the extremely rapid growth in the volume of unsolicited commercial electronic mail.”² As the Act notes, unsolicited commercial electronic mail imposes numerous significant costs on its recipients, who have lost control over the mail that they receive. Not only are recipients faced with an onslaught of fraudulent, deceptive, and unwanted sexually explicit e-mail, but the explosion in the volume of spam “creates a risk that wanted electronic mail messages, both

² Pub. L. No. 108-187, § 2(a)(2), 117 Stat. 2699, 2699 (2003). Hereinafter, all citations to the CAN-SPAM Act contain only the section of the Act that is referenced.

commercial and noncommercial, will be lost, overlooked, or discarded amidst the larger volume of unwanted messages, thus reducing the reliability and usefulness of electronic mail to the recipient.”³

Those same factors have threatened the reliability and usefulness of electronic mail to companies such as IAC, which count on electronic mail as the most efficient means by which to apprise their customers and members of important information that they are entitled to receive. IAC strongly supports the CAN-SPAM Act and the efforts of Congress and the Commission to restore consumer privacy in the e-mail arena – not only because every additional unwanted message obscures legitimate e-mail and further threatens the viability of the electronic mail medium, but also because IAC is firmly committed to protecting consumer choice and control. These twin goals – the protection of consumer privacy and the preservation of e-mail as a valuable communications medium in the modern world – are closely intertwined, and the rules that the Commission promulgates should be carefully designed to target and eliminate unwanted commercial messages while allowing legitimate electronic mail to retain its usefulness.

With that in mind, IAC asks the Commission to implement rules clarifying five aspects of the Act. First, the Commission should promulgate regulations clarifying the factors that should be used to determine the primary purpose of a message, and should explain how these factors would be applied to determine the primary purpose of several types of messages that IAC Businesses (like other companies) routinely transmit. Second, the Commission should issue rules on the definition of a transactional or relationship message to clarify that (1) such messages need not be based on an exchange of consideration, but also include messages based on

³ Section 2(a)(4).

non-monetary transactions and relationships; and (2) the exception extends to messages from third parties with which the recipient has engaged in a transaction or has a relationship. Third, the Commission should hold that a message can have only one sender under the Act; adopt a consumer expectation test for determining the identity of that sender; and clarify how that test would be applied to several common e-mail scenarios. Fourth, the Commission should make clear that “forward-to-a-friend” messages are not commercial e-mail under the Act, because the initial seller does not procure or initiate those messages. Fifth, the Commission should implement a rule that a “valid physical postal address” under the Act includes a Post Office Box. The language, purpose, and legislative history of the statute support each of these interpretations, and public policy weighs heavily in favor of the approaches that IAC suggests.

I. THE FTC SHOULD IDENTIFY THE PRIMARY PURPOSE OF VARIOUS TYPES OF MESSAGES

Effective implementation and enforcement of the Act depend in large part on determining the “primary purpose” of an electronic mail message, because the nature of that primary purpose determines whether an e-mail message is (i) a “commercial electronic mail message” – and thus regulated by the Act; (ii) a “transactional or relationship message” – and therefore, while perhaps in part a commercial message as well, exempt from the requirements of the Act; or (iii) not commercial – and therefore outside the scope of the Act. While IAC does not support a bright-line test to determine the primary purpose of an electronic mail message – because such a test would likely be easy for those intent on violating the statute to exploit and circumvent – it does ask the FTC to affirm that the e-mail messages that the Act was intended to regulate are messages whose primary purpose is commercial, and to articulate and apply a set of factors to clarify that certain types of messages are not commercial and therefore fall outside the scope of the Act.

A. The Primary Purpose of the Advertisements That the Act Was Designed To Regulate Is Commercial

Although the Act regulates all commercial e-mail, the Congressional Findings and Policy and legislative history make clear that the main target of the Act is unsolicited commercial e-mail, or “spam.”⁴ As the Senate Report notes – and as everyone with an e-mail account can attest – spam is problematic because it is always voluminous, often deceptive, and sometimes offensive.⁵ The overriding goal of the Act is therefore twofold: (1) to eliminate fraudulent or misleading commercial e-mail; and (2) to allow consumers to choose not to receive unwanted commercial e-mails on a source-by-source basis.⁶

Because spammers are driven by the desire to make a profit, in both cases Congress focused exclusively on “marketing e-mails” – messages with the primary purpose of inducing the purchase of a commercial product or service. In contrast, Congress deliberately excluded from the scope of the Act “an e-mail that has a primary purpose other than marketing, even if it mentions or contains a link to the website of a commercial company or contains an ancillary marketing pitch.”⁷ In most cases, it is easy to determine the primary purpose of a given message – but for e-mails that have multiple components, the Commission should articulate several relevant factors for discerning the primary purpose. Those factors should take into account both the intent of the party responsible for the message (and who must comply with the

⁴ Section 1; S. Rep. 108-102, at 2 (2003).

⁵ S. Rep. 108-102, at 2.

⁶ Section 2(b)(2)-(3).

⁷ S. Rep. 108-102, at 14.

Act if the message is primarily commercial) and the impression of the recipient of the e-mail (whom the Act is designed to protect).⁸ Specifically, the Commission should consider:

- whether the entity responsible for the message would have transmitted it even if the commercial component(s) were removed;
- the triggering event for the message, because most commercial e-mail is triggered by the seller's desire to promote its product or service and make money, rather than by an act on the part of the recipient (such as engaging in a recent transaction or subscribing to a newsletter);
- a reasonable consumer's principal impression of or expectation about the message, because a central unifying characteristic of spam is that consumers believe it is first and foremost trying to sell them something; and
- the subject heading of the message, unless the subject heading is deceptive or misleading (and therefore otherwise prohibited by the Act).

The use of these factors would protect consumers by encouraging meaningful messages, sent in response to an affirmative act by the consumer, crafted to make clear to the consumer the nature of the message, and with a truthful subject heading. The adoption of these factors also would provide a clear set of criteria for legitimate sellers to consider in designing e-mail. But in using these factors to evaluate messages, the Commission should keep in mind that the purpose of the Act is to regulate e-mail that is primarily designed to market a commercial product or service – and not the types of messages described below, where the primary purpose is not commercial, but where the seller may choose to supplement its core text with some ancillary promotional material.

⁸ The Commission should determine the party responsible for the message by using the analysis set forth *infra* in Section III.

B. Confirmation and Follow-Up Messages Are Not Commercial E-Mail Messages, Even If They Include Promotional Material

As noted, many IAC Businesses send electronic messages to their customers immediately after completing a transaction, such as purchasing an airline ticket or booking a hotel room.⁹ The primary purpose of these messages is to inform the consumer that his or her transaction has been completed and processed – a critical function given the ongoing unfamiliarity or mistrust of some consumers with respect to online transactions. IAC Businesses may also send follow-up e-mails leading up to the transaction event, such as the actual airline flight or hotel stay. The purpose of these messages is to remind the consumer of the upcoming event, just as some restaurants call to confirm reservations on the day for which they are scheduled.

These confirmation and follow-up messages may contain advertising content – which is often related to the transaction event itself – but their core purpose is to facilitate and follow through on the transaction into which the customer has voluntarily entered. These are also the types of messages that IAC's customers not only wish to receive, but affirmatively expect to receive. Thus, a strict set of regulations governing the conditions under which IAC Businesses could send confirmation and follow-up e-mails to their customers (such as having to scrub each message against their opt-out lists) would not only impose a significant hardship on the Businesses' ability to serve their customers, but also relegate those customers who have opted out of receiving commercial e-mail to a lower level of customer service and a higher level of uncertainty about their online transactions.

⁹ At the Commission's request, IAC would be happy to provide samples of these and the other types of e-mail messages discussed herein.

Confirmation and follow-up messages are thus not only not the types of messages that the Act was designed to regulate, but they also are plainly not commercial under the factors articulated above: the Businesses would send these messages regardless of any promotional content; they are triggered by an underlying consumer transaction; they are understood by consumers to be related to that transaction; and they are clearly specified as such in the subject heading. The FTC should therefore clarify that confirmation and follow-up messages are not commercial under the Act even if they contain advertising content.¹⁰

C. Customer Satisfaction Surveys Are Not Commercial E-Mail Messages

A second category of messages that the FTC should clarify is not commercial consists of customer surveys that IAC Businesses (like other companies) sometimes send to their members or customers. Although they may also contain ancillary advertising for commercial products or services that may be of interest to customers, these e-mails are sent to obtain feedback from customers on the quality of the services they already have received from the IAC Business, as well as on their level of satisfaction with the product or service that they already have purchased from the underlying seller. The Businesses do not send these surveys indiscriminately or frequently to sell products, but only to current or former members or customers and in an effort to improve the quality of their customer services and of their product and service offerings. These surveys are therefore quite distinct from the types of messages that the Act was intended to regulate, and are not commercial e-mail messages under any of the factors considered above: they would be sent regardless of any incidental advertising in them;

¹⁰ Moreover, even if they could be deemed to be commercial, the Commission should make clear that both confirmation and follow-up messages fall within the transactional or relationship exception in the Act. *See* 149 Cong. Rec. S13012-01, 13019 (2003) (statement of Sen. McCain) (specifically identifying “airlines ticket confirmations” within the category of “transactional” e-mail that is exempt from the Act).

they are triggered by the existence of a customer relationship; and they are clearly identified as surveys in the subject line. True to their primary purpose, they also are designed to be viewed by recipients as surveys rather than advertisements – because if they were not, customers would be less likely to read and respond to them, and to provide the feedback that the Businesses need to improve their customer service.

The analogous federal telemarketing regulations also make clear that surveys are not commercial in nature. The Federal Communications Commission’s rules governing telephone solicitations apply broadly to any “telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services” – not just to those calls with a “primary purpose” of advertising a commercial product or service – and yet the FCC specifically exempted surveys from that definition.¹¹ The exclusion of surveys from the broader definition of telephone solicitations in this analogous context demonstrates that they should similarly be excluded from the definition of commercial electronic mail messages.¹²

D. Party Invitations Are Not Commercial E-Mail Messages

IAC also asks the Commission to clarify that messages sent by a for-profit entity – but which promote an event in which that entity has no commercial stake – are not commercial. Specifically, Evite’s business is to enable individuals and entities to efficiently design and send

¹¹ 47 C.F.R. § 64.1200(f)(9); 68 Fed. Reg. 44144, 44147 (2003).

¹² As it did when it promulgated the Telemarketing Sales Rule, the Commission should also consider creating an exception to the rules implementing the CAN-SPAM Act for business-to-business electronic mail messages. These messages fall outside the scope of electronic mail that the Act was primarily designed to govern – messages advertising a consumer product or service – and strong policy reasons do not exist for subjecting messages sent by legitimate businesses to legitimate businesses and promoting business products or services to the strictures of the Act. In contrast, mandating that entities comply with the Act’s requirements for all of their business-to-business electronic mail correspondence would severely disrupt common and routine practices.

event invitations to a group of recipients selected entirely by the event planner. This service is free to both host and guests, and Evite receives no commercial benefit from the event. These messages also are plainly outside the ambit of the Act, and are not commercial under any of the four factors articulated above: they would be sent regardless of any ancillary advertising in the message (and are in fact sent by private parties, and not by Evite); they are triggered by the planner's desire to sponsor an event; they are viewed by the recipients as invitations, not advertisements; and they are clearly described as invitations in the subject line. Moreover, to require Evite – or the event planner – to scrub every list of recipients against an Evite opt-out list not only would be technologically difficult, but also would limit consumer choice in a way that would severely diminish the utility of Evite to event planners and participants alike. Surely consumers who have asked Evite to no longer send them promotional messages would not also expect to be precluded from receiving Evite-sponsored invitations to their friends' parties or any other events.

Although excluding Evite-sponsored event invitations from the definition of commercial e-mail is intuitively obvious, the example demonstrates the danger of interpreting the Act too literally. These invitations do necessarily include a link to the Evite website (on which the invitation is located), and inherently promote Evite's product. The example thus underscores the importance of a test for determining the primary purpose of a message that is firmly grounded in the four factors articulated above.

II. THE FTC SHOULD CLARIFY ELEMENTS OF THE EXCEPTION FOR TRANSACTIONAL OR RELATIONSHIP MESSAGES

The Commission has also sought comment on the meaning of the “transactional or relationship” message definition in the Act. This definition excludes five categories of messages from the Act's definition of “commercial electronic mail message,” depending on the

primary purpose of the message. Although in many cases these messages are already beyond the scope of the statute because their primary purpose is not commercial, there are various types of messages that IAC Businesses send which have a primary purpose that is arguably both commercial and transactional. IAC therefore asks the Commission to promulgate rules clarifying that: (1) a relationship between the sender of a message and its recipient need not involve an exchange of consideration to fall within the exception, and (2) the exception covers relationships between a customer and all parties to a transaction in which that customer has engaged.

A. The FTC Should Clarify That a Transactional or Relationship Message May Be Based on a Non-Monetary Transaction or Relationship

IAC first requests that the Commission articulate that the transaction or relationship forming the basis for a message need not include an exchange of consideration in order to fall within the statutory exception. Such an interpretation is correct under the language and legislative history of the Act, and also serves important public policy goals that further the purpose of the statute.

The language of the statute makes clear that a transaction or relationship does not need to include an exchange of consideration to fall within the exemption. The transactional or relationship message exception generally applies to “commercial” transactions between an entity and its customers; under the Act, “commercial” products or services specifically include “content on an Internet website operated for a commercial purpose.” And the exception explicitly encompasses “a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services

offered by the sender.”¹³ Thus, registering for a free Internet service – for example, becoming a member of Evite and using the service to send party invitations – plainly is a commercial transaction or relationship that falls within the scope of the exception, because the customer is using services offered by a commercial website.

The legislative history emphasizes that the exception was meant to cover non-monetary transactions and relationships. The Senate Report explains that the exception “is intended to cover messages directly related to a commercial transaction or relationship that the recipient has already agreed to enter into, such as receipts, monthly account statements, or product recall notices.”¹⁴ Two of these categories of messages – receipts and monthly account statements – occur frequently in the context of non-monetary transactions. In particular, most IAC Businesses send receipts to their new members confirming that these individuals have signed up – for free – to take advantage of the services offered by the website.

This interpretation also effectuates the purpose of the Act: to curb unwanted and unsolicited e-mail while protecting the integrity and free flow of the types of electronic communications that individuals wish to receive, such as messages from an entity to its members. Whether a consumer has paid money to receive a service should have no bearing on the significance of a given message to a recipient; consumers do not expect that the importance of their relationships with online service providers, and of the messages those relationships engender, will vary depending on whether they are paying for the service. Indeed, restricting the transactional or relationship message exception to only those transactions that are based on an exchange of consideration would have the odd result of potentially depriving subscribers to free

¹³ Section 3(2), (17).

¹⁴ S. Rep. 108-102, at 16.

services (such as Evite) of important information about their membership that they have affirmatively signed up to receive – whether a notice about security, the terms of their membership, or a special offer – if they happen to have opted out of future commercial messages from that service. Because companies need to be able to communicate effectively with their customers without the encumbrances of the Act – most notably scrubbing the list of recipients against their opt-out databases for every e-mail to customers – this interpretation would create a perverse incentive for businesses to charge money for all of their services in order to come within the transactional or relationship exception. Since the Act is intended to protect consumers and elevate the importance of legitimate and important electronic messages – like those from a business to its customers – above the flotsam of spam, the Commission should clarify that commercial transactions under the exception include those that do not involve an exchange of consideration.

B. The FTC Should Clarify That the Transactional/Relationship Exception Extends to Messages from All Parties to a Transaction in Which a Customer Has Engaged

As noted, the primary service that many IAC Businesses provide is to facilitate a transaction between a consumer and a third party. For example, individuals book airline flights through Expedia; make lodging reservations on Hotels.com; obtain mortgage bids through LendingTree; and purchase tickets on Ticketmaster. When a consumer engages in one of these transactions, it establishes a relationship not only with the IAC Business, but also with the seller of the underlying product – the airline, hotel, lender, or event organizer. In other instances, a consumer initiates a transaction with an affiliate of an IAC Business – such as by searching for and making lodging reservations at a Holiday Inn through A1 Discount Hotels, which is an affiliate of Hotels.com. In that case, the consumer begins the transaction on the affiliate’s website, but is either automatically redirected to the IAC Business’ website, or engages in the

transaction through a search engine and database that is powered by the IAC Business. The IAC Business (Hotels.com in this example) is therefore the entity that collects the consumer's e-mail address, but it must provide that e-mail address to the other entities (A1 Discount Hotels and Holiday Inn) with which the consumer has voluntarily engaged in the transaction.

The Commission should clarify that the transactional/relationship exception encompasses relationships that have been established between customers and all parties to a transaction – including indirectly between customers and third-party product or service providers. In addition, the Commission should promulgate a rule allowing the intermediary or data-collecting entity through which the customer voluntarily has entered into such a transaction – the IAC Business in the examples above – to share the customer's e-mail address with those third parties involved in the transaction, regardless of any request by the customer to opt out of receiving future commercial e-mail from the intermediary or data-collecting entity.

This result is supported by the language of the Act. Subsection (i) of the transactional or relationship exception covers e-mail the primary purpose of which is “to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender.” Subsection (iii) encompasses e-mail that provides “notification concerning a change in the terms or features of [or] change in the recipient's standing or status with respect to . . . a subscription, membership, account, loan, or comparable ongoing commercial relationship.” And subsection (v) allows an entity “to deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender” without being

subject to the requirements for transmitting commercial e-mail.¹⁵ These exceptions reflect the importance to a business of easily being able to update the consumer on a transaction – and to the consumer of readily being able to receive that information without worrying about having inadvertently opted out of receiving it. In order for any of the third parties described above to provide these types of valued customer services as permitted under this exception – whether information about a scheduled flight, hotel accommodations, a potential mortgage, or an upcoming concert – they need access to a customer’s electronic mail address.

However, an overly literal interpretation of Section 5(a)(4)(A)(iv) of the Act – which generally prohibits a sender from transferring for any purpose (other than complying with the law) the e-mail address of a recipient who has opted out of receiving commercial messages from that sender – would not only prevent the transmission of messages that are clearly contemplated by this exception, but also substantially impede these businesses’ ability to communicate effectively with their customers. Under the strict letter of that clause, if a consumer purchased a United Airlines ticket from Expedia, but then opted out of receiving future marketing e-mails from Expedia before Expedia had shared his or her e-mail address with United (or, indeed, had previously opted out of receiving marketing e-mails from Expedia), the Act would preclude Expedia from disclosing that customer’s e-mail address. As a result, Expedia could not share the customer’s e-mail address with United Airlines; United would not be able to communicate by e-mail with its customer; and the customer would be unable to receive information about his or her airline reservation from United. But that was not at all the purpose of this provision. In fact, Section 5(a)(4)(A)(iv) was narrowly “intended to prevent a sender or

¹⁵ Section 3(17)(A).

other person from treating an opt-out request as a confirmation of a ‘live’ e-mail address, and selling that information to other would-be spammers.”¹⁶

As a result, the FTC should clarify that the transactional or relationship exception extends to third parties with whom the consumer has voluntarily but indirectly established a relationship (or where the third party is otherwise part of the commercial transaction into which the consumer agreed to enter), and that the transactional intermediary’s sharing of the consumer’s e-mail address with those third parties is permissible to effectuate the purpose of that exception – and therefore for “compliance with this Act or other provision of law” under Section 5(a)(4)(A)(iv).¹⁷ Any other interpretation would thwart Congress’ intent in establishing the exception, and would have serious negative consequences for consumers and businesses.

III. THE FTC SHOULD CLARIFY THAT A MESSAGE CAN HAVE ONLY ONE SENDER, AND SHOULD ADOPT A CONSUMER EXPECTATION TEST FOR DETERMINING WHO THE SENDER IS

Under the Act, the “sender” of a commercial electronic mail message is the “person who initiates such a message and whose product, service, or Internet web site is advertised or promoted by the message.”¹⁸ To “initiate,” in turn, means to originate, transmit, or procure the transmission of the message; and to “procure” means “intentionally to pay or provide other consideration to, or induce, another person to initiate such a message on one’s behalf.”¹⁹

Identifying the “sender” of a particular commercial e-mail message is critical, because the Act imposes specific obligations on the sender of such a message with respect to

¹⁶ S. Rep. 108-102, at 18.

¹⁷ A consumer who then wished to opt out of future commercial e-mail messages from that third party would need only to make that request directly of the third party.

¹⁸ Section 3(16).

¹⁹ Section 3(9), (12).

recipient opt-out requests. The Act requires that every commercial e-mail message include a mechanism by which a recipient can opt out of receiving future e-mails from that sender, and senders are not permitted to initiate commercial e-mails to a recipient who has previously opted out of receiving these messages from that sender. Except for the requirement that every message include a valid physical postal address for the sender, the only requirements imposed on the sender of a message are those that concern opt-out requests.

The Commission should clarify that there is only one sender for each commercial e-mail message, and should adopt a consumer expectation test for determining who the sender of a message is. Under that test, the sender of a message would be the entity to which a consumer would reasonably expect that his or her opt-out request would be directed. This rule would comply with the plain language of the Act and effectuate its purposes, including maximizing consumer choice and control and preserving current good business practices.

A. There Is Only One Sender of a Message Under the Act

1. The Language, Purpose, and Legislative History of the Act Contemplate Only One Sender

In traditional list broker rental arrangements, a sole advertiser pays a list broker to send a promotional message to the list broker's mailing list. Because many, if not most, such rental lists are developed on an opt-out basis, the recipient likely has not explicitly requested to receive this type of mailing, and has no prior relationship with the list broker.

This is the sole scenario contemplated by the Act, and the basic set of circumstances that the statute was designed to address. As the Act makes clear, an entity is prohibited from transmitting a message without a means by which the recipient can request "not

to receive future commercial electronic mail messages from that sender.”²⁰ The Act then prohibits future messages from or on behalf of that sender to a recipient who has opted out – with the intent of “ensur[ing] that persons providing e-mail marketing services will be responsible for making a good faith inquiry of their clients (the senders, under the definitions of the bill) to determine whether there are recipients who should not be e-mailed because they have previously requested not to receive e-mails from that sender.”²¹ The Congressional Determination of Public Policy in the Act explains that these complementary requirements were designed because “recipients of commercial electronic mail have a right to decline to receive additional commercial electronic mail from the same source.”²²

In contrast, the Act simply does not contemplate a situation in which there are multiple senders of the same message. The Act was not drafted with messages containing promotions for multiple advertisers in mind, and appears simply to assume that there will be no more than one “sender” of a given message. The language of the statute makes clear that Congress considered only those messages that promote the products of a single seller when it drafted the Act. Most notably, the Act prohibits initiating a commercial e-mail message without “clear and conspicuous notice of the opportunity [] to decline to receive further electronic mail messages from the sender; and a valid physical postal address of the sender.”²³ Moreover, a “commercial electronic mail message” is defined as any message with the primary purpose of

²⁰ Section 5(a)(3).

²¹ S. Rep. 108-102, at 18.

²² Section 2(b)(3).

²³ Section 5(a)(5) (emphasis added).

promoting “a commercial product or service.”²⁴ Other key provisions of the Act – all of which repeatedly refer to only a single sender – similarly contemplate only those messages with one advertiser and therefore one sender.²⁵ Although the Act specifically notes that more than one entity may be considered to have “initiated” a particular message – referring to the situation in which a list broker transmits a message at the direction of an underlying seller – it nowhere even suggests that more than one entity may be considered to be the “sender” of a particular message.²⁶ The absence of direction from Congress on this point – particularly in light of the express language that more than one entity may “initiate” a message, as well as the onerous requirements that the Act imposes on senders – is compelling evidence that Congress did not intend that a message have more than one sender within the meaning of the statute.²⁷ Any interpretation to the contrary would violate the well-settled principle that “[w]hen ‘Congress includes particular language in one section of a statute but omits it in another section of the same Act . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.’”²⁸

The legislative history provides further support for the concept of a single sender. In describing the intent of the key relevant provisions of the Act – the definitions of “initiate,” “procure,” and “sender,” as well as the opt-out requirements – the Senate Report refers

²⁴ Section 3(2)(A) (emphasis added).

²⁵ *See, e.g.*, Section 5(a)(3)-(4) (implying that opt-out requests apply to only one sender per message).

²⁶ Section 3(9).

²⁷ *See also* S. Rep. 108-102, at 15 (noting that “more than one person may be considered to have initiated a message”).

²⁸ *Clay v. United States*, 537 U.S. 522, 528 (2003) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

consistently and exclusively to messages sent on behalf of just one advertiser, and with a single sender. In particular, the Report explains that a “sender” is “a person who initiates a commercial e-mail and whose product, service or Internet web site is advertised or promoted by the message. Thus, if one company hires another to coordinate an e-mail marketing campaign on its behalf, only the first company is the sender, because the second company’s product is not advertised by the message.”²⁹

2. *Interpreting the Act To Allow for Multiple Senders Would Create Critical Policy Problems*

There are three typical scenarios in which businesses promote products and services by e-mail other than the traditional single-seller and list broker rental arrangement described above. These scenarios illustrate the problems inherent in interpreting the Act to contemplate multiple senders of the same e-mail message. In the first scenario, the list broker compiles an electronic circular that contains advertisements for products and services offered by multiple sellers.³⁰ For example, Expedia, Hotels.com, Hotwire, and other non-IAC entities may all contract with a given list broker to include their promotions in a single electronic mail message. In the second scenario, a company that has an established relationship with its customers may distribute to them a newsletter or other periodically scheduled electronic mailing that contains advertisements for not only its own products or services, but also those offered by third parties. In this case, Expedia might include in its newsletter to customers a list of travel

²⁹ S. Rep. 108-102, at 16; *see also* S. Rep. 108-102, at 7-8 (requirements of the Act pertain to “the sender” of the message), 15 (intent of “procure” is “to make a company responsible for e-mail messages that it hires a third party to send”).

³⁰ IAC uses the term “list broker” to refer broadly to both the owner of the actual list of recipient e-mail addresses and any third party that may aggregate advertisements from various sellers for distribution to those recipients.

promotions that includes an advertisement for United Airlines. In the third scenario, that same company might distribute an e-mail to its customers that contains only advertisements from third parties. Here, Expedia might transmit to its customers a message that details specials offered by relevant affiliates, such as Hotels.com and Hotwire, as well as promotions for various airlines that have contracted with Expedia for placement in that message. In each case, there would be seriously detrimental consequences if the underlying advertisers were considered to be “senders” of the messages.

In contrast to the traditional scenario that Congress contemplated – in which a single seller hires a list broker to transmit its commercial e-mail message to prospective customers on the broker’s list of e-mail addresses – these three situations illustrate the inherent and unworkable complexity of a regime that allows for multiple senders. Under the traditional scenario, the underlying seller should be deemed the sender as a matter of policy, because it has simply hired the list broker as a conduit to transmit the seller’s message to a given group of recipients. The seller therefore can and should scrub the list of recipients against its company-specific opt-out list, and can work directly with the list broker to develop a mechanism by which recipients can opt out of receiving future commercial e-mail from the seller – the sole entity whose products are advertised in the message.

But under the three scenarios described above, the consequences of a multiple-sender regime would be unworkable for businesses and untenable for consumers. In the first scenario (list broker with multiple advertisers), if each of these advertisers is to be considered a “sender,” the list broker would have to develop a mechanism for receiving suppression lists from every advertiser with which it deals, and for comparing its own mailing list against all of those suppression lists for each message that it sends. The message itself would have to include

multiple opt-out mechanisms and instructions on an advertiser-by-advertiser basis, which would be very confusing for the recipient to navigate and unduly burdensome for the list broker to manage. Moreover, because the list broker would have to scrub its list of recipients against the lists of each underlying advertiser, consumers who had opted out of receiving messages from one of the underlying companies (for example, Expedia) would not be able to receive messages containing promotions for others (such as Hotels.com) that they might wish to receive – or that they may even have affirmatively consented to receive. And while the individual recipients would be able to opt out from one advertiser at a time, the list broker would never be required to give recipients the ability to get off its mailing list.

The consequences are equally complex and confusing in the second and third scenarios – in which the recipient (1) already has an established relationship with the entity transmitting the messages (Expedia in the examples above), and (2) has either affirmatively consented to receive messages from that entity or at the very least has not chosen to opt out. Were the underlying advertisers in these messages considered to be senders, the entity that actually compiled and distributed the message to its own customers would be responsible for scrubbing its own customer list against the opt-out lists of those advertising companies. This would not only be inordinately complex, but the primary transmitting entity (Expedia) would then not be permitted to send messages to its own customers – messages that they are entitled or have even specifically consented or requested to receive – just because the message happens to contain an advertisement for another business whose own commercial electronic mail the recipient has opted out of receiving.³¹ This is illogical from a business perspective and

³¹ And, as above in the first scenario, the transmitting entity would have to work with each underlying advertiser to somehow develop mechanisms by which consumers could opt out-on a (continued...)

inevitably frustrating from a consumer perspective, because consumers would lose control over whether they could receive e-mail from the entities of which they are customers. For example, if an Expedia newsletter were scheduled (obviously unbeknownst to the consumer) to contain an advertisement for United Airlines, and that consumer had opted out of receiving commercial e-mail from United, the consumer would not be permitted to receive the newsletter from Expedia. This is the opposite result from that which the Act seeks: instead of restoring consumer control over his or her in-box, it would actually diminish that consumer choice.

Allowing multiple senders would also increase the threat to the security of personal information. As noted, if each advertiser were considered a “sender,” suppression lists and opt-out requests would need to be continually shared and transmitted among a wide variety of parties. While responsible companies use reasonably secure means to transmit these lists – which contain thousands or even millions of e-mail addresses – the more often personal data are transmitted and the more parties involved in handling the data, the more likely a security breach, and the greater the possibility that the data could be misappropriated or misused. As the Commission knows, a fundamental tenet of Internet security is that consumer personal information should be shared as infrequently and among as few parties as possible. Designating multiple senders of a given message would require that companies violate this principle on a massive scale.³²

seller-by-seller basis – but would not have to provide its own members with the ability to opt out of these types of messages.

³² Ironically, those who apparently are most concerned about potential misuse of their e-mail addresses – individuals who have exercised their rights to opt out – would be more likely to have their e-mail addresses on these widely distributed lists and would therefore be more likely to have their e-mail addresses accessed or used in an unauthorized manner.

B. Who the Sender Is Should Be Determined by Consumer Expectations

Because the Act plainly does not contemplate situations involving multiple advertisers or intend that a message have multiple senders – and because subjecting multiple parties to the opt-out requirements would have potentially disastrous consequences – the Commission should adopt a rule clarifying that every commercial e-mail message has only one sender, and that the sender is the entity to which the recipient of the message would reasonably expect that opt-out requests should be directed. This comports with the factual circumstances contemplated by Congress when it drafted the Act. It also complies with the plain language of the Act: Congress specifically noted that “recipients of commercial electronic mail should have a right to decline to receive additional commercial electronic mail from the same source,” and a consumer expectation test determines the sender by asking which entity the recipient would understand to be the “source” of a message.³³

As described below, the Commission should also explain how the rule would be applied in each of the four basic scenarios that IAC has presented:

(1) A List Broker Transmits a Message on Behalf of a Single Advertiser. This is the scenario that was contemplated by Congress when it drafted the Act. In this case, a single advertiser hires a list broker that provides e-mail marketing services – and that has no prior relationship with the recipients of the message – to transmit a commercial message on its behalf. Because there is just one advertiser (for example, Expedia) – and because the recipient has no relationship with the list broker that actually transmits the message – a consumer would reasonably expect that any opt-out request would be made to that advertiser. Thus, the

³³ Section 2(b)(3).

Commission should make clear that in this case, the underlying advertiser should be considered as having “initiated” the message and should be considered the “sender” of the commercial message.

(2) A List Broker Transmits a Message on Behalf of Multiple Advertisers. In this case, the list broker’s role is to compile advertisements for products from potentially dozens of different entities (for example, Expedia, Hotels.com, Hotwire, and numerous non-IAC entities) into a single message, and then to transmit that message to recipients on the broker’s list of e-mail addresses. The message therefore cannot possibly be associated with just one of the advertisers. Instead, a recipient of the message would reasonably expect to be able to opt out of future electronic circulars containing advertisements from the entity that compiled and transmitted that message – in this case, the list broker. To avoid misleading recipients regarding the nature of the message and whose list the recipient is on, the list broker, in addition to complying with the requirements under the Act, should be required to identify itself and the role that it plays in sending the e-mail message. By identifying itself and the service it provides, the list broker would be promoting its own product and therefore would be considered the “sender” under the Act for this reason as well. This will ensure that every commercial electronic mail message has exactly one sender – the list broker – and that recipients will be able to notify the true “source” of the message if they no longer wish to receive commercial e-mails from that source.

This interpretation is consistent with the plain language of the statute. Where multiple entities provide promotional content for a commercial e-mail message, it is impossible to conclude that any one of those entities “initiated” or “procured” that message under the Act. To “procure” a message, an entity must pay or induce “another person to initiate such a message

on one's behalf'; but where there are multiple advertisers, these entities are paying the transmitting company only for the inclusion of their own promotional content, and not to physically send an entire message on their behalf, as the Act contemplates. In other words, if the list broker would have sent the message even without content from any one of the advertisers, it is unreasonable to conclude that any one of these advertisers "initiated" the message.

(3) A Company with Which the Recipient Has a Relationship Sends a Newsletter or Periodic Mailing Containing Third-Party Ads. These messages (such as a periodic newsletter sent by Expedia to its customers) often include some amount of promotional content relating to the products or services of a third-party advertiser (for example, ads for United Airlines). In these cases, the advertiser pays the transmitting entity to include its promotional material in the scheduled e-mail message. But the core purpose of the message is to provide information or services from the transmitting business to its customers, and a consumer expectation test dictates that any opt-out requests would therefore be directed to that transmitting entity with which the consumer has an established relationship.

Moreover, as above, the third-party advertiser(s) did not initiate or procure the initiation of the message. Indeed, because the message is periodically sent, it would have been transmitted regardless of whether that third party had provided the promotional content for inclusion. For that reason – and because of the consumer's expectations upon receiving the message – the FTC should clarify that the transmitting entity (with which the consumer already has a relationship) should be designated as the sender, and all opt-out requests and responsibilities should flow to it.

(4) A Company with Which the Recipient Has a Relationship Sends a Message Solely Containing Third-Party Ads. This scenario is a combination of the facts

described in situations (2) and (3) above; not surprisingly, therefore, the result is the same. In these circumstances, a company with which a consumer has an established relationship (such as Expedia) sends a message to its customers that is a promotion for United Airlines – or for multiple third parties. A consumer who receives the message understands that it is a third-party promotion that has been sent to him or her because he or she is an Expedia customer – which distinguishes these messages from the unsolicited and random advertisements described in scenario (1), where the transmitting entity acts merely as a conduit for the underlying seller. In this situation, the consumer would reasonably expect that all opt-out requests would be made to Expedia: a recipient would request to opt out of receiving third-party promotions (or all commercial e-mail) from Expedia, rather than to opt out of receiving promotions directly from the third-party advertiser. This is true whether the message contains promotions for one advertiser or for multiple advertisers: the message is triggered by the consumer’s relationship with Expedia, and the recipient understands that.³⁴ The Commission should clarify that this is in fact the case, and that under the consumer expectation standard, the sender of a message that is transmitted by an entity with which a consumer has an existing relationship, but that contains third-party promotions, is the entity with which the triggering customer relationship exists.

IV. THE FTC SHOULD CLARIFY THAT MERELY OFFERING OR ENCOURAGING THE USE OF “FORWARD-TO-A-FRIEND” SERVICES DOES NOT MAKE THE ADVERTISER A SENDER

The FTC also seeks comment on whether it should implement rules clarifying the obligations of an underlying seller that offers a “forward-to-a-friend” service with a commercial e-mail that it sends. In this common scenario – in which some IAC Businesses engage – a

³⁴ By definition, these messages promote Expedia because they contain the Business’ logo and are identified as being from Expedia.

commercial e-mail message sent to a recipient also provides that recipient with the option of forwarding the message to a friend whom the recipient believes may be interested in that message. The second level of recipients, in turn, may also forward the message to others, and so on.³⁵

IAC asks the FTC to clarify that the underlying advertiser is not the “sender” of a message that is forwarded by the initial recipient just because it offers or encourages the use of a forward-to-a-friend feature. This interpretation is consistent with the plain language and purpose of the Act, and it also makes sense from a policy perspective.

In determining whether the underlying seller is the sender of the forwarded message, the FTC should ask whether the seller “initiates” that forwarded message. This, in turn, depends on whether the seller “procures” the forwarded message. Under the Act, as noted, “procure . . . means intentionally to pay or provide other consideration to, or induce, another person to initiate such a message on one’s behalf.”³⁶ The plain meaning of “induce” is to “lead or move by persuasion or influence, [or] to bring about.”³⁷ Merely offering recipients the option of forwarding the message to a friend, or encouraging recipients to pass the message along to interested third parties, involves no consideration and falls short of in fact “inducing” those recipients to forward the message. The entity that offers or encourages the use of this feature therefore does not “initiate” the message under the Act, and accordingly it should not be deemed the “sender” of that message.

³⁵ Some IAC Businesses also offer a service on their websites by which consumers can forward to their friends information about products on that site. The analysis set forth below applies equally to this situation, in which the fact that the Business simply offers this service is insufficient to render it the sender of any resulting message from consumer to consumer.

³⁶ Section (3)(12).

³⁷ Webster’s II New College Dictionary, at 565 (2001).

The purpose of the “procure” provision also supports this interpretation. The Senate Report emphasizes that “[t]he intent of this definition is to make a company responsible for e-mail messages that it hires a third party to send”³⁸ Without this provision, sellers that spam would not be liable for messages that they did not physically transmit themselves – which would create a huge loophole rendering enforcement authorities unable to prosecute the offenders who are actually responsible for generating the messages. In contrast, designating an underlying seller as a sender merely because it allows or encourages consumer recipients to forward – at their discretion – e-mail that they have received does nothing to further the purpose of this provision, or of the Act as a whole.

Such an interpretation would also make no sense from a policy perspective. If the underlying seller were deemed to be the sender of these forwarded messages, it would be obligated somehow to scrub every potential recipient against its database of individuals who have opted out of receiving its messages. This would be extremely difficult. Unlike when a seller hires a list broker or other third party to transmit e-mail to a specified group of recipients, here the seller has no ability to determine when and to whom these messages might be forwarded – or if in fact they are ever forwarded at all. But even assuming this could reasonably be done, it would impose a needless barrier on the ability of recipients to communicate with their friends by electronic mail – and one that would be completely ineffective anyway, because the recipient could simply forward the message using that functionality on the e-mail program itself, rather than the one included by the seller in the original message. Such an interpretation of the statute would also fly in the face of consumer expectations, because recipients of forwarded messages

³⁸ S. Rep. 108-102, at 15 (emphasis added).

understand that these e-mails are being sent to them by their friends, and not by the underlying seller. Making sellers responsible for these messages therefore would defy consumer expectations, create liability for businesses for messages over which they exercise no control, and interfere with the ability of people to share information with one another. That simply would be the wrong interpretation of the Act.³⁹

V. THE FTC SHOULD HOLD THAT A VALID PHYSICAL POSTAL ADDRESS INCLUDES A POST OFFICE BOX

Finally, IAC asks the FTC to clarify that including a Post Office Box location in a commercial e-mail message fulfills the Act's requirement that all commercial e-mail contain "a valid physical postal address of the sender."⁴⁰ This interpretation would be consistent with the legislative history, which notes that the Act requires every message to include "a mailing address where a recipient can contact the sender, thereby better informing the recipient of the identity of the sender."⁴¹

³⁹ IAC also believes that it is lawful to identify only the recipient who is forwarding the message – and not the underlying seller that offers the forwarding service – in the "from" line of these forwarded e-mails under the Act, which requires only that the "from" line "accurately identif[y] any person who initiated the message." Section 5(a)(1)(B). In this regard, IAC requests that the Commission also clarify that "accurately" does not require that the seller verify the legal accuracy of any member or user name that the forwarding recipient has chosen to enter on the seller's website (i.e., that the user name is that person's real name), but rather simply that the "from" line accurately reflects the user's chosen member or login name. IAC's Businesses are simply not in a position to verify that the member name information that they have accurately reflects the identity of the forwarding customer.

However, should the Commission determine that the underlying seller in these forwarded e-mails must also be identified in the "from" line, IAC asks the Commission to clarify that this requirement may be met by including the name of the seller in any portion of the "from" line – including the "friendly name," the e-mail prefix, or the sending domain – rather than requiring the name to be included in a particular part of the "from" line. Permitting the inclusion of the seller's name in any of those portions would serve the same purpose – identifying that entity to the recipient – but would greatly alleviate compliance complexity for businesses.

⁴⁰ Section 5(a)(5)(A)(iii).

⁴¹ S. Rep. 108-102, at 12-13 (emphasis added).

The inclusion of a valid physical postal address is also intended to aid efforts in enforcing the Act and prosecuting spammers who conceal their identity and whereabouts. Many spammers use spoofed transmission and routing information to disguise their identity, and the transient nature of electronic mail has impeded enforcement efforts, because it is often quite difficult to identify and locate violators. The requirement that all senders include a valid physical postal address thus not only provides another clear way for recipients to distinguish between legitimate senders of commercial messages and illicit spammers, but also a means for enforcement authorities and Internet service providers to locate and serve with process entities that violate other provisions of the law.

The use of a Post Office Box in a commercial e-mail message fulfills these purposes as well. P.O. Boxes are traceable to specific entities or individuals, thus enabling enforcement officials and ISP's to track down senders that have violated the Act. And a P.O. Box is "physical postal address" – a tangible location that is without question a postal address – and so falls within the plain language of the statute.

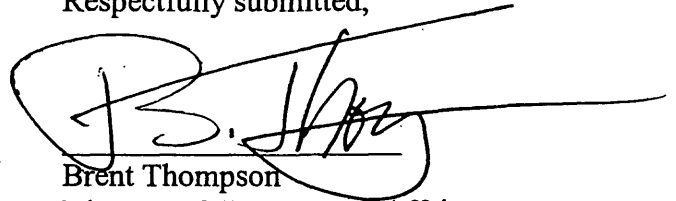
There is also an important policy reason for allowing the use of P.O. Boxes instead of requiring street address information in all commercial e-mail. Particularly in this day and age, many businesses are concerned about growing threats to their security, and requiring the inclusion of a company's street address in all e-mail messages would greatly simplify the efforts of any would-be criminal who was intent on causing physical or economic harm to a business or its employees. These security risks are heightened not only by terrorism concerns, but also by the threat to the vast amounts of consumer and employee data that most businesses – including the IAC Businesses – store. Although IAC employs sophisticated technology to protect the security of its offices and the personal data that its Businesses maintain, no level of precaution

can guarantee security. As the Commission knows all too well, security breaches can happen anywhere and at any time, and requiring the inclusion of a company's street address in all commercial e-mail will likely increase the risk of such a breach. Because the use of a P.O. Box serves the purpose and complies with the language of the Act, the Commission should clarify that it fulfills the requirement of a "valid physical postal address."

* * * * *

IAC appreciates the opportunity to comment on the Commission's implementation of the CAN-SPAM Act, and looks forward to working with the Commission to develop rules that best effectuate the purposes of the Act.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "B. Thompson", is written over a horizontal line. The signature is enclosed within a large, hand-drawn oval.

Brent Thompson
Director of Government Affairs
IAC/InterActiveCorp

and its Businesses

Citysearch
Entertainment Publications
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Expedia
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Hotels.com
Hotwire.com
Interval International
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