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The Honorable Donald S. Clark
Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

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

Dear Mr. Secretary:

Motion Picture Association of America ("MPAA") is pleased to submit these comments ("Comments") in response to the Federal Trade Commission's ("FTC" or "Commission") Advance Notice of Proposed Rulemaking ("ANPR"), published in the Federal Register, 16 C.F.R. 316, on March 11, 2004, with respect to regulations to be enacted under the Controlling the Assault of Non-Solicited Pornography and Marketing Act ("CAN-SPAM" or "the Act").

MPAA serves as the voice and advocate of the American motion picture, home video and television program production industries.[1] Members of MPAA provide permission-based electronic mail to consumers containing a wide range of promotional materials for member products. MPAA members support the principles underlying the recently enacted CAN-SPAM Act, which requires all companies to provide consumers with the choice not to receive unwanted commercial e-mail and imposes tough new federal penalties on illegitimate marketers' ("spammers") deception. In keeping with the purposes of the Act, the FTC must be careful to target its enforcement of CAN-SPAM against the illegitimate marketers that the Act was intended to reach,[2] without unduly burdening legitimate e-mail marketers, who are providing an important and burgeoning service to both consumers and businesses.

As used by legitimate enterprises, commercial e-mail is an efficient, useful, and nonintrusive method of providing information. With existing marketplace solutions, such as

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[1] MPAA members include Metro-Goldwyn-Mayer Studios Inc.; Paramount Pictures Corporation; Sony Pictures Entertainment, Inc.; Twentieth Century Fox Film Corporation; Warner Bros. Entertainment, Inc.; Universal City Studios LLLP; and The Walt Disney Company.

[2] CAN-SPAM §§ 2(a) (2)–(4).

spam blocking, as well as emerging technological innovations to identify and charge e-mail senders, e-mail could become vastly preferable, for consumers and businesses alike, to almost any other form of direct solicitation, *e.g.*, door-to-door, direct mail, telemarketing, or pop-up ads. The value of e-mail marketing to both consumers and businesses is that it uniquely offers the potential for a high degree of message personalization (thus enabling consumers to receive only the messages they want and need), interactivity through embedded links to websites (which facilitates convenient consumer access to a large store of additional product information as well as direct purchase opportunities) and immediacy (the ability for businesses to very quickly communicate time-sensitive offers to interested consumers, such as discounted last-minute travel opportunities), while doing so at a low cost to the marketer.

The low cost of conducting e-mail marketing, however, also has made possible the avalanche of unsolicited, unwanted, and unappealing e-mails that are commonly known as "spam." In order to protect against harassment of e-mail recipients, and to preserve the utility of the e-mail medium for legitimate marketers, the Commission must take a reasonable and balanced approach in exercising the rulemaking authority with which it has been entrusted by Congress. It also is very important for the FTC to provide clarification and guidance on the issues discussed herein in order to set national standards for all entities charged with enforcement of CAN-SPAM. Incomplete or unclear guidance in these regulations could lead to varying enforcement strategies by the FTC, other federal agencies such as the Federal Communications Commission, state Attorneys General, and Internet Access Services, which will increase legitimate businesses' compliance costs, and ultimately will harm consumers through increased transaction costs and consumer confusion.

Through its rulemaking authority, the FTC has an opportunity to develop clear guidelines and definitions that will allow consumers to retain control of their e-mail inboxes and allow businesses to market freely their products to interested consumers. Throughout these Comments, MPAA recommends that the FTC develop clear tests to distinguish spam from legitimate marketing. MPAA believes this clarity will best address the policy goals of the Act, minimize consumer harm, and allow legitimate marketers to develop new products and services. To that end, MPAA's Comments will focus both on the FTC's statutorily required rulemaking as well as optional Section 13 rulemaking in which the FTC should engage to provide clarity to businesses attempting to adhere to the statute. MPAA provides Comments on: (1) the "primary purpose" of a commercial e-mail; (2) the "sender" of commercial e-mails; (3) the "transactional or relationship" exception; (4) tell-a-friend and forward-to-a-friend tools; (5) the definitions of "originate" and "procure"; (6) third-party and licensee liability; (7) the scope of "commercial advertising or promotion"; (8) the ten business day requirement for unsubscribe requests; (9) the line of business or division element of the "sender" definition; and, (10) the restrictions upon transfers of unsubscribed e-mail addresses.

Finally, we encourage the FTC to recognize in its rulemaking the fact that certain protections for business-to-consumer communications may not be appropriate for business-to-business communications. Consumers and businesses are two very distinct classes of e-mail recipients with different privacy expectations, levels of sophistication, and relationships with

senders. For this reason, at times standards may apply to business-to-business e-mails that are different from those applied to business-to-consumer e-mails.

I. MPAA Proposes the FTC Adopt a Rule That the Primary Purpose of an E-Mail Is "Commercial" When Commercial Advertising or Promotional Content Contained Therein Is *More Important* Than All Other Content

The FTC is required to issue regulations defining the "primary purpose" of a commercial electronic mail message ("commercial e-mail").[3] The primary purpose definition is necessary to apply the requirements applicable to commercial e-mail under CAN-SPAM and to provide legitimate businesses clear guidance on how to adhere to the Act. The primary purpose determination may have an equally important function in clearly identifying the "sender" of a commercial e-mail.

Given the importance of the term, a clear, unambiguous test should be developed for the "primary purpose" element of the definition of "commercial electronic mail message" under Section 3(2)(A). MPAA advocates that, consistent with a Commission proposal in the ANPR (ANPR A:1), the primary purpose of an e-mail should be "commercial" when commercial advertising or promotional content contained therein is *more important* than all other content.

In order to provide clear guidance to legitimate businesses that send e-mails to consumers and other businesses, the FTC should adopt unambiguous standards to determine when advertising is "more important" than all other purposes of an e-mail. Quantification of a "more important" test into percentages may help provide that guidance. MPAA believes that the FTC should establish a safe harbor for this "more important" standard so that if the total commercial content in an e-mail constitutes no more than 33-1/3% of the e-mail message's overall content as measured by volume (the "one-third content test"), the primary purpose cannot be commercial.[4] Thus, these e-mails would not be subject to CAN SPAM's requirements. This one-third content test would help provide a clear standard for implementation of the "more important" test that MPAA supports, while allowing some flexibility in presentation and design by the marketer.[5] A one-third content test that provides a reasonable safe harbor for the "more important" standard is an efficient solution, while being consistent with the statutory language, Congress's intent, and consumer expectations. Such an objective, clear-cut test is vital for legitimate businesses to comply with CAN-SPAM without imposing undue administrative burdens.

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[3] *Id.* § 3(2)(c).

[4] Put another way, if 66-2/3% of the e-mail message concerns one or more non-commercial purposes, the commercial purpose is ancillary to the overall purpose of the e-mail, and, therefore, the e-mail is not a commercial e-mail under CAN-SPAM.

[5] For example, if the top half of an e-mail message consisted of an advertisement for a new automobile, and the other half of the e-mail message contained information about an upcoming charity event, that e-mail message would not fall within the proposed safe harbor. On the other hand, if an e-mail message contained a small banner ad for a new automobile occupying approximately 20% of the e-mail "space," while the rest of the e-mail message contained information about the upcoming charity event, that e-mail message would not be considered commercial e-mail under the proposed safe harbor.

In applying the one-third content test to determine whether an e-mail meets the "more important" safe harbor, the volume of the e-mail can be calculated by the size of the e-mail message (either in HTML or text), excluding the mandatory unsubscribe option, postal address footer, and commercial content notice. This test can be applied easily and objectively by analyzing the complete e-mail – the commercial advertisement in comparison to the e-mail's non-commercial content.[6] The FTC can enforce the standard, while companies will have a bright-line rule to apply without seeking legal counsel on every e-mail.

The Senate Report on CAN-SPAM clarifies that "the definition [of commercial electronic mail message] is not intended to cover an e-mail that has a primary purpose other than marketing, even if it [. . . .] contains an ancillary marketing pitch."[7] The one-third content test is in harmony with this legislative history – one third or less of advertising in an e-mail would constitute an ancillary marketing pitch in an e-mail that has a different primary purpose.

Consumer expectations are consistent with the one-third content test as well. The reasonable consumer likely would expect that information he or she has requested may also contain promotional materials. For example, when a consumer purchases a product, whether in person or online, the consumer may expect the receipt and product information that accompanies the purchase to include promotions for other products. If, however, this material contains so many advertisements that the product information is superfluous, the consumer may likely change his or her opinion – the material may be a commercial promotion of a variety of products in a reasonable consumer's opinion. If the product information contained in any e-mail advertisements constitutes less than one third of the e-mail, the consumer may consider that to be the "tipping" point from objective and necessary product information to commercial promotion.[8]

The FTC should be equally clear that e-mails containing editorial content are not commercial e-mail and therefore fall outside CAN-SPAM.[9] Editorial content is not commercial speech and is fully protected by the First Amendment, and thus is not subject to this type of regulation.[10] This is the case regardless of whether the editorial content is supported by one or more advertisements, whether it contains a logo or other branding of the commercial website, or whether it contains the complete text of a news story or simply a hyperlink to the story on the

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6 The calculation can be performed comparing the square inches of the commercial advertisement in comparison to the other material in the e-mail.

7 S. Rep. 108-102, *CAN-SPAM Act of 2003: Report of the Committee on Commerce, Science and Transportation on S. 877*, at 14 (July 16, 2003).

8 While MPAA is not advocating a reasonable consumer or net impression test as the FTC definition of primary purpose, reasonable consumer expectations are consistent with the one-third test.

9 To the extent that unscrupulous spammers seek to use this interpretation of editorial content in an illegitimate manner in order to continue to send consumers unsolicited mail without complying with CAN-SPAM, the FTC is empowered to prosecute fraud and deception, and MPAA encourages the FTC to use its prosecutorial discretion to address such nefarious conduct when and if it arises.

10 *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (the fact that "books, newspapers and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment."). *See also Time, Inc. v. Hill*, 385 U.S. 374, 397 (1967) (same).

website. Additionally, websites whose purpose is to provide editorial content are not "websites operated for a commercial purpose" under the commercial e-mail definition in CAN-SPAM, and, thus, a link to an editorial content website embedded in an e-mail does not make the e-mail commercial.[11]

Similarly, press releases directed to news organizations, institutions, or other businesses (including press releases concerning new product announcements and press events tied to the promotion of new products and services) also are constitutionally protected speech and outside CAN-SPAM.[12] The FTC should make such distinctions explicit, otherwise, the Act attempts to enforce its provisions or regulations promulgated thereunder, and may impermissibly chill speech.

II. The FTC Should Clarify the Definition of "Sender" to Ensure that E-Mails May Have Only One Sender

The Act specifies that a sender is any person who initiates an e-mail *and* whose product, service, or Internet website is advertised or promoted by the e-mail.[13] The Act also treats persons who procure, *i.e.*, "pay or provide other consideration, or induce, another person to initiate an e-mail" as if they had initiated the e-mail.[14]

The Act does not provide that e-mails should or can have more than one sender. MPAA believes Congress did not intend to create a system in which every e-mail potentially has multiple senders, which would require consumers to opt-out repeatedly from multiple participants whose offers appear in a single e-mail.[15] While the definition of "initiate" makes it clear that more than one entity can initiate an e-mail, this clarification is missing from the definition of "sender." Clearly, Congress could have explicitly allowed for multiple senders, but it chose not to do so. Therefore, MPAA believes that the statutory language allows the FTC to conclude that each e-mail can and should have only one sender. Indeed, common sense and consumer expectations compel such a result.

MPAA believes that the FTC should use its rulemaking authority granted in Section 13 of CAN-SPAM to clarify the definition of "sender" in order to assist companies in complying with the Act.[16] In particular, the FTC should promulgate rules to address situations in

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11 *See, e.g., Bernardo v. Planned Parenthood Federation of America*, 115 Cal. App. 4th 322, 346 (2004) (presence of advertisements for specific Planned Parenthood clinics on Planned Parenthood website did not convert website into commercial speech).

12 *See, e.g., Bolger v. Young Drug Products*, 463 U.S. 60, 64 (1976). A further distinction with respect to CAN-SPAM's applicability to press releases is that press releases do not promote a commercial product or service for purchase, rather, they attempt to encourage other organizations or individuals (publications and their editors, reporters, and investigators) to report on the subject of the press release. Therefore, press releases fall outside CAN-SPAM's commercial e-mail definition under this analysis as well.

13 CAN-SPAM § 3(16).

14 *Id.* §§ 3(9) and 3(12). *See* Section IV.C, *supra,* on the "procure" definition.

15 *See* S. Rep. 108-102, at 16.

16 *See, e.g.,* ANPR E:2.

which the statute might be misapplied to create multiple senders or no sender at all. Instead, these rules should lay out clear tests to designate one entity as the sender of a given e-mail. Ensuring that each e-mail has only one sender is consistent with the Act and greatly benefits consumers by reducing confusion and allowing for easy, one-stop opt-outs. A single sender model also provides certainty for businesses and ensures one entity has a vested interest in making the e-mail appealing, since that entity bears the full burden of any opt-outs. With a single sender, compliance by companies and enforcement by regulators is more clear-cut.

While the Act can be interpreted to allow one e-mail to have several different senders, this interpretation is not required by the text of the statute.[17] As such, MPAA believes the FTC should issue regulations making it clear that every commercial e-mail should have a single sender. Multiple senders are inconsistent with the goals of the Act, severely undermine the potential benefit to consumers of CAN-SPAM's opt-out requirements and create enormous burdens for both consumers and legitimate e-mail marketers. There is no good policy reason to force consumers to opt-out multiple times from a single e-mail. Reasonable consumers would expect that a single opt-out would ensure they would not receive similar e-mails promoting most of the same products in the future. But if multiple opt-outs are required and only one is acted on, the consumer could receive an e-mail with all but the "opted out" offers a few days later. Multiple opt-outs also leave consumers with no one place to raise questions or complaints about opting-out.

In many cases, multiple opt-outs can even undermine consumer privacy where consumers inadvertently share their personally identifiable information with entities that did not previously possess such information. Thus, if several entities are designated as senders but only one entity, the company that physically sent the e-mail, has a record of the consumer's e-mail address, then the multiple opt-out requirement could lead a consumer to opt-out with a company that did not previously have his or her e-mail address. In addition, those companies that did not previously have the e-mail address would have a difficult time effectuating the opt-out as they would have no record of the consumer in their databases.[18]

Finally, multiple opt-outs put an unnecessary burden on businesses to offer and track multiple opt-outs. Businesses will have to devote resources to cross-referencing the resulting proliferation of overlapping opt-out lists. In contrast, a single-sender model eases the burden on businesses *while at the same time* providing clear, more effective choices for consumers that meet both consumer expectations and the requirements of the Act.

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17 For example, in an e-mail with four advertisers where all four have "initiated" the e-mail according to CAN-SPAM, all four advertisers could be deemed to be senders. The Act could also leave open the possibility that a given e-mail has no sender (*e.g.*, if no one advertiser is the determinative reason why the e-mail was sent, it could be argued that no advertiser "initiated" the transmission of the e-mail). While MPAA does not agree with this interpretation, this ambiguity in the sender definition requires clarification by the Commission.

18 The exchange of opt-out lists between companies in order to adhere to CAN-SPAM Section 5(a)(4)(A) could also force a company to be inconsistent with its privacy policy if the policy states that the company would not share a user's personally identifiable information with third parties. In fact, the FTC has undertaken multiple enforcement actions against such practices. *See, e.g., FTC v. Toysmart.com, LLC,* Civil Action No. 00-11341-RGS (D.Ma.) (filed July 21, 2000) (*available at* http://www.ftc.gov/os/2000/07/toysmartconsent.htm).

The single-sender model would be used in conjunction with the primary purpose test. Once an e-mail is determined to have a commercial primary purpose, the single sender model would be used to make it clear which party is the sender of the e-mail.

In order to effectuate this single-sender model, MPAA recommends the FTC adopt four clear, easy-to-apply alternative tests to determine which entity is the sender of a given e-mail. In summary, MPAA recommends the FTC promulgate rules that clarify the definition of sender so that:

A. In the first instance, if a consumer has affirmatively consented to receive e-mails from a specific entity, the entity that received the opt-in is the sender, provided the e-mail contains more than a *de minimis* amount of content devoted to that entity's commercial product or service (the "affirmative consent sender");

B. In the second instance, where there is no affirmative consent, the entity whose products or services constitutes 51% or more of the e-mail (as measure by volume) is the sender (the "51% sender");

C. In the third instance, where there is no affirmative consent and no single entity accounts for 51% or more of the e-mail content, then the entity to whom the consumer responds to purchase the product or services is the sender (the "call-to-action sender"); or

D. Finally, when there is no affirmative consent, no single entity accounts for 51% or more of the content of the e-mail, and there is no call to action, then the entity "most proximate to the consumer" is the sender ("most proximate sender").

These four tests can be applied sequentially as needed. For example, if there is an affirmative consent sender, there is no need to move on to the next test. By providing a clear series of steps to determine which entity should be designated the sender of an e-mail, the FTC will ensure consumers have clear choices and businesses have clear guidelines. Each of these tests is discussed in more detail below.

A. When Consumers Affirmatively Consent to Receive Commercial E-mails, the Owner of the Opt-in List Is the Sender

If a consumer affirmatively consents to receive one or a series of commercial e-mails, the entity to which the consumer directs that request logically should be responsible for subsequent opt-out requests. [19] The owner of this opt-in list may be the only entity that already has the consumer's e-mail address and, therefore, it is in the best position to effectuate opt-out requests. Reasonable consumers would also expect that the company from whom they first request the e-mails is the same company *and the only company* they need to tell to stop sending

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[19] MPAA's use of the term "affirmative consent" in these Comments is consistent with the definition contained in Section 3(1) of the Act.

e-mails. It would be counter-intuitive and harmful to consumers to require them to opt out of every advertisement or promotion that appears in such an e-mail. Indeed, if such an e-mail promotes the products of several entities, but the consumer only sends one opt-out, he or she might continue to receive similar e-mails promoting many of the same products (except the products of the company from whom he or she opted out), even though the consumer would reasonably expect not to receive any additional e-mails of that type, regardless of the exact make-up of advertisers.

Thus, if a company offers an online coupon service that sends subscribers who have opted in periodic e-mails with discount offers and promotions for different entities, consumers would reasonably expect that the coupon service, not the products advertised in the e-mail, is responsible for the implementation of an opt-out request. MPAA believes as long as the coupon service includes more than a *de minimis* amount of its own content in the e-mail, that coupon service should be designated as the sender, under the affirmative consent sender principle.[20]

The alternative – that all the companies whose coupons and promotions are included in the e-mail be considered senders – would create confusion and frustrate consumers' expectations with respect to both their receipt of commercial e-mail and their privacy. Requiring the consumer to complete all of the opt-outs is burdensome and unnecessary, particularly when the consumer has an established relationship with one entity, and requires the consumer to provide personally identifiable information to other entities with whom he or she has no prior relationship.

B. If There Is No Affirmative Consent to Receive the E-mail, the Entity Whose Commercial Content Comprises 51% or More of the E-mail Is the Sender

If a consumer has not affirmatively consented to receive an e-mail, MPAA suggests the FTC adopt a 51% threshold for determining the sender (the "51% test"). If advertising or promotional material from a single company constitutes at least 51% of the content of the e-mail, that company (or the relevant line of business or division of that company) would be deemed the sender for purposes of CAN-SPAM, and would be responsible for providing the recipient both the option to unsubscribe from its future commercial e-mails and its postal address. For example, if there are three advertisements in an e-mail that each occupy one third of the total volume of the e-mail and two of those advertisements are from a single motion picture studio and the third is from a beverage company, the motion picture studio is the sender.

Once again, the 51% test comports with consumers' reasonable expectations. When the majority of an e-mail promotes one company's products, the reasonable consumer would expect to direct his or her opt-out request to that company. Like the affirmative consent

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[20] The Act requires that a sender be an entity that, among other requirements, promotes or advertises its own product, services, or website in the e-mail. CAN-SPAM § 3(16). In the coupon service example above, if the e-mail promotes the coupon service or its website and consumers affirmatively request to receive the service's e-mails then the coupon services should be deemed the sender.

test discussed above, the 51% test avoids a situation in which consumers are faced with multiple opt-outs and the possibility of their privacy preferences being ineffectively enforced. This bright line rule also aids businesses in identifying the sender and allows companies to comply with CAN-SPAM.

C. If There Is No Affirmative Request and No Entity Meets the 51% Test, the Entity to Whom the "Call-to-Action" Is Directed Is the Sender

When there is no affirmative request to receive the e-mail and no one entity meets the 51% test, MPAA suggests the FTC promulgate a rule that designates as the sender the entity that consumers must contact to purchase the product. By focusing on the company to whom the call-to-action is addressed, the rule would match consumers' expectations and provide a clear way for businesses and regulators to identify the sender under the call-to-action test.

This test is particularly important when one e-mail promotes a single product offered by multiple entities. Examples of such e-mails include a travel package that includes airline tickets, hotel reservations, and car rental to be purchased collectively or, as discussed in more detail below, an upcoming movie promoted by a motion picture studio, a motion picture exhibitor, and a national ticket distributor. Even if the "product" offered (the trip or the movie) constitutes more than 51% of the e-mail, the sender cannot be determined by the 51% test, since multiple parties have come together to offer one product. Unless the consumer has affirmatively asked to receive the e-mail (and thus the e-mail falls under the test described above in Section A), the sender should be the enterprise to whom the consumer responds.

For example, a motion picture studio, a motion picture exhibitor, and a national ticket distributor might jointly promote an upcoming motion picture by urging the recipients of promotional e-mails to purchase tickets from the ticket distributor. The ticket distributor thus would be the object of the e-mails' "call to action" and would be treated as the sender under this rule. Since consumers must contact the ticket distributor to see the motion picture, this rule would be consistent with consumer expectations as to the identity of the "sender" of the e-mails.[21]

If the FTC does not create a sender definition applicable to these types of commercial e-mails, the process of identifying the entity "whose product, service or Internet website" is being advertised by these e-mails would lead to uncertainty and confusion on the part of both businesses and consumers.[22] Without action by the Commission to provide clarity in these situations, businesses will be unable to determine efficiently which participant should assume the statutory duties as a "sender" of the e-mails. Responsibility for compliance thus would be diffuse and result in consumer confusion.

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[21] Applying the call-to-action test to sweepstakes or contest promotions, the sender would be the promoter of the sweepstakes or contest, rather than the sponsor of the prize, which is consistent with the requirements of state sweepstakes statutes.

[22] In the example of a motion picture promotion involving the motion picture studio, the motion picture exhibitor, and a ticket distributor, conflicting conclusions might easily be reached as to the identity of the entity that is offering this entertainment "product" or "service."

D. If There Is No Affirmative Request, No Entity Meets the 51% Test, and There Is No Call To Action, the Entity Most Proximate to the Consumer Is the Sender

If an e-mail does not meet any of the standards described in Sections A through C above, MPAA urges the FTC to adopt a rule that designates as the sender the enterprise whose role in the joint production and distribution of the e-mail is most proximate to the consumer, when the e-mail has the look and feel of being sent by that most proximate entity.[23]

By way of illustration, a film festival might send an advance e-mail promoting an upcoming festival by highlighting several films that will be screened during the festival and providing promotional reviews of the films. The e-mail may not, however, provide the opportunity to purchase festival tickets. Although motion picture studios produce the films and may have contributed to the cost of distributing the e-mail, the e-mail itself has the look and feel of "coming from the festival" – not all of the studios whose films are mentioned therein. In such a case, the e-mail is branded as "from the festival," promotes the festival, and is most proximate to the consumer. As such, the film festival should be the sender.

Similarly, a radio station may send out a branded electronic newsletter that contains information on its station and/or website, as well as content from a variety of advertisers and sponsors who contribute to the cost of distribution. When the e-mail has the look and feel of being sent by the station and contains information on the station or its website, a reasonable consumer would expect that its primary relationship is with the station, not the advertisers. Thus, the radio station would be most proximate to consumers and would be designated as the sender under the proximity test.

This proximity test addresses consumers' reasonable expectations and allows businesses to participate in e-mail marketing with a clear understanding of where the sender obligations lie. Finally, it prevents the necessity of multiple, confusing opt-outs. If consumers were required to opt-out from every movie studio discussed in the festival example above, some consumers would be discouraged from exercising their preferences at all. Others might opt-out from one studio only to receive another e-mail promoting the film festival and movies of different studios. These negative results can be avoided by adopting the foregoing test.

MPAA urges the FTC to adopt these clear tests to clarify the definition of sender. By ensuring commercial e-mails have only one sender, the FTC will meet the requirements of the Act while avoiding a confusing amalgam of compliance requirements that will only serve to frustrate consumers. The single sender model provides consumers with straightforward methods to communicate their privacy preferences while matching their reasonable expectations as to which party is responsible for acting on those preferences. Businesses will also have clear

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[23] To comply with the language of the Act, the e-mail would also have to contain more than a *de minimis* amount of content from the entity most proximate to the consumer. The "look and feel" portion of the test may include consideration of what entity is being held out as the sender, and whether the sender is clear to the consumer from the text and representations made in the e-mail.

guidance as to their statutory obligations, paving the way for better compliance and avoiding the unnecessary burden of reconciling multiple overlapping opt-out requests.

III. The FTC Should Use Its Section 13 Rulemaking Authority to Clarify the CAN-SPAM Transactional or Relationship Exceptions

The "transactional or relationship" exception to CAN-SPAM should be clarified and should explain the nexus between transactional or relationship e-mails and the "primary purpose" test.[24]

Many of the five delineated exceptions for transactional or relationship exemptions require further elaboration.[25] For example, e-mail messages that deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a previously agreed-to transaction are considered transactional or relationship messages under the Act.[26] This exemption should expressly include business-to-business e-mails where the companies have an established business relationship. This elaboration is necessary in order to address "quasi-contractual" relationships in which the two parties have not yet engaged in a "transaction" for purposes of CAN-SPAM. For example, if a magazine e-mails several companies that routinely advertise one month in the summer to determine whether they are interested in the magazine's next June, July, or August edition, that e-mail communication should fall into the exception. Such clarification is consistent with the purpose and intent of CAN-SPAM, but also allows businesses to continue established business relationships without having to amend long-standing and reasonable business practices. This clarification is also necessary because these businesses are sophisticated parties who have willingly engaged in a commercial relationship. Therefore, the FTC's need to strictly regulate those relationships is diminished.

The transactional or relationship exception should be further clarified expressly to include e-mails that provide an ongoing service and that the consumer has requested or consented to receive, such as a subscription or "preferred customer" loyalty program where special discounts and event opportunities are routinely promoted. Such commercial relationships need not, and often do not, necessitate the exchange of consideration in a strict contractual sense. Nonetheless, when consumers request or consent to receive this information, they reasonably expect to receive such information on a routine basis. This on-going, consumer-initiated relationship is the equivalent of a "transaction" or "relationship" under the terms of this exception. In such circumstances, the consumer recipient may protect himself or herself from receiving unwanted e-mails by terminating the relationship.

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24 The FTC has the authority to implement regulations on the transactional or relationship exceptions in Sections 3(17) and 13 of CAN-SPAM.

25 CAN-SPAM §§ 3(17)(a)(i-v).

26 *Id.* § 3(17)(A)(v).

Furthermore, the transactional exception that allows for e-mails that "facilitate, complete or confirm" transactions also should be clarified.[27] Specifically, that exception should expressly include e-mails that thank the consumer for a completed purchase or commercial transaction. Although implicitly included in the "confirmation" prong, the FTC should explicitly state that such e-mails are transactional or relationship e-mails and thus outside the scope of CAN-SPAM. Also implicit in the "facilitate, complete or confirming" exception standard are e-mails that complete or facilitate a bargained-for exchange. For example, if a consumer signed up for a conference or participation in an event at a destination resort, e-mails confirming his or her participation are already expressly exempt from CAN-SPAM. The FTC, however, also should make clear that follow-up e-mails providing details on the event, or other activities occurring at the destination at the same time as the event, are part of the transactional exception both because those e-mails facilitate the initial transaction (transaction exemption i) and provide updates that the consumer is entitled to receive (transaction exception v).

Under the fourth transactional or relationship exception, the FTC should clarify that, for purposes of CAN-SPAM, an "employment relationship" begins at the time when an offer of employment is tendered. This important clarification would enable the employer to send related information on employer-provided rental housing, employee health or life insurance options, or other administrative benefit information prior to the time of hire. Having an unsubscribe option in those e-mails is not only unrelated to the congressional intent, it is illogical to believe that a candidate who has been offered a job but has not commenced work would consider the advisory e-mails from his or her future employer to be commercial e-mail from which he or she would like to unsubscribe.

The one-third primary purpose test is very important in order to establish guidelines on transactional and relationship messages as well. If the proposed one-third rule were adopted, transactional and relationship e-mails would be covered by the same primary purpose test, and companies would therefore be required to have two thirds of the content of a transactional or relationship e-mail directed toward the relationship purpose, rather than overwhelming the transactional e-mail with promotional content that is unrelated to the underlying transaction or relationship.

IV. The FTC Should Make Clear That Certain Activities Do Not Trigger the CAN-SPAM Requirements

A. Online Businesses Are Not "Senders" of Forward-to-a-Friend or Tell-A-Friend E-mails

When an individual consumer sends an e-mail to a friend that contains commercial information,[28] whether by forwarding an e-mail or generating it through a website, those e-mails should be considered to be outside the scope of the Act. These two different

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27 *Id.* § 3(17)(A)(i).

28 If individual consumers forward news content, that communication is protected by the First Amendment, as discussed above in Section I, and thus outside of the scope of the Act.

actions by friends lead to the same result – CAN-SPAM does not apply. The first scenario, known colloquially as "forward-to-a-friend" e-mails, consists of a friend that receives a commercial e-mail in his or her inbox and decides to forward it to a friend who might be interested in the product or service. The second action, known as "tell-a-friend," is when an individual fills out a prepopulated (or personalized) form on a website that is then transmitted in the form of an e-mail by the website's servers to a "friend's" e-mail address that the individual has supplied. Both of these forms of e-mail communication must be deemed to be outside of CAN-SPAM because (1) there is no sender, as defined by the Act, since the company whose products or services are promoted did not initiate the e-mail, either directly or by procuring its origination or transmission, and/or (2) the actions taken by the website merely constitute routine conveyances under the statute. Moreover, if these types of e-mails were covered by the Act, little would be done to address the complaints consumers have about true spam and many companies would simply cease to offer this valuable service to consumers.

When a consumer forwards a commercial e-mail to a friend, the communication is driven entirely by the individual consumer. The original sender of the commercial e-mail has no control over whether the e-mail is forwarded from the consumer's inbox and generally has no way of knowing whether the e-mail was forwarded and, if so, to whom. Thus, it would be close to impossible to hold the original sender of the e-mail liable for subsequent actions taken once the e-mail left its possession. Furthermore, merely sending an e-mail to an individual who can either choose or not choose to forward the e-mail cannot reasonably be considered "origination" of the e-mail. Therefore, the business does not meet the first prong of the CAN-SPAM sender test and thus cannot be considered the sender under CAN-SPAM.[29] MPAA does not believe it is technologically feasible to adhere to the CAN-SPAM requirements in the forward-to-a-friend scenario, and asks that the FTC make it clear that such e-mails are not part of CAN-SPAM.

Even when a website operator provides a consumer with a "tell-a-friend" feature, transmission of an e-mail promoted by the individual's actions must be considered a routine conveyance and thus not an initiation of an e-mail under CAN-SPAM. Tell-a-friend tools on websites use an automatic technical process to prepopulate an e-mail, but rely on the consumer to provide the recipient's e-mail address. These services also often let the consumer personalize the message. As the Act makes clear, a routine conveyance includes "the transmission, routing, relaying, handling, or storing, through an automatic technical process of an electronic mail message for which another person has identified the recipients or provided the recipients' address."[30] Such routine conveyance is expressly excluded from the definition of "initiate" (§3(9)), and thus even if the e-mail arguably promotes a commercial product or service, the website operator cannot be considered a sender because it has not "initiated" the e-mail.[31]

The ability to forward information of interest to friends and families is one of the many benefits of online access, while the technological costs to businesses to compare their unsubscribe lists with the addresses input by consumers either at websites or in their e-mail

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29 *See supra,* at Section II.

30 CAN-SPAM §3(15).

31 *See, supra,* at Section II.

inbox would be prohibitive. Thus, holding the original sender of the e-mail responsible for such forwarding of e-mails and website content is unduly burdensome. There also is no harm to consumers when friends forward e-mails to one another, since friends often know what might be of genuine interest to each other and there is little risk of repeated e-mails promoting a given product. Thus, subjecting these e-mails to the Act would not only place an enormous burden on businesses, but would do little if anything to address consumers' concerns with e-mail marketing. Construing the Act to cover the sending of these e-mails will simply reduce the number of services offered to consumers and will not address customers' complaints and concerns about commercial e-mail or advance the goals of the Act. MPAA urges the FTC to promulgate a rule that makes it clear that all such "friend" e-mails, whether forwarded directly by the consumer or sent via an automated form on a website, are exempt from the obligations of the Act.[32]

B. The Term "Origination" Should Be Clarified to Exclude Minimal Contributions to the Composition of a Commercial E-Mail

While an entity is deemed to "initiate" a commercial e-mail message if it "originate[s]" or "procure[s]" the origination" of such a message, the Act provides no definition of the term "originate." The FTC should provide guidance on what is meant by "origination." If "originate" is deemed to include some level of contribution to the composition of a commercial e-mail, businesses will need guidance on the standards for determining what degree of such contribution will trigger the statutory obligations that flow from the "initiation" of such an e-mail.

The benefits of e-mail marketing will be severely compromised if the Commission were to adopt an overly broad and expansive definition of "origination." In complex commercial arrangements, various entities may contribute in a variety of ways to the text of an e-mail message. For example, a hotel or cruise ship operator might provide travel agents photographs of the operator's hotel or cruise ship facilities, accompanied by permission to include these photographs in the text of promotional materials sent by the travel agent on its own behalf to potential customers. In similar fashion, a meeting or convention facility owner might provide descriptive text concerning the facility for meeting organizers to use to describe the facility in promotional materials to be sent to potential meeting attendees. In neither of these cases would any reasonable consumer consider the facility owner to have "initiated" the e-mail or to be the "sender" of the e-mail. Yet, unless the Commission adopts a reasonable definition of the term "originate," such facility owners will be exposed to the risk of failing to comply with the requirements of the Act.

MPAA suggests that the following reasonable boundaries be placed on the meaning of the term "originate." No entity should be deemed to have "originated" a commercial

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32 The FTC may also want to consider whether a website operator does or does not retain the tell-a-friend e-mail as a factor in determining a safe harbor. If a website does not retain the e-mail address provided by the sending friend, the argument becomes even stronger that the tell-a-friend function is only a routine conveyance to facilitate communication between private individuals, and the website operator does not obtain any additional value by providing this service. Therefore, CAN-SPAM should not apply.

e-mail unless it has affirmative knowledge that its content would constitute over 50% of the final text of the e-mail message.[33] Furthermore, no entity should be deemed to have originated a commercial e-mail if another entity possessed the freedom to include or exclude the materials provided. Thus, merely making photographs, text, or other content available for inclusion in commercial e-mails would not constitute "origination" of the e-mails, provided that the person who actually composed the e-mails possessed the freedom to include or exclude the materials and determine the proportional composition of the message. Such a definition creates reasonable certainty for entities who make promotional materials available for inclusion in e-mails and properly respects legitimate consumer expectations.

C. The Term "Procure" Should Be Clarified to Exclude General Inducement to Promote a Commercial Product or Service

As noted above, an entity is deemed to have "initiated" an e-mail if it procures the origination or transmission of a commercial e-mail. CAN-SPAM § 3(9). The term "procure" means "intentionally to pay or provide other consideration to, or to induce, another person to initiate such a message on one's behalf." *Id.* § 3(12). MPAA suggests that the FTC make clear that the required payment, consideration or inducement must be *specific* to the sending of e-mails that advertise or promote the products or services of the entity offering the consideration.

The general inducement to promote an entity's products or services, where the means of promotion are at the discretion of the promoting parties or are otherwise not defined, should not constitute "procurement" under CAN-SPAM. The term "intentionally" in the procure definition implies that there must be some specific deliberate action by the commercial entity with respect to e-mail promotion of its product or service, thus strongly suggesting that general inducement is not sufficient to trigger CAN-SPAM initiator liability.

The practical implications of this issue are immense. For example, travel agents routinely receive commissions from travel service providers (such as airlines, hotels, and cruise ship operators) for booking reservations. These travel agents often contact their consumer clients by e-mail and use offers from travel service providers to promote the agent's own travel advisory and booking services. The e-mails may focus on a particular offer from a particular travel service provider (such as an airline's limited-time discount for off-season travel between certain cities) or may mention a variety of travel service providers' offers. Of course, in virtually all cases, the travel agent's aim is to establish or maintain a long-term relationship with the consumer that will yield financial benefits that transcend any immediate commission from booking the services mentioned in the e-mail.

With respect to these e-mails, the travel service provider's potential payment of a commission on products mentioned in the e-mail cannot reasonably be considered a payment or inducement to "procure" the travel agent's e-mail, particularly where the travel service provider and the agent have no agreement that requires the travel agent to engage in any such e-mail

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[33] The test for determining the "origination" volume of the e-mail should be the same as the primary purpose volume test. *See* Section I, *supra*.

activities. If the FTC were to hold otherwise, these types of commercial relationships would be put in grave peril. Many senders of such e-mails are small businesses that have no means by which to coordinate unsubscribe links and suppression lists with a myriad of suppliers. Thus, while these businesses can manage their own responsibilities as "senders" of e-mails that promote their advisory and booking services, they cannot manage also treating the product or service providers as "senders" of the e-mails. Moreover, treating general inducements to promote the sale of a product or service as a form of "procurement" in these situations is not consistent with reasonable consumer expectations and would actually harm consumers by denying them access to valuable product and service messages. For all of these reasons, the Commission should issue clear guidance that under the "procure" definition any payment, consideration, or inducement must be *specific* to sending of e-mails that advertise or promote the products or services of the entity offering the consideration.

D. Actions By Licensees Should Not Be Attributed to a Licensor in a Typical Commercial Relationship

The FTC should clarify that products and services that are produced and/or offered under license from a trademark or copyright holder are the products or services of the trademark or copyright licensee, not the licensor, and the licensor therefore should not be considered a "sender" under Section 3(16)(A). In addition, a licensor that is not involved in the sale, lease, gift, or loan of the licensee's products also should not be subject to liability under Section 6 for actions of the licensee, since it is the licensee, not the licensor, that has "put out" the products into the stream of commerce. [34]

The FTC should clarify that Section 6 of the Act does not apply to typical licensor/licensee relationships, but rather only to sham companies created to evade CAN-SPAM liability. Section 6(b) provides for enforcement against third parties with respect to the practices prohibited by Section 5(a)(1), but it should be made clear that this enforcement power is limited and does not extend to standard licensor/licensee relationships. Promotion of such licensed products or services should not be deemed to be promotion of the "trade or business [of the licensor], or goods, products, property, or services sold, offered for sale, leased, or offered for lease, or otherwise made available through that trade or business" within the meaning of Section 6(a)(1) and the licensor should not be regarded as receiving an "economic benefit," as that term is used in Sections 6(a)(2) and 6(b)(2)(B)(ii), from any prohibited conduct undertaken by the licensee without the licensor's advance knowledge or consent. The licensor, therefore, should not be held liable for the licensee's prohibited promotional activity.

Licensors of trademarks are not held strictly liable in tort for the activities of their licensees when they do not participate in the design, manufacture, or distribution of the licensee's product. *See* RESTATEMENT (THIRD) OF TORTS: Products Liability § 20 (1998). In the same way, licensors should not be held liable under the Act for the promotional activities of their licensees

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[34] A non-manufacturer may only be held liable as a manufacturer or seller of a defective product where the non-manufacturer "puts out as his own product a chattel manufactured by another." RESTATEMENT (SECOND) OF TORTS § 400 (1965). One who "puts out a chattel" is defined as one "who supplies it to others for their own use or for the use of third persons, either by sale or lease or by gift or loan." *Id.*

when they do not participate in those promotional activities. It would surpass customary tort and business law to hold licensors liable for such actions by licensees when the licensor had no direct participation in the distribution of the licensed products or services. Therefore, neither Section 3(16)(A) nor Section 6 should be deemed to impose liability upon licensors engaged in legitimate licensor/licensee relationships.

E. Third-Party Liability for Initiating E-mails under CAN-SPAM Section 5 Should Be Narrowly Construed

The term "knowledge fairly implied on the basis of objective circumstances," as employed in Sections 5(a)(4)(A)(ii) and (iii), must be clarified. Persons acting on behalf of the sender to initiate or assist in initiating the transmission of a commercial electronic mail message to a recipient more than ten business days after receiving an unsubscribe request from the recipient can be held liable if they have "knowledge fairly implied on the basis of objective circumstances" that the message they are transmitting falls within the scope of the recipient's previous unsubscribe request.

Failing to clarify the meaning of "knowledge fairly implied on the basis of objective circumstances" could create unwarranted liability in situations where the e-mail service provider executes successive campaigns for a single sender and receives unsubscribe requests in response to each such campaign. Where the service provider has forwarded to the sender in a timely fashion unsubscribe requests from a campaign, the service provider should not be deemed to have "knowledge fairly implied on the basis of objective circumstances" of these unsubscribe requests in the event that the sender fails to include the previously unsubscribed e-mail addresses in a subsequent list provided to the service provider in connection with a subsequent campaign. Thus, even if the service provider has kept a list of the previous unsubscribe requests, the service provider should not be held to have "knowledge fairly implied on the basis of objective circumstances" if the unsubscribed e-mail address does not appear on the subsequently provided suppression list.

Sound reasons exist for not imputing knowledge of prior unsubscribe requests to the service provider in such cases. First, the service provider generally cannot know whether the e-mail addressee has reversed his or her initial unsubscribe request by subsequently providing the sender affirmative consent to receive the sender's commercial e-mails.[35] Moreover, if the service provider has archived a copy of the sender's prior suppression list, the sender most probably will have done so simply to establish a record of its compliance with its statutory responsibilities with respect to the sender's prior e-mail campaign. In such case, the prior suppression list would not be maintained in any current operational database of the service provider. Requiring the service provider to retrieve and compare a series of archived sender-supplied suppression lists in order to execute safely a subsequent e-mail campaign would impose an unreasonable burden on the service provider, thereby substantially raising the cost of conducting e-mail campaigns without creating any significant social benefit. Finally, it is the sender that has the best ability to maintain an accurate, up-to-date suppression list, and the sender

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[35] Subsequent affirmative consent is contemplated in CAN-SPAM Section 5(a)(4)(B).

may be held fully responsible under the Act for failing to do so. For all of the reasons, the concept of "knowledge fairly implied on the basis of objective circumstances," as employed in Sections 5(a)(4)(A)(ii) and (iii), should not apply in these situations.

V. MPAA Proposes that CAN-SPAM Should Not Apply to a Single or Small Number of E-Mails in Order to Make CAN-SPAM Consistent with Established Law on Commercial Advertising and Promotions

MPAA believes that further guidance is needed regarding the scope of the definition of commercial electronic mail message.[36] In particular, MPAA urges the FTC to define the phrase "commercial advertisement or promotion" in conformance with the standard legal definition of the phrase as widely adopted by the federal district and circuit courts and employed in interpreting another trade-related enactment, Section 43(a)(1)(B) of the Lanham Act. 15 U.S.C. § 1125(a)(1)(B).[37]

MPAA believes that the promulgation of a rule defining "commercial advertising and promotion" in a manner congruous with the generally accepted interpretation of the phrase in the various circuit and district courts will result in greater fidelity to the purposes of the Act and consistent enforcement at the federal and state levels without unnecessarily burdening commercial activity. MPAA thus proposes that the FTC adopt a standard that requires "*some* level of *public* dissemination of information" for commercial electronic mail to be considered part of "commercial advertising or promotion." *Sports Unlimited, Inc. v. Lankford Enters.*, 275 F.3d 996, 1005 (10th Cir. 2002) (emphasis in original). To interpret the scope of the Act to include isolated and otherwise limited instances of commercial electronic mail would impermissibly restrict all commercial speech, and would be inconsistent with Lanham Act precedent interpreting commercial advertising or promotion.

Like the use of advertising or promotion of commercial products or services in the Lanham Act, "the language of the [Act] cannot be stretched so broadly as to encompass all commercial speech." *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 314 F.3d 48, 57 (2nd Cir. 2002). "[T]he touchstone of whether [communications] may be considered 'commercial advertising or promotion' is that the contested representations are part of an organized campaign to penetrate the relevant market. Proof of widespread dissemination within the relevant industry is a normal concomitant of meeting this requirement." *Garland Co. v. Ecology Roof Systems, Corp.*, 895 F. Supp. 274, 276 (D. Kan. 1995). "[I]t appears to be an unlikely term for Congress to have employed if it had intended to include isolated communications within the Act's purview." *Id.*

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36 "Commercial electronic mail message" is defined in the Act as "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service . . . ." CAN-SPAM § 3(2)(A).

37 Section 43(a)(1) provides for a private cause of action to any person damaged by another's use of any "word, term, name, . . . false or misleading description of fact . . . , in commercial advertising or promotion, [which] misrepresents the nature, qualities . . . of another person's goods." Like the CAN-SPAM Act, the Lanham Act failed to define the phrase "commercial advertisement or promotion."

MPAA believes that an individual or a small number of e-mails that may contain promotional or advertising material cannot be considered "commercial advertising or promotion." *Cf. Fashion Boutique*, 314 F.3d at 58 ("[defendant's] twenty-seven oral statements regarding plaintiff's products in a marketplace of thousands of customers . . . is insufficient to satisfy the requirement that representations be disseminated widely in order to constitute "commercial advertising or promotion . . ."). Thus, MPAA urges the FTC to explicitly recognize that single e-mails or e-mails sent to a limited number of recipients, whether directed toward businesses or toward consumers, are outside the scope of the CAN-SPAM Act. This is necessary in order to reconcile CAN-SPAM with other legislation addressing commercial advertising and promotion.

VI. The Ten Business Day Time Frame to Respond to Unsubscribe Requests Should Not Be Shortened

Honoring a consumer's request to unsubscribe is critically important. For this reason, MPAA members and other entities involved in e-mail marketing have expended considerable resources in building systems and instituting practices to comply with the ten business day period specified in Section 5(A)(4)(a). The investment made in these systems would be severely compromised if the statutory basis upon which such investment was made were changed a few months after the effective date of the Act. Moreover, there is no valid reason for such a change. In many cases, the processing of e-mail recipients' unsubscribe requests involves the manual collection of the requests by the service provider that transmits the e-mail campaign. This service provider then must forward the unsubscribe requests to the "sender" for inclusion in the sender's master suppression list. The sender then must forward that suppression list to each service provider that will transmit further e-mails for the sender. The suppression list must then be compared against the service providers' e-mail campaign distribution lists. A minimum period of ten business days is both reasonable and appropriate to accomplish these complex processes. Any shortening of this time frame would be unduly burdensome.

VII. Divisions or Lines of Business that Share the Same Brand Name May Still Be Considered Separate Senders under the Act

MPAA urges the FTC to define the factors that will be used to determine when a "division or line of business" of an entity may be treated as the "sender" of an e-mail. Under the Act, a line of business may be treated as the sender of an e-mail when the entity: (a) "operates through separate lines of business or divisions;" and (b) "holds itself out throughout the message as that particular line of business or division."[38]

Factors MPAA believes should be included in evaluating compliance with this test include geographic separation of businesses, discrete sets of products, and differing distribution mechanisms. Internal accounting indicia and the entity's internal organizational structure may have bearing on what is considered a line of business under CAN-SPAM, but

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38 *See* CAN-SPAM § 3(16)(B).

should not be determinative. Specifically, the FTC should not regard mere similarity in the brand names of products or services as indicating the absence of distinct lines of business to which those products or services pertain. Companies frequently use one brand across various divisions to assist in marketing and branding of their products. For example, if a company has a theme park, a motion picture studio, and a television network that incorporate the same brand name, it is clear from the geographic locations (if any) of the products, the types of products being offered, and the distribution methods that these are separate products. Furthermore, reasonable consumers recognize that a brand name may span several business models, but the products are different. In this example, the studio, the theme park, and the network should be considered separate lines of business and only the line of business that was actually responsible for distributing the e-mail should be considered a sender under the Act.

VIII. Section 5 (a)(4)(A)(iv) Should Not Be Deemed to Prohibit Transfers of E-Mail Addresses for Specified Legitimate Purposes

The FTC should make it clear that transfers of e-mail addresses for certain legitimate purposes are not prohibited by Section 5(a)(4)(A)(iv).[39] Specifically, MPAA proposes that the terms "transfer or release," as well as the related terms "sell, lease or exchange" be deemed to exclude transfers of legitimately obtained e-mail addresses in the following circumstances, provided the transferor has not been the subject of an unsubscribe request with respect to the transferred e-mail address:[40]

> (1) a corporate merger, consolidation, transfer of control, or sale of all or substantially all of the assets of an entity that owns an e-mail distribution list;[41]
>
> (2) a transfer of an e-mail distribution list between entities that are under common control;[42] and
>
> (3) a transfer of an e-mail distribution list to an affiliated or nonaffiliated entity solely for the purpose of the transferee's fulfillment of a service function on behalf of the transferor.[43]

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39 Section 5(a)(4)(A)(iv) provides that if an e-mail recipient makes a request to unsubscribe from a commercial e-mail, it is unlawful "for the sender, or any other person who knows that the recipient has made such a request, to sell, lease, exchange, or otherwise transfer or release the electronic mail address of the recipient (including through any transaction or other transfer involving mailing lists bearing the electronic mail address of the recipient) for any purpose other than compliance with this Act or other provision of law."

40 For purposes of this rule, an e-mail address would not be deemed to be "legitimately obtained" if it were the product of the abusive tactics described in Sections 5 (b)(1)(i) and (ii) (*i.e.*, address harvesting and dictionary attacks).

41 *Cf.* COPPA Notice of Final Rulemaking, 64 Fed. Reg. 59910 (Nov. 3, 1999) (in the event of corporate merger of website operator, new privacy notice and parental consent required *only if* there is a "material change in how the operator collects, uses or discloses personal information").

42 *Cf.* Gramm-Leach-Bliley Act, 15 U.S.C. § 6802(a), (b) (statutory data disclosure restrictions do not apply to disclosures to an "affiliate"); 15 U.S.C. § 6809(5) ("'affiliate' means any company that controls, is controlled by, or is under common control with another company").

Congress declared that Section 5(a)(4)(A)(iv) was "intended to prevent a sender or other person from treating an opt-out request as a confirmation of a 'live' e-mail address, and selling that information to another spammer."[44] Interpreting this statutory provision broadly to include legitimate transfers thus would create unintended and unwarranted results. The transfer of e-mail addresses incidental to a merger, transfer of control, or sale would be prohibited, even though the transferor had never been the subject of an e-mail recipient's unsubscribe request. Transfers between related entities would also be prohibited, if the transferor obtained incidental knowledge of an unsubscribe request, regardless of the fact that the transferor itself had never been the subject of any unsubscribe request. For example, a radio station might be compensated for sending stand-alone commercial e-mails to its listeners that only promote an advertiser's products. In this circumstance, the advertiser likely would be treated as the "sender" of the e-mails.[45] If the radio station collected unsubscribe requests resulting from these e-mails and forwarded these requests to the advertiser, the radio station would have "knowledge" of the unsubscribe requests. The radio station might also acquire this "knowledge" through the suppression list provided to the radio station by the advertiser. In either case, the radio station would be prohibited from transferring these e-mail addresses to a related entity, despite the fact that the station itself had never been the subject of an unsubscribe request.

Finally, businesses would be unable to outsource e-mail list management functions, since such a "release" might be deemed to run afoul of the statutory prohibition, even if the station strictly confined the service provider's rights in the list solely to service functions executed on behalf of the radio station.

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[43] *Cf.* FTC COPPA Rule, 16 CFR §312.2, "Third Party" definition (excluding service providers); Gramm-Leach-Bliley Act, 15 U.S.C. §6802 (b) (2) (service provider exception to data disclosure restrictions).

[44] S. Rep. 108-102, at 18.

[45] Because these stand-alone e-mails would concern *solely* the products and services of the advertiser, and would not contain sufficient content from the radio station to satisfy the *de minimis* test, the various proposed rules outlined in Section II above would not apply.

For the foregoing reasons, we ask that the FTC provide guidance on the identified issues herein. Such guidance will provide assurance that e-mail marketing will continue as an effective tool for commercial speech and provide regulatory certainty to legitimate companies on how to comply with CAN-SPAM under national standards, while still retaining the FTC and state Attorney General power to enforce CAN-SPAM against those who do not comply, particularly the fraudulent actors and spammers.

Thank you for the opportunity to submit these Comments on the ANPR.

Sincerely,

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