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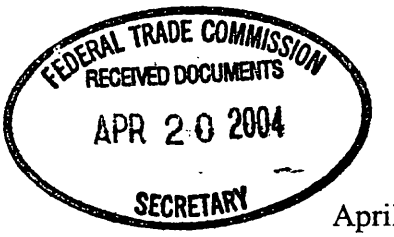

Microsoft

April 20, 2004

VIA HAND DELIVERY

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

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

Dear Secretary Clark:

Microsoft submits these comments to assist the Commission in developing regulations to implement provisions of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the "CAN-SPAM Act" or "Act"). Like other providers of Internet access and e-mail services, our top priorities are ensuring that our customers feel comfortable using e-mail to communicate and that e-mail remains a viable medium for business and personal communications. For these reasons, Microsoft supported passage of the CAN-SPAM Act, and we are committed to working with the Commission, law enforcement, and other industry members to address the spam problem.

Microsoft appreciates the opportunity to provide these comments. We have focused these comments on five areas identified in the Commission's Advance Notice of Proposed Rulemaking ("ANPR") that we believe are critical to ensuring that the CAN-SPAM Act helps consumers control the types of commercial messages they receive, provides clarity for legitimate companies that seek to use e-mail responsibly, and captures illegal tactics employed by spammers to avoid detection.

- *First*, we urge the Commission to adopt a "net impression" test to determine the primary purpose of an electronic message. This standard provides guidance to legitimate businesses, while ensuring that unlawful spammers cannot easily evade the law.
- *Second*, we urge the Commission to clarify aspects of the definition of "transactional or relationship messages." Specifically, we ask the Commission to clarify that the term "commercial" as used throughout this definition does not require the exchange of consideration, and that promotional e-mail messages sent as part of a subscription or other service specifically requested by a consumer fall within the definition.

- *Third*, we ask the Commission to add the following activities to the list of aggravated violations under Section 5(b) of the Act: (1) the sale or distribution of "open proxy" lists to facilitate spamming; and (2) inaccurate domain registration for advertised domains.
- *Fourth*, we urge the Commission to clarify that merely offering or encouraging use of a feature that enables recipients to voluntarily forward messages to friends does not make the entity that offers or encourages the use of that feature a "sender" under the Act.
- *Fifth*, we ask the Commission to clarify that there is only one sender per commercial e-mail message, and that the sender of a message is the party to which a recipient of the message would reasonably expect that any opt-out requests be directed.

In addition to these five points, we also provide comments to assist the Commission with preparing its report to Congress setting forth a system for rewarding those who supply information about violations of the Act. While this concept is laudable, we have concerns that in practice such a bounty system may be more likely to be disruptive than helpful to the Commission's enforcement efforts.

I. MANDATORY "PRIMARY PURPOSE" RULEMAKING

Congress based its definition of "commercial electronic mail" on those messages whose primary purpose is to advertise or promote a product or service. In incorporating the primary purpose concept and directing the Commission to define criteria that will help facilitate determination of a message's primary purpose, Congress sought both to provide guidance to legitimate companies seeking to structure their operations to comply with the law and to ensure that unlawful spammers could not evade the law. This is a challenging task: the more specific the criteria used to determine a message's primary purpose, the more useful the rules will be for legitimate companies, but also the more easily spammers will be able to develop ways to circumvent the law.

Microsoft has considered this tension, along with the various proposals outlined in the Commission's ANPR, and believes the determination of an electronic mail message's "primary purpose" should be based on the message's "net impression." This approach will help legitimate organizations better understand the types of messages that may be considered commercial and, at the same time, ensure that spammers cannot easily modify their messages to avoid the law's prohibitions and substantive requirements.

As the Commission notes, there are a number of factors that contribute to the net impression of the message's primary purpose, none of which is determinative by itself. These include (1) the totality of the message's promotional content as compared to the

totality of the message's non-promotional content in terms of relative importance;[1] (2) the positioning and prominence of the promotional content; (3) the subject line and headings used within the body of the message;[2] and (4) the proportion of the message's space used by the promotional content.[3]

One factor listed in the Commission's ANPR that should *not* be considered is the sender's identity – specifically, whether or not the sender is a for-profit company. The relevant test should focus on the nature of the communication, and not on the nature of the sender. This is consistent with the language of the Act, which asks only whether the e-mail itself – and not the seller's overall business – is commercial. And as a policy matter, there is no reason that the very same message, when sent by a non-profit entity, should be treated any differently than when that message is sent by a for-profit company. If the message, taken on its face, is primarily commercial, consumers should have the same rights with respect to that message regardless of the tax status of the sender.

II. DEFINITION OF "TRANSACTIONAL OR RELATIONSHIP" MESSAGES

The Act designates five categories of messages as "transactional or relationship," and exempts these messages from the provisions of the Act. We urge the Commission to rely on its authority under Section 3(17)(B) and clarify two aspects of the definition of "transactional or relationship messages."

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[1] It would not be reasonable to compare the totality of the promotional content to each individual non-promotional purpose. For example, a sender of an e-mail message may have five different non-promotional items that it needs to communicate to a consumer – each of which constitutes 15% of the e-mail message's importance. Thus, the message may be 75% informational, with the remaining 25% consisting of advertising. All other considerations being equal, the advertising may be seen as more important than any individual non-promotional purpose. But it would nevertheless seem to be highly unreasonable to conclude that the primary purpose of such a message is promotional.

[2] Assuming that the subject line of an e-mail message is not deceptive and is therefore in compliance with Section 5(a)(2) of the Act, a subject line that indicates a non-promotional purpose of a message should weigh heavily in determining the primary purpose, since it is the information indicated in the subject line to which the reader will primarily be drawn.

[3] This last factor should take into account a consumer's reasonable expectation about the amount of promotional content in a given message. A consumer that receives generally non-commercial messages from a free service would reasonably expect these messages to contain more promotional material – understanding that the service operates by selling ad space, rather than by charging a membership fee. In contrast, a consumer would reasonably expect less advertising in a generally non-commercial message from a paid service (*i.e.*, one which charges a membership fee). In other words, a free service should typically be able to include more advertising in its message without tipping the balance of its primary purpose to being "commercial."

A. The Definition Should Capture Transactions and Relationships Formed Without the Exchange of Consideration

The Commission should make clear that for purposes of the "transactional or relationship messages" definition, the term "commercial" does not require the exchange of consideration. As the Commission is well aware, many website operators offer their products and services to consumers free of charge. For example, consumers can voluntarily subscribe to free electronic mail services or request to receive free online newsletters. In these circumstances, electronic mail messages with the primary purpose of confirming or fulfilling subscriptions, providing security information, or notifying users concerning a change in terms or features should be considered "transactional or relationship" messages.

Any other interpretation would impair the ability of a wide array service providers who offer their products or services at no cost to notify their customers of important messages. Disadvantaging these service providers or their customers because the services happen to be free would cause many more online businesses to charge for their services – clearly not what Congress had in mind when it wrote the Act. We therefore urge the Commission to clarify that the term "commercial," as used throughout the definition of "transactional and relationship messages," does not require the exchange of consideration.

B. The Definition Should Capture Specific Consumer Requests to Receive Promotional Material

The Commission should also clarify the scope of the fifth category of "transactional or relationship messages," which encompasses messages the primary purpose of which is "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." Section 3(17)(A)(v).

The scope of this section is unclear. On the one hand, this category could be interpreted so broadly as to cover almost any type of electronic mail message sent to an individual that had previously engaged in a transaction with the sender. For example, a sender could take the position that any promotional e-mail is a "service . . . that the recipient is entitled to receive under the terms of" any previous transaction. In this way, the exemption could swallow the rule and contravene the purposes of the Act. On the other hand, this exemption could be interpreted too narrowly and thereby rendered meaningless. For example, if it was defined only to include messages that would not otherwise meet the "primary purpose" test for commercial e-mail, the exemption would become superfluous and Section 3(2)(B) of the Act (which enumerates the exception) would have no purpose. That cannot be correct. Thus, the category must include, and thereby exempt, some messages that are primarily commercial or promotional in nature.

To resolve this tension and strike the proper balance, the Commission should focus on consumer expectations, with the goal of maximizing the choices available to

consumers. Thus, where the underlying transaction specifically includes the receipt of promotional e-mails, such as a subscription to a free online service that is supported in whole or in part though the transmission of promotional messages to subscribers, these messages should fall within this fifth category. For example, if a consumer subscribes to a service and is clearly informed that as part of subscribing to that service, he or she will receive messages about special offers or promotions, then by agreeing to enter into that transaction, the recipient is not only "entitled" to receive these types of messages, but in fact he or she expects to receive them.[4]

We therefore urge the Commission to issue rules specifying that when a consumer is clearly and conspicuously informed of the receipt of promotional messages in conjunction with a transaction – formed with or without the exchange of consideration – electronic mail messages sent pursuant to that transaction constitute the delivery of "services . . . that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter with the sender" under Section 3(17)(A)(v).

III. ADDITIONAL AGGRAVATED VIOLATIONS

In addition to the practices already designated as "aggravated violations" under Section 5(b) of the Act, the Commission should issue rules specifically calling out the following practices that are currently being used to aid spammers.

A. Sale or Distribution of "Open Proxy" Lists to Facilitate Spamming

Relaying spam through "open proxies," "drones" or other protected computers is a widely employed method of obscuring the sending IP address, and therefore the mailer, of spam. This type of illegal spamming depends entirely on the spammer's ability to acquire lists of open proxies, drones, or other computers through which the spammer's mail can be sent. Lists of such computers are readily available for sale on the Internet today. Indeed, websites brazenly offer such lists to spammers, along with subscriptions for weekly updates of newly captured drones or newly discovered open proxies. Without such lists, many spammers would be simply unable to effectively route their spam through masking computers.

Although the CAN-SPAM Act prohibits the *practice* of relaying spam through open proxies, drones, or other protected computers, it does not prohibit the *means* by which spammers can obtain information about these computers. A regulation that prohibited the sale and distribution of lists of open proxies, drones, or other protected computers through which spam can be sent would be a natural analog to Section

[4] This rule would also clarify that messages falling within the transactional or relationship exception are distinct from those that are sent pursuant to affirmative consent. Under the former scenario, the recipient has engaged in an underlying transaction (or has an underlying relationship) with an entity, and has been clearly informed by the entity that the transaction includes the receipt of commercial messages. Under the latter scenario, the recipient has simply provided affirmative consent to receive a particular commercial message or type of message – but without the necessity of any underlying transaction or relationship.

5(b)(1)(A), which creates an aggravated violation for persons who "assist in the transmission" of spam through the sale or distribution of harvested e-mail addresses. Because such mail is already improper under Section 5(a)(1), enhanced damages could be assessed against a person who "assists in the origination of such message through the provision or selection of addresses of computers or computer networks that such person lacks authorization to access."

B. Inaccurate Domain Registration for Advertised Domains

A natural parallel to requiring accurate registration for "sending" domains is requiring accurate registration for domains that are advertised within the body of an e-mail message. Senders who permit their goods and services to be advertised in e-mail are already required by the Act to take steps to ensure that such e-mail is not fraudulent. However, these provisions are ineffective and difficult to enforce if the sender can falsify its WHOIS registration information.

As noted in the Act's legislative history, the effectiveness of enforcement depends significantly on the ability of investigators to "follow the money" through the business promoted in the e-mail message.[5] Without accurate registration information to identify the owner of the website advertised in an e-mail message, recipients of such messages have great difficulty "following the money" to find the responsible spammer.

There seems to be little legitimate purpose for an advertiser to falsely register its domain. Requiring advertisers who use e-mail to accurately register their domains would be a simple and inexpensive manner of facilitating truth and transparency in the e-mailing process.

IV. "FORWARD-TO-A-FRIEND" SCENARIOS

The Commission should also adopt rules clarifying the legal obligations of entities that offer individuals the ability to forward information to a friend via e-mail. Many websites offer this feature as a convenient way for users to pass information on to friends or colleagues. To interpret the Act in a way that would make the website operator the "sender" of commercial electronic mail messages that have been forwarded by website users to their friends would do nothing to further the purposes of the Act, but would impose unnecessary burdens on website operators.

The current confusion surrounding the treatment of "forward-to-a-friend" scenarios under the Act hinges on what it means to "initiate" a commercial electronic mail message. To "initiate" includes "procuring" the "origination or transmission" of a message, and the Act defines "procure" as "intentionally to pay or provide other consideration to, or induce, another person to initiate" e-mail on one's behalf. The term "induce," however, is not defined under the Act, and an overbroad interpretation of this term could essentially preclude use of "forward-to-a-friend" features.

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[5] See S. Rep. 108-102, at 4 (2003).

For example, if "induce" were interpreted as simply offering users the opportunity to use a website's "forward-to-a-friend" functionality – or merely encouraging or suggesting that they take advantage of this feature – businesses and consumers would face harsh unintended consequences. The website owner – who would be deemed a sender – would be required to scrub every commercial e-mail message that a recipient wished to forward against its opt-out list. In order to avoid misleading the user of the feature into believing that his or her message had been delivered, the website operator would also need to notify the user if it was unable to complete the transaction because of a prior opt-out request. This notification, however, could potentially violate the operator's privacy statement by disclosing information about another user (*i.e.*, that he or she has opted-out of receiving communications from the website operator).

Moreover, every forwarded e-mail would be required to have a working unsubscribe feature that applied to the website operator. But this would make little sense to recipients of the forwarded messages, who would not expect to be able to opt out of messages from an underlying seller that had never even sent them a message in the first place.[6] And no company would want to risk an increased number of opt-outs based on the behavior of an individual user over whom it has little or no control. Thus, if entities were considered senders merely because they provided or encouraged the use of this feature, most websites would likely remove the feature rather than risk the implications and potential liability of being the sender. This result would deprive consumers of a valuable and widely-used tool for disseminating information.[7]

Thus, we urge the Commission to adopt rules clarifying that merely offering or encouraging the use of a "forward–to-a-friend" feature does not make a website owner the "sender" of any resulting commercial e-mail messages.

V. THE QUESTION OF MULTIPLE SENDERS

The Act imposes obligations on the "sender" of a commercial e-mail message with respect to recipient opt-out requests. Every message must include a mechanism by which a recipient can opt out of 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 messages from that sender.

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[6] For a discussion of the role of consumer expectations in determining the "sender" of a message, see *infra* at Section V.B.2.

[7] If encouraging words used in conjunction with the feature could alone constitute an "inducement," it would be nearly impossible for website operators to know what level of encouragement was permissible. Would merely pointing out the feature be enough? What about instructing the website visitor on how to use the feature? Or suggesting that the visitor's colleagues might find the information on the webpage useful? How strongly worded could the suggestion be before it became an inducement?

The Commission should adopt rules clarifying that there is only one sender per commercial e-mail message, and explaining that the "sender" of a message is the party to which a recipient of the message would reasonably expect that any opt-out requests be directed. The Commission should also specifically highlight which entity would be the sender in several common scenarios. This rule would comply with the plain language of the Act, and the Commission's guidance will help preserve current good business practices and maximize consumer choice and control.

A. The Problem of Treating Every Advertiser as a "Sender"

Many common marketing practices involve one or more advertisers providing promotional content to a list owner, which then sends that content via e-mail to its customers.[8] That commercial message generally includes unsubscribe language allowing recipients to opt out of receiving third-party offers from the list owner.

The Act potentially has significant and unforeseen impacts on this common business scenario. Traditionally, the list owner described above – and not the advertisers in the message – was considered the sender and undertook the tasks associated with obtaining any prior consent and collecting and honoring subsequent opt-out requests. However, under a strict literal reading of the Act, because the e-mail message promotes the advertisers' products or services, and because the advertisers may be seen as having "procured the origination or transmission" of the message, each advertiser would be considered a "sender." In addition, if the list owner does not market its own products or services in the message, it may not be considered the sender even where it has a relationship with recipients such that they would expect opt-out requests to flow to the list owner. Interpreting the Act in this manner would severely disrupt current commercial arrangements, turning traditional notions of consent-based e-mail marketing upside down and creating a number of significant problems.

1. It Would Add Unnecessary Cost and Complexity for Legitimate E-Mail Senders

If each advertiser is considered a sender, it would have to assume the following obligations that the list owner generally handles today:

- Provide its content and its opt-out list to the list owner, and require the list owner to compare the advertiser's opt-out list to its own distribution list and remove any matches before sending the message.

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[8] The term "list owner" is used throughout these comments to indicate the entity that controls the mailing list to which a given e-mail message is sent. This entity would normally be seen as owning the consent relationship with the consumer. It is not meant to imply that the list owner is necessarily engaged in any "list rental" or "list sale" activities.

- Require the list owner to include in its message opt-out instructions for the advertiser, and ensure that there is a mechanism in place by which it could receive subsequent opt-out requests.

- Implement those opt-out requests and ensure that no further messages are sent to those who have opted out of receiving commercial communications from the advertiser.

While these requirements are workable – though difficult – where a message is sent on behalf of just one advertiser, it is frequently the case that more than one advertiser provides content for a single e-mail message. That situation creates far more complexity. If each of these advertisers were considered a "sender," the list owner 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 multiple suppression lists for each message that it sends. And the message itself would likely have to include multiple opt-out instructions, which would be difficult for the recipient to understand and unduly burdensome for the list owner to manage.[9]

2. It Would Undermine User Choice and Control

Other consequences for the recipients of these messages would be more than just confusing. If every advertiser that provides content for a commercial e-mail message is considered a sender but the list owner is not, e-mail recipients will not have the kind of choice and control that was intended by the Act. Consumers who have opted out of messages from one advertiser would not be able to receive e-mail messages promoting services or products offered by other advertisers that they may wish to receive – even messages that the consumer has previously explicitly requested to receive – if those messages also include content about the advertiser from which the consumer has opted out. Moreover, individual recipients would be able to opt out one advertiser at a time, but they would never have the opportunity to remove themselves from the list owner's distribution list. This would unacceptably limit consumer choice and control.

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[9] It is simply not plausible for a message that contains promotions for multiple sellers to have a single opt-out choice that would apply to every advertiser in the message. *First*, advertisers would not want to be forced to accept opt-out requests that may not be specifically directed to them. For example, if a recipient is annoyed by the actions of the list owner or by another advertiser that has content in the message, and opts out as a result, all parties involved would have to stop sending commercial e-mail to that user. *Second*, advertisers would likely want to control the messaging surrounding any opt-out mechanism that applies to them. This would especially be true if the advertiser were treating different divisions of its company as different "senders" or offering opt-out choices that vary in scope, both of which are explicitly permitted by the Act. In either case, the advertiser would need to make clear to the recipient the parameters of the opt-out selection. *Third*, from a consumer perspective, such an approach limits user choice. If the recipient simply wants to get off of the list owner's mailing list or to opt out from one of the advertisers, he or she will not be able to do so without also being forced to opt out of promotional content from all advertisers involved.

3. It Would Result in Personal Data Being More Widely Shared, Create Security Vulnerabilities and Increase the Chance of Misuse

Designating every advertiser as a sender would also increase security risks for consumers and businesses. This interpretation would necessitate frequent and ongoing sharing of suppression lists and opt-out requests among the multiple parties involved (list owners, advertisers, and possibly other vendors that participate in sending the messages). Most responsible companies will endeavor to use reasonably secure means to transmit these lists, which contain thousands or even millions of e-mail addresses. Nevertheless, the more often that personal data is transmitted and the more parties that handle this information, the more likely a security breach and the greater the likelihood that the data could be stolen or misused.

The irony is that the people who are most concerned about the use and misuse of their e-mail addresses (*i.e.*, those individuals who have opted out) will be most likely to have their e-mail addresses on these widely distributed lists. It is therefore those consumers who are most interested in protecting their privacy that would be the most likely to have their e-mail addresses accessed or used in an unauthorized manner.

B. Recommended Rulemaking

An overly literal reading of the Act would therefore have a number of unintended consequences that would needlessly burden legitimate and common business practices, confuse e-mail recipients, limit consumer choice, and increase security vulnerabilities. Thus, there is a need for clarification that is consistent with the language of the Act and permits legitimate e-mail activities to continue in a way that gives recipients control over the receipt of commercial e-mail. The solution is for the Commission to explain that every commercial e-mail message has only one sender, and that the sender is determined by consumer expectations as to the source of that message.

1. The Act Does Not Contemplate Multiple Senders

It is clear that Congress intended in some cases for the third-party advertiser whose product is promoted in a message to be considered the "sender" of that e-mail. In traditional list rental arrangements, a single advertiser pays a list owner to send a promotional message to the list owner's mailing list. In these circumstances, it makes sense to consider the single advertiser – and not the list owner – to be the sender: because there is just one advertiser and the recipient has no relationship with the list owner that actually transmits the message, a consumer would reasonably expect that any opt-out request would flow to that underlying advertiser. This interpretation also closes a loophole by which an advertiser could circumvent a recipient's request to not receive commercial e-mail messages from that advertiser by simply having another party send a promotion on its behalf.

This is the sole scenario contemplated by the Act, and the paradigm set of circumstances that the statute was designed to address. The statute prohibits an entity

from transmitting a message without a mechanism for the recipient to request "not to receive future commercial electronic mail messages from that sender."[10] 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."[11] 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."[12]

In contrast, the Act simply does not consider a situation in which there are multiple senders of the same message. That is, the Act was not drafted to account for a message that contains promotions for multiple advertisers, and it does not intend for there to be more than one "sender" of a given message. This is clear from both the plain language and the legislative history of the Act.

The language of the statute implies strongly 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."[13] Moreover, a "commercial electronic mail message" is defined as any message with the primary purpose of promoting "a commercial product or service."[14] 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.[15]

Moreover, 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. The absence of direction from Congress on this point – particularly in light of this 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 for a message to have more than one sender.[16] For had it

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10 Section 5(a)(3) (emphasis added).

11 S. Rep. 108-102, at 18 (emphasis added).

12 Section 2(b)(3).

13 Section 5(a)(5)(A)(ii)-(iii) (emphasis added).

14 Section 3(2)(A) (emphasis added).

15 See, e.g., Sections 5(a)(3)-(4) (referring to opt outs for only one sender in each message).

16 Congress determined that both the entity that transmits an e-mail and the underlying seller are considered to have initiated the message in order to subject both to the Act's

intended that there could be multiple senders of a single message, Congress surely would have said so.[17]

The legislative history is equally compelling. 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 repeatedly to messages that are sent on behalf of just one advertiser, and therefore 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."[18] These examples highlight the language of the Act and the Senate Report, which consistently speak in terms of a single advertiser and a single sender.

2. The Sender of a Message Is the Entity to Which a Recipient of the Message Would Reasonably Expect That Opt-Out Requests Would Be Directed

Because the Act plainly does not contemplate a situation involving multiple advertisers or intend for a message to have multiple senders – and because subjecting multiple parties to the opt-out requirements would have the potentially disastrous consequences described above – 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 a recipient of the message would reasonably expect that any opt-out requests would be directed. Thus, for those mailings sent on behalf of a single advertiser by a list owner that has no prior relationship with the recipient, opt-out requests should flow to the advertiser.[19] As noted, this comports with the factual circumstances contemplated by

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prohibitions against fraudulent and deceptive behavior – such as false transmission information and misleading subject headings. This enhances the FTC's ability to prosecute violators by "'following the money' through the business promoted in the e-mail message to the spammer." S. Rep. 108-102, at 4.

[17] Clay v. United States, 537 U.S. 522, 528 (2003) ("When '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.'") (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

[18] S. Rep. 108-102, at 16; see also id. at 15 (intent of definition of "procure" is "to make a company responsible for e-mail messages that it hires a third party to send").

[19] Nevertheless, even in this scenario of a single advertiser engaged in a traditional list rental arrangement, where Congress intended for the advertiser to be considered the "sender," a "best practice" would be to also offer consumers a way to direct an opt-out request to the list owner – so long as the list-owner's opt-out is clearly differentiated from the advertiser's opt-out. Otherwise, consumers may find themselves unable to remove themselves from the list owner's mailing list.

Congress when it drafted the Act, and it makes sense in light of the reasonable expectations of a recipient as to the source of that message.

In contrast, where a consumer would reasonably expect that it would be able to opt out of future messages from the list owner – as will often be the case for a message with multiple advertisers, or which is scheduled to be transmitted at regular intervals (such as a newsletter) – the Commission should clarify that the list owner would be the sender, and would therefore be subject to the Act's opt-out requirements. In such cases, in order to avoid misleading recipients regarding the nature of the message and whose list the recipient is on, the list owner 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 is providing, the list owner is promoting its own services and therefore plainly would be considered the "sender" under the language of the Act. This will ensure that every commercial electronic mail message has one sender, and that recipients will be able to notify the true "source" of the message that they no longer wish to receive commercial e-mails from that source.

Several examples underscore the practicality and appropriateness of this approach, and we urge the Commission to affirm the results described in these examples.

Commercial E-Mail Messages Sent as Regularly Scheduled Mailings. These messages (such as a monthly member letter sent to subscribers of a company's service, or other types of e-mail newsletters) often include some promotional content relating to the products or services of a third-party advertiser. Nonetheless, the list owner should be considered the sole "sender" of the message, because the recipients of that message would reasonably expect that their requests to opt out of future such messages would flow to that list owner. These recipients have a pre-existing relationship with the list broker; understand that these are the types of messages that the list broker regularly sends them; and expect to contact the list broker – and not some underlying advertiser – if they no longer wish to receive these messages. Moreover, because each message is regularly scheduled, it would have been sent regardless of whether a third-party advertiser provided the promotional content for inclusion – and the third-party advertiser therefore did not "procure" the message as defined by the Act.[20] That is, the third-party advertiser did not procure the initiation of the message itself, but rather simply paid for placement of its content in a pre-existing and prescheduled message. The Commission should therefore clarify that for these regularly scheduled mailings, it is the list owner – and not any underlying advertiser – that is the "sender" of the message.

Commercial E-Mail Messages Containing Promotional Content from Multiple Companies. Where a commercial message contains advertisements for multiple parties, it simply is not possible to isolate any one of those entities as having "initiated" the message – and therefore as the "sender." Instead, a recipient of the message would reasonably expect to be able to opt out of future such messages containing multiple

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[20] "Procure" is defined as "with respect to the initiation of a commercial message . . . to pay . . . another person to initiate such message on one's behalf." See Section 3(12).

advertisements from the entity that compiled and transmitted that message – the list broker. Moreover, as in the scenario involving a regularly scheduled mailing, if the list owner would have sent the message without content from any one of the advertisers, it would be unreasonable to conclude that any one of these advertisers "initiated" the message. Thus, the Commission should clarify that the sender of a message containing multiple advertisements is the entity responsible for compiling and transmitting that message.

Messages Promoting Products Sold by Retailers and Other Resellers. Many entities resell other companies' products as part of their own businesses. These businesses include traditional retailing, consulting services associated with the products that are sold, or system integration services with custom solutions that involve the products of one or many manufacturers. E-mail messages sent by these companies may feature products from dozens of different manufacturers. The intent of these messages, however, is to promote the retail outlet or the resale services of the sender – not the underlying entities whose products are being sold. Because the retailer is understood by the consumer to be the source of the message, the retailer – and not the manufacturers of the products included in the mailing – should be considered its sole "sender."

Messages Sent Pursuant to Affirmative Consent. Numerous messages are sent to individuals who have given their express consent by specifically requesting to receive such e-mail. If a consumer opts into receiving promotional e-mail messages, the Commission should clarify that the list owner is the sole "sender" of these messages. This is the only approach that would be consistent with the reasonable expectation of the consumer.[21] It also is consistent with the express language of the Act, which defines "affirmative consent" as express consent to receive a particular message, rather than a message from a particular sender.[22] As the Senate Report explains:

> "[t]his definition does not require consent on an individual, sender-by-sender basis. A recipient could consent to messages from one particular company, but could also consent to receive either messages on a particular subject matter (e.g., gardening products) without regard to the identity of the sender, or messages from unnamed marketing partners of a particular company."[23]

However, if multiple underlying advertisers were all considered separate senders of a given message, a subsequent opt-out request directed to one of these advertisers would have to be interpreted to override prior express consent to receive a message from a list

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[21] When a consumer affirmatively subscribes to a newsletter or e-mail service provided by one company, the consumer's reasonable expectation is that he or she will continue to receive the messages sent as part of that newsletter or service until he or she unsubscribes – and that this request to unsubscribe would be sent to the same company as the original subscription request.

[22] See Section 3(1).

[23] S. Rep. 108-102, at 14.

owner that happens to contain a promotion for that advertiser.[24] In that case, Congress' intent in the "affirmative consent" provision would be thwarted, and the notion of consumer expectations would be defeated.[25]

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For all of these reasons, the Commission should implement a rule clarifying that every commercial e-mail message has only one sender, and that the sender is the entity to which a recipient of the message would reasonably expect that any opt-out requests be directed.[26]

VII. SYSTEM FOR REWARDING THOSE WHO SUPPLY INFORMATION ABOUT VIOLATIONS

The Act obligates the Commission to write a report setting forth a system by which a reward of not less than 20 percent of the total civil penalty collected for a violation of the Act is provided to "the first person that identifies the person in violation of the Act, and supplies information that leads to the successful collection of a civil penalty by the Commission." See Section 11(1). While this concept is laudable, in

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[24] In fact, the list owner might have to condition receipt of a newsletter on providing consent to receive any and all promotional content from the company or companies that provide content for the newsletter. This interpretation would also preclude offerings that enable a customer who is concerned about the wide distribution of his or her e-mail address to request to receive promotional content related to a variety of companies while sharing his or her e-mail address with only one trusted company.

[25] In order to support the position that the list owner is the "sender," the Commission could encourage companies to add additional disclosures to the opt-in choice to make the scope and effect of the opt-in choice clear to users. For example, the text could read:

> I understand that by selecting "yes," I am agreeing to permit [name of list owner] to send me e-mail messages that promote the products or services of third parties. I wish to continue to receive such e-mail messages unless and until I inform [name of list owner] that I wish to unsubscribe from this service.

For existing subscribers, the list owner could send an administrative mailing to all subscribers making it clear that this opt-in subscription overrides consent choices made directly with any third-party content providers, and giving subscribers the ability to unsubscribe if they wish to. This type of robust and explicit opt-in consent to receive third-party promotional material, along with an unsubscribe link in every such message, should make it clear to subscribers that the third-party advertisers in messages sent as part of an opt-in service are not "senders" and that the consent choices for that subscription could be managed exclusively by the list owner that originally obtained the opt-in consent.

[26] When evaluating a message under this reasonable expectation test, the Commission should consider whether the recipient has received the message as the result of opt-in or opt-out consent. If there is opt-in consent and the individual had previously requested that a particular entity send e-mail messages, the sender would clearly be that same entity to which the individual directed the original request.

practice such a bounty system is unlikely to be effective, and is more likely to be disruptive than helpful to the Commission's enforcement efforts.

As the Commission is well aware, one of the most difficult challenges facing those who seek to enforce anti-spam laws is identifying the spammer. Spammers use a variety of sophisticated and fraudulent tactics to hide their identities, including "spoofing" the sender's e-mail address, making it seem that the spam message originated from someone else; establishing different e-mail accounts to avoid detection; and transmitting spam from systems determined to be open to unauthorized use (such as open relays, open routers, or open proxies).

Internet service providers and law enforcement officials spend a tremendous amount of time and effort hunting down these unlawful spammers. As an ISP seeking to enforce the law against spammers, we hire outside investigators in an attempt to locate the sender of unlawful spam messages. We also work closely with our technology departments to identify elements of spam messages that may lead to the culprit. And we share information with other ISPs to find those who have set up different e-mail accounts from which to send spam. Despite these efforts, which cost hundreds and thousands of dollars, identifying unlawful spammers is still a great challenge.

We certainly favor having additional resources to identify those who violate the Act, and we recognize the benefits of reward programs in eliciting information to support enforcement actions. That said, a bounty system is premised upon the assumption that there exist industry experts or participants whose investigative techniques or particularized knowledge is unique and beyond that of the Commission and its enforcement team. A bounty system is also premised upon the hypothesis that reports from such sources are likely to provide strong, admissible evidentiary links to a particular spammer.

Our experience in civil spam enforcement is somewhat at odds with these two postulates. In our experience, purported links between a spam campaign and a particular spammer – while frequently accurate – are often based on speculation, intuition or other inadmissible perceptions. While such suggestions are helpful in focusing the nature of an investigation, they are not usually definitive and, more importantly, are not based on evidence likely to be admissible in any enforcement proceeding. Indeed, we find that critical admissible evidence is frequently not available without subpoena. That is, the strong and admissible evidence by which a spammer can be identified and prosecuted is often in possession of a third-party (for example, a domain registrar, ISP, hosting company, on-line payment company or affiliate program operator) that is unwilling or unable to provide such information without compulsory process. Thus, such information is equally unavailable to industry experts and "spam watchers," and reports from such entities are unlikely to provide the definitive evidence necessary for prosecution.[27]

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[27] One concern with the bounty system is that, unless expectations are very clearly stated, individuals will demand account and other information from ISPs, who are not authorized to provide them with such information absent a subpoena. In the end, ISPs may be viewed as unwilling to cooperate with individual investigators and this could cause great consumer

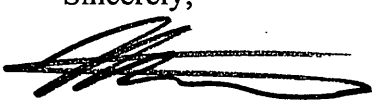
Moreover, our experience is that the enormous volume of illegal spam ensures that it is quite easy to collect actionable e-mail, and to identify e-mail campaigns, worthy of investigation. The difficulty is frequently not a lack of information, but rather an overwhelming and unmanageable volume of information to which limited investigative resources must be applied. Thus, there is no lack of candidates for enforcement efforts, and it is not particularly important to expand the pool of investigative targets through "tips" from industry groups or participants.

This is not to dismiss the notion of soliciting input and information to assist in investigating particularly notable or high-profile targets. Our experience is that an offer of reward can and does work to encourage disclosure of information held by persons with direct, personal knowledge of spamming operations – often current and former employees – whose evidence is both admissible and compelling. In our view, a reward system would work best for motivating informants to come forth in particular cases, rather than for encouraging the delivery of voluminous, relatively generic, and inadmissible reports on spammers.

VII. CONCLUSION

Microsoft appreciates the opportunity to provide these comments to assist the Commission with implementing the CAN-SPAM Act. We urge the Commission to develop rules that are consistent with consumer expectations; provide clear guidance to companies that want to act responsibly; and give the Commission, law enforcement, and ISPs additional means to thwart the continued efforts of those who abuse the e-mail system. We are committed to tackling spam on behalf of our customers and look forward to working with the Commission toward this common goal.

Sincerely,



Michael Hintze
Senior Attorney
Microsoft Corporation

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frustration. We therefore urge the Commission to provide clear guidance on the type of information necessary to receive a reward under the Act and make clear that ISPs are not be expected to supply individual investigators with any information unless the request complies with existing law. This will help ensure ISPs are not burdened with having to deal with requests that cannot be fulfilled.