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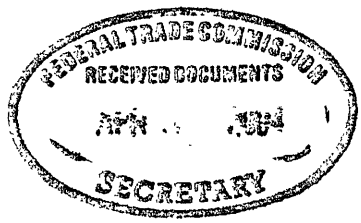
Mellon Financial Corporation

Michael E. Bleier
General Counsel



April 7, 2004

Federal Trade Commission
CAN-SPAM Act
P.O. Box 1030
Merrifield, VA 22116-1030

RE: CAN-SPAM Act Rulemaking, Project No. R411008

Dear Sirs and Madams:

Mellon Financial Corporation, Pittsburgh, Pennsylvania, appreciates the opportunity to comment on the need for rulemaking under the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("the Act"), as we believe the Commission's rulemaking will play a key role in clarifying the applicability of the Act.

Mellon fully supports the intent of the Act, which, as its title implies, is to reduce the avalanche of unsolicited pornography and marketing offers that threatens to render e-mail an unusable medium for many people. However, the Act raises numerous issues relating to the normal use of e-mail to conduct business, especially by large, diversified financial services organizations. The Commission's rulemaking can go a long way toward resolving many of those issues.

I. Coverage of the Act

First, it is clear that Congress was primarily concerned with regulating the flow of *unsolicited* e-mail. Not only does the title of the Act refer to "non-solicited pornography and marketing," but Section 2, "Congressional Findings and Policy," is almost exclusively concerned with "unsolicited" and "unwanted" e-mail, using those terms no fewer than 13 times. Notwithstanding this obvious focus on unsolicited e-mail, the substantive provisions of the Act can be read to suggest that some of its requirements may apply even when e-mail is being sent with the recipient's consent, or even at the recipient's request. Such a broad reading has the potential to interfere with the normal operations of businesses that are not at all involved in "spam."

Although e-mails sent with consent are not subject to the requirement for conspicuous labeling in Section 5(a)(5)(A)(i), we would urge the Commission to clearly define those

One Mellon Center • Pittsburgh, PA 15258-0001
(412) 234-1537 Office • (412) 236-4814 Fax

instances when e-mail sent with the consent of the recipient is subject to the requirement for an opt-out mechanism under Section 5(a)(3). In particular, individualized communications sent by e-mail in response to the recipient's request for specific information about the sender's products or services should not be subject to the Act. We suggest this be addressed by rulemaking under the subject of the *primary purpose* of an e-mail.

Further, we believe that the Act was meant to apply primarily to bulk e-mail (e-mail sent to a large number of recipients), or to repetitive e-mails to the same party. Occasional, individualized communications to a party or small number of parties known to the sender should not be subject to anti-spam rules, even if it is not explicitly requested by the recipient.

Also in regard to the "primary purpose" of an e-mail, we urge the Commission to make it clear through rulemaking that communications that are primarily informational in nature – for example, a newsletter about tax developments sent by the asset management unit of a bank, or an invitation to a free seminar about new legal developments sent by a law firm to clients or prospective clients, are not "commercial e-mail" as that term is used in the Act. The Act's requirements should apply only to e-mails that directly offer products and services for sale.

Finally, we note that the Act gives the Commission the authority to modify and expand the definition of "transactional or relationship message." It would be appropriate to make it clear that a transactional or relationship message includes the following:

(1) Ongoing exchanges of e-mails in the negotiation of a transaction.

(2) E-mails, including periodic e-mails, that an existing customer has specifically requested (for example, periodic updates on economic conditions from a financial adviser, information on new products, or a newsletter containing articles about general business topics such as fraud prevention). People should, of course, always have the option of unsubscribing from services to which they chose to subscribe. But there is no reason why a request to unsubscribe from something voluntarily subscribed to should be translated into a request to opt out of *all* commercial e-mail from the sender.

II. 10-Day Opt-Out Rule

The Act requires a sender to implement an opt-out within 10 business days after receiving it, but gives the Commission the authority to modify that time period. We strongly urge the Commission to exercise its authority by extending the period to one calendar month. The opt-out provisions of the Act necessitate each business organization maintaining and disseminating a "Do Not E-Mail" list. For many organizations, these activities are not, and cannot become in the near future, highly automated. Efficient use of time and resources requires that businesses be permitted to update information on a monthly basis, rather than constantly, as the 10-day rule would require.

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If you would care to discuss the comments in this letter, please feel free to call the undersigned at 412-234-1537, or Charles F. Miller, Associate Counsel, at 412-234-0564.

Sincerely,

Michael E. Bleier
General Counsel