April 20, 2004

Federal Trade Commission
Office of the Secretary
Room 159-H
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: CAN–SPAM Act Rulemaking, Project No. R411008

Gentlemen:

MBNA America Bank, N.A. ("MBNA") is pleased to respond to the Advance Notice of Proposed Rulemaking ("ANPR") issued by the Federal Trade Commission ("FTC" or "Commission") (69 Fed.Reg. 11776, (2004)).

We welcome the passage of the CAN SPAM Act (the "Act") as a first step toward attacking the problem of spam. As a reputable company and legitimate marketer, we believe that it is in the best interest of all to market only to those customers or members who wish to hear from us. We are deeply concerned about the problem of false or misleading e-mail advertisements. The credibility of legitimate companies that market goods and services through e-mail is being damaged by the conduct of spammers.

Overview

In our view, the Act needs reasonable interpretive regulations and expanded exemptions to ensure a fair balance between the protection of e-mail recipients and the legitimate commercial needs of companies and organizations to serve their customers and members. A balanced interpretation will prevent the loss of an entire channel of communication that benefits customers and members. The Commission's regulations must not blur the distinction between the beneficial activities of legitimate American companies and organizations and the harmful activities of unscrupulous entities like spammers, hackers, and pornographers.

We are recommending:

- An objective standard for "primary purpose"
- Expanded categories of "transactional and relationship messages"
- A single-sender rule
- Retention of the existing "from" line and subject line rules
- Limitation on the effective time of an opt-out
- Extension of the ten-business day rule for processing opt-outs to 30 calendar days

We urge the Commission to recognize the important differences between communications sent to existing customers and those sent to non-customers. We believe that these and certain other changes we are recommending in this letter will benefit both marketers and recipients as well as recognizing a reasonable scope for commercial speech. We have tried to give factual support for our recommendations and to respond to most of the questions posed by the Commission in the ANPR. This resulted in a long letter, but one to which we have given much serious thought and effort in order to request a balanced and realistic set of results from the Commission.

I. Primary Purpose

The CAN-SPAM Act mandates that the FTC issue regulations "defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message." (Act §3(2)(C)). The ANPR states that "the 'primary purpose' regulation will elucidate how to determine whether a particular message constitutes a 'commercial electronic mail message.'"

For this discussion, we assume a dual-purpose e-mail message that is not within the definition of "transactional and relationship message." We also assume that the commercial content consists of an advertisement or promotion of the sender's commercial goods or services, and that the non-commercial content may consist of news, product updates, or other information that is not directly part of the advertising content.

In section IV.A of the ANPR, the Commission asks the following questions to elicit "criteria" for determining "primary purpose":

1. Whether it means more important than all other purposes?
   What determines whether one purpose is more important than another?

2. Whether it is more important than any other single purpose?

3. Whether the FTC's "net impression" analysis should be applied to determine it?

4. Whether it means that the advertisement is "more than incidental"?

5. Whether the commercial aspect provides the financial support for non-commercial content (e.g., newsletter)?

6. Whether the identity of the sender (for-profit or non-profit) should affect the determination?

7. Whether there are other ways to provide relevant criteria to help determine the primary purpose of the email?

The Commission's questions suggest these starting points for developing criteria:

- Importance (Q1, Q2)
- Effect on reasonable observer ("net impression") (Q3)
- Quantity ("more than incidental") (Q4)
- Relationship of commercial content to other content ("newsletter") (Q5)

- Nature of the sender (Q6)
- Other (Q7)

Questions 1-3 involve somewhat "subjective" criteria; questions 4-6 involve more "objective" criteria. It would be desirable to develop criteria that are predominantly objective in order to provide clear guidance to initiators of e-mail and to reduce the likelihood of innocent confusion that leads to regulatory action and litigation. The Commission should define criteria that minimize ambiguity and vagueness and that facilitate objective determinations. A subjective standard does neither.

The word "primary" can mean first in time, rank, order, quantity, quality, or importance. Its inherent ambiguity becomes apparent when trying to determine the degree of quality, quantity, importance, etc. For example, the word "primary" has been used in various contexts relating to quantity to mean a plurality, a majority, or substantially all. Neither the lexical definition nor the diverse holdings of cases that interpret "primary purpose" can resolve the inherent ambiguity of the term. The Commission has the opportunity to hone a standard of interpretation that has a high degree of precision and objectivity, one that gives clear guidance to the sender as well as serving as establishing a fair and useful judicial standard.

"Net Impression" Test

In its third question, the Commission proposes using its "net impression" test, which it employs as part of its "deception analysis" for evaluating advertisements. In its "FTC Policy Statement on Deception" (and cases cited therein, 1983), the Commission listed and explained its steps (elements) in analyzing potentially unfair or deceptive acts or practices under section 5 of the Federal Trade Commission Act:

> (i) there must be a representation, omission or practice that is "likely to mislead the consumer";
> (ii) the representation, omission, or practice is examined from the point of view of "a consumer acting reasonably in the circumstances";
> (iii)the representation, omission, or practice must be a "material" one.

For a representation or sales practice, the second element of the analysis means "the consumer's interpretation or reaction is reasonable." For cases involving advertisements, the Commission stated that:

> "…in evaluating advertising representations, we are required to look at the complete advertisement and formulate our opinions on them ***on the basis of the net general impression conveyed by them***…." [Emphasis added.]

With regard to developing criteria for evaluating e-mail messages under CAN-SPAM, the Commission seems to be saying that it desires to use only the second element of the deception analysis to determine the nature of the e-mail message (i.e., primarily advertisement or information). (Of course, the entire deception analysis is still applicable to the separate question of whether the advertising portion of the e-mail is deceptive.)

The "net impression" test is both vague and subjective. It is a heavily fact-based analysis, having generated an extensive body of case law from which certain useful factors have been culled, e.g., viewing the communication as a whole; not emphasizing words or phrases apart from their context; avoiding fine print; using understandable language, clear and conspicuous disclosures, etc. These are necessary tools, because the net impression test is basically a standardless standard. It provides no stated criteria except for standards selected from extensive, but not always consistent, cases. At best, it shifts the duty of defining "primary purpose" from the regulator to case-by-case decision-makers, and it invites subjectivity and inconsistency by those decision-makers. At worst, it may well mean that any dual-purpose e-mail is likely to be deemed "primarily" advertising. It provides little guidance to either the sender in designing its e-mail or the decision-maker in evaluating it.

We believe that the "net impression" test is the most subjective and least useful option proposed by the Commission.

"Importance" - Qualitative or Evaluative Standard

The Commission also proposes for consideration a criterion of "importance," which the Commission notes generates several subissues:

- What does "importance" mean when evaluating the nature of an e-mail message?
- How do we quantify "importance" or rank it based on some value judgment? That is, how do we determine whether one alternative is "more important" than another?

In attempting to answer these questions, we must ask the following questions:

- Should "importance" be quantified in some way, e.g., by amount of written content?
- Should "importance" be a qualitative standard or value judgment based on an interpretation of the nature of the differing content?
- If the latter, should "importance" be evaluated from the point of view of the sender or the recipient or some ideal "reasonable observer"?

The first two questions depend on the definition of "important." But the question, "What is most important?" is just another way of saying "What is the primary purpose?" Attempting to use an "importance" standard merely shifts the task to that of defining "importance" instead of defining "primary." An "importance" standard is qualitative or evaluative, i.e., inherently subjective.

Even if the decision-maker attempts to evaluate the message from a recipient's point of view, which recipient's views will be adopted? One recipient may find the advertising content of no interest, but find the informational content quite useful. Another recipient may readily respond to the advertisement, but have no interest in the informational content. The advertisement is important to the recipient who regards it as important. This means that "importance" is based on what a particular recipient chooses to do with the message. How can a decision-maker discern otherwise?

The decision-maker may say that only a small percentage of recipients respond to the typical advertisement, therefore it is less important. But the sender already knows that only a small

percentage of prospects respond to any particular campaign. Who is to say which recipient is the standard?

We believe that a qualitative standard, such as "importance," has the same subjectivity and vagueness problems as the "net impressions" test. It burdens the decision-maker with defining and applying two vague or ambiguous terms, "primary purpose" and "importance," and trying to explain their relationship.

Quantity Standard

If we use a quantity standard for "importance," we would compare the amount of content devoted to advertising against the amount of content devoted to non-advertising content, e.g., information, explanations, product updates, advice, data, news, legal or business developments, etc. (collectively, "information"). The Commission proposed, in its fourth question, a standard ("more than incidental") that could be used as a quantity standard. Together with the gradations of "primary" above, we would have a quantity scale in the order of increasing amounts of information content in a message:

- more than incidental
- a plurality (more than any other single purpose)
- a majority (more than all the other purposes together)
- substantially all

We recommend the quantity standard be adopted and that the measure be "majority," i.e., for an e-mail message to be deemed an advertisement, the advertising content should be the majority of the content. This would be the most objective standard, because it gives the sender a bright line requirement for displaying the two types of content.

We believe that using a quantity determination standard would be the most objective standard, even though this standard too has some measure of subjectivity, because the court or agency ("decision-maker") must discern which content is advertisement and which content is information. The sender should have the burden of making the types of content clear, separate, and reasonably measurable.

A quantity standard may be validly criticized in the case where something "important" may be expressed in a small amount of content compared to "less important" advertising. The most likely recipient of an "important" message would be an existing customer. We believe that in order for the objective quantity standard to be effective, it is necessary for the Commission to expand the categories under "transactional and relationship message" as discussed below. We believe this will provide clearer guidance to the sender in designing the message and the decision-maker in evaluating the message than adopting an elastic standard such as "importance."

Newsletters, Informational Messages, and the But-For test

An electronic newsletter is a good example of a message that has a high informational content compared to its advertising content. Newsletters are commonly funded by the advertising within the newsletter; however, the advertisers do not "initiate" the newsletter because they do not "procure" its transmission. The publisher of the newsletter would continue to publish the newsletter in most cases even if a particular advertiser were to terminate its advertising. The only way that a newsletter would become a commercial electronic mail message ("CEM") is if the advertiser procures its transmission. The question should be, "But for this advertisement, would the publisher transmit the newsletter?" If the publisher will only transmit the newsletter if the advertisement is provided, then it would be a CEM. But if the publisher would transmit the newsletter without the advertisement, then it would not be a CEM.

In addition to newsletters, there are many other types of e-mail messages that have much informational content, many of which the recipients must "subscribe" for or consent to receive, such as product updates, legal or business developments, financial advice, schedules, new product offerings, price lists and discounts, etc. The "but-for" test would be a useful criterion or alternative test for the decision-maker to use in evaluating the nature of any multi-party message. A sender's obligation to provide CAN-SPAM Act disclosures and opt-out Act would only occur when the transmitter would not transmit but-for the sender's advertisement.

II. Transactional and Relationship Message

In section 3(17)(B) of the Act, "Modification of Definition," Congress delegated power to the Commission to "expand or contract the categories of messages that are treated as transactional and relationship messages … to the extent that such modification is necessary to accommodate changes in electronic mail technology or practices and accomplish the purposes of this Act." In section 2(a) of the "Findings," Congress was primarily concerned with entities engaged in abusive conduct – pornographers, spammers, hackers, dishonest advertisers, etc. It is reasonable to conclude that Congress did not mean to impede communications between legitimate companies and their customers. The Commission should balance the goals of providing adequate protection to recipients with maintaining beneficial commercial communications for customers.

In section IV.B of the ANPR, the Commission asks whether the particular exemptions listed under the definition of "transactional and relationship message" should be expanded or contracted. We believe that, because of the narrowness of the existing list, the Commission should expand the list to recognize some important marketplace realities and to provide exemptions analogous to some of those provided in the Telemarketing Sales Rule and the Telephone Consumer Protection Act.

Preliminarily, we recommend that any e-mail message that otherwise qualifies as a "transactional and relationship message" should remain a "transactional and relationship message" under the Act and regulations even if the e-mail message includes advertising and promotion. The Congress clearly recognized the importance of exempting certain communications to existing customers and employees from the requirements of the CAN-SPAM Act .

Established Business Relationship ("EBR")

The Commission should provide some form of EBR exclusion. It can be time-limited and/or frequency-limited, but without it, the Act severely impacts the business-customer relationships of legitimate marketers and does nothing to stop the onslaught of illegitimate entities (e.g., pornography, ponzi schemes, fraudulent offers, hackers, etc.).

Approximately two-thirds of the legislation and proposed legislation at the state level relating to commercial electronic mail messages contained some form of an EBR exclusion. The revised Telemarketing Sales Rule ("TSR") also contained an EBR at 16 CFR §310.2(n):

> (n) *Established business relationship* means a relationship between a seller and a consumer based on:
> (1) the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the eighteen (18) months preceding the date of the telemarketing call; or
> (2) the consumer's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call.

The TSR has purposes and policies that are similar to the prospective rule the Commission will promulgate relating to commercial e-mail messages. By providing this exclusion in the TSR, the Commission recognized the consensual nature of a customer relationship and the likelihood that the customer would benefit from further communications with the company with which he or she chooses to transact business. This is especially true where a customer has opened an account with a financial institution or retailer that envisions continuing, revolving, or occasional transactions and communications related thereto.

When a company communicates with existing or recent customers, it does so with the objective of providing information, goods, or services that have a reasonable likelihood of use or benefit to the customer based on the transaction(s) that created the business-customer relationship.

We feel confident that the drafters of the CAN-SPAM Act did not intend the Act to treat marketing as a worthless nuisance or the equivalent of pornography. The marketing messages of legitimate providers of information, goods, and services perform a valuable economic service in the marketplace. Millions of customers respond to advertising with billions of dollars of purchases. The customer relies on advertising for information in making purchasing decisions. The closing or restriction of a channel of communication to legitimate marketing would result in a less informed and less competitive market place.

The value of marketing information to customers has been demonstrated by market research. For example credit card market research performed by Synovate, the market research arm of communications specialist, Aegis Group, PLC, shows that closing or unreasonably restricting a marketing channel limits consumers' awareness of better credit offers, and keeps them captive to their existing credit arrangements.

Consumer preferences and credit needs do not remain static; both change frequently. The bankcard market shows a steady trend, as reported by Synovate, toward more beneficial credit offers over time:

- In 2000, 41% of all bankcard offers featured an annual fee; in 2001 the number fell to 19%; and in 2002, it fell further to 16%.
- In 2000, the mean introductory bankcard interest rate was 1.82%, in 2001 it was 1.48%; and in 2002 it fell to 0.90%.
- In 2000, the mean bankcard "go to" interest rate was 16.87%; in 2001 it was 14.71%; and in 2002 it fell to 11.64%.
- In 2001, 15% of all bankcard offers featured a reward or rebate; in 2002, that figure rose to 19%, a 27% year-over-year increase. (No statistically significant data were available for the year 2000.)

Not only do credit offers become more competitive over time on an industry-wide basis, most consumers' credit profiles improve with time, making them eligible for better, targeted, credit offers: FICO reports that a typical "young" consumer's (4 years or less on file) FICO score increases over time, assuming bills are paid on time.

- After 1 additional year on file, the score increases range from 5 to 32 points for the majority of consumers. After 5 additional years from the original time on file, the score increases range from 26 to 64 points for the majority of customers.

The same is true for those who become timely payers since their last major derogatory item.

- Assuming bill payments become and remain timely, 1 additional year since the last major derogatory item sees the score increases range from 9 to 64 points for the majority of consumers. After 5 years, the score increases range from 29 to 95 points for the majority of consumers.

By restricting all marketing communications, the Act will impede communications to a customer from a company in which the customer has already expressed interest.

The EBR need not be a blank check to companies to bombard existing or recent customers. Most legitimate companies would not do that in any event because it is counterproductive. The Commission can prevent abuse of an EBR exclusion by limiting the number of times that a company may send a CEM to a customer-recipient, such as once per week or five times per month, etc.

We recommend that the Commission adopt a definition of “established business relationship” analogous to that of 16 CFR §310.2(n) and expand the categories of messages treated as “transactional and relationship messages” to include it. For example, a category of transactional and relationship message would be:

If the sender and a recipient have an established business relationship, then, in addition to any other electronic mail messages that may be initiated under the Act, the sender may initiate up to five additional commercial electronic mail messages per calendar month to the recipient, which shall be deemed transactional and relationship messages.

Ongoing Commercial Relationship

In addition to, or in lieu of, an exemption for "established commercial relationship," the Commission should provide an expanded exemption for an "ongoing commercial relationship," which is currently referred to in section 3(17)(A)(iii) of the Act.

Clause (iii) of section 3(17)(A) should be expanded to recognize current beneficial marketplace communications. The Commission should expand the exemption to include messages containing information on usage, features, benefits, services, or changes relating to any product, service, subscription, membership, or account that is part of an ongoing commercial relationship between the sender and the recipient. There should be a broad exemption for these types of servicing messages to existing customers.

An ongoing commercial relationship consists of more than a transaction or two. It is a series of mutually beneficial exchanges and service communications over time, during which the recipient is often benefited by the timely receipt of information relating to factors outside the current wording of this clause. Customers expect this kind of servicing and promotional communication, and they benefit from it. (See the Synovate research cited above.)

Ongoing commercial relationships are consensual and interactive. Quality of service and customer satisfaction depend heavily on the timely communication of potential benefits to the recipient during the course of the relationship. Many customers are unaware or only vaguely aware of the different features, benefits, and uses of a product or service that he or she has obtained from the sender. Senders should be able to initiate this type of message without risking a global opt-out. It is in the sender's interest to limit messages to essential and targeted communications of the most probable utility to the customer. Legitimate marketers must avoid "over-communicating" with customers, which can have counterproductive effects, such as the failure to provide important customer information. It is in the customer's interest to be made aware of new benefit offers, opportunities for lower rates and prices, incentives for additional usage or purchases, etc., that are characteristic of a continuing commercial relationship.

We recommend that the Commission in its regulation expand clause (iii) of section 3(17)(A) in some fashion like the following:

(iii) to provide-
***

(III) at regular periodic intervals account balance information or other type of account statement, or at various other times messages containing information relating to the usage, features, benefits, services, offers, or changes with respect to ….

If the Commission is concerned that this exclusion may be abused, the Commission can add a frequency limitation, as cited above under EBR.

Employment Relationship - Private Intranets

Section 3(17)(A)(iv) in the definition of "transactional or relationship message" should be expanded and clarified to distinguish between the public Internet and private intranets. Many companies, agencies, and organizations have private intranets (LANS, WANS, MANS), which are designed, built, purchased, and owned by a company for exclusive use by the management and employees of the company to conduct the business and private communications of the company. Even though e-mail messages can be sent from outside the company and received at an in-house network, the network is typically protected by security barriers, firewalls, and spam filters to insulate it from improper use by outside users of the Internet. The e-mail addresses for such a private network are typically in a single domain or other unitary distribution protocol and are, in fact, company property, and are so understood by the employees.

Unfortunately, the definitions of "electronic mail address," "electronic mail message," and "commercial electronic mail message" do not explicitly distinguish between such private networks and the public Internet, although in many proprietary LANs, e-mail messages are transmitted internally without the use of an "Internet domain" as such.

There should be an explicit exemption under the Act for employers or any owner of a private network to send e-mails to its employees or authorized users of its proprietary network. A regulation to this effect could expand §3(17)(A)(iv) as follows:

> Any electronic mail message initiated by the owner, employee, or authorized user of a private intranet network to any electronic mail address owned by the owner but provided to an individual employee or authorized user of the owner shall be deemed a transactional and relationship message.

Or the Commission could issue a regulation interpreting the definition of "electronic mail address" (§3(5)) to exclude any e-mail communications between users of a private or in-house network:

> "Electronic mail message" shall not include an electronic mail message initiated by the owner, employee, or authorized user of a private intranet network to any electronic mail address owned by the owner but provided to an individual employee or authorized user of the owner.

It is unlikely that the drafters of the statute intended to ensnare private, proprietary, and internal e-mail networks within the scope of the statute. We also note that the "Electronic Communications Privacy Act" gives the provider of a communications network, including an employer that provides such a service for its employees the right to monitor the employees' communications. It would be paradoxical for the Congress to recognize the employer's absolute control over its e-mail service in this context, yet impose CAN-SPAM Act compliance requirements on the employer.

B2B Relationships

The Commission should exempt all e-mail messages between non-consumer entities. The Act should parallel the consumer purpose of the TSR. A business has no incentive to "over-communicate" with businesses that it is doing business with or hopes to do business with. Businesses are also more likely to have spam filters and other defensive mechanisms that consumers may not be able to afford.

Individual Communication Exemption

The problem of spam is basically bulk-mail abuse. An individual communication containing a promotion from a salesperson and to a prospect the salesperson has just met is not a spam problem. Numerous business communications by e-mail take place each day in each organization. It would be burdensome and unreasonable to require CAN-SPAM disclosures and opt-out mechanisms for every business communication. It would be inordinately burdensome to have to police every such e-mail at the organization's gateway.

The Commission should adopt a de minimis rule that provides that any e-mail communication that has fewer than, say, 50 recipients should be exempt from CAN-SPAM. This would provide a realistic and reasonable zone of business communications without adding substantially to the burden of unsolicited commercial e-mail.

III. Sender and Joint Marketing

Sender

Section VI.E of the ANPR states that the definition of sender "…appears to contemplate that more than one person can be a 'sender' of commercial e-mail." We respectfully disagree with this interpretation.

The Act defines only two types of parties who initiate CEMs and who are, therefore, covered by the requirements of the Act: "persons who initiate CEMs" ("initiators") and "senders." A sender is an initiator whose products or services are being advertised or promoted. (Act §3(16)). An initiator is a person who "originates or transmits" a CEM or "procures the origination or transmission" of a CEM. (Act §3(9)).

The definition of "initiate" includes an important clarification: "For purposes of this paragraph, more than 1 person may be considered to have initiated a message." (Act §3(9)). The definition of "sender" conspicuously lacks this sentence. (Act §3(16)).

In addition, the Act observes the distinction in terminology throughout section 5 of the Act, which specifies the disclosure and opt-out duties of the two categories of parties. In all subsections under section 5, the "sender" is always referred to in the singular as "the sender," whereas some plural formulation, such "any person who initiates," always refers to the act of "initiating."

In addition to the plain meaning of the words, however, it is useful to look at the application of these terms to a multi-party CEM. If an entity transmits a CEM to its customers or members, and the CEM includes advertising from 10 other companies, must the entity transmitting the CEM include disclosures and opt-out mechanisms for all 11 parties? It would be an absurd result, one Congress could not have intended. It would cause confusion to the recipients. It would add prohibitive burdens to all initiators because they would be required to match all of their suppression lists. It would add significant security and privacy risks. Even if there were fewer parties, it would be reasonable to require only one sender for a CEM, as discussed in the following joint marketing arrangement.

We urge the Commission to adopt a regulation that requires only one party to a multiple-party CEM to provide the CAN-SPAM disclosures and opt-out mechanism, i.e., only one sender per e-mail.

Joint Marketing Arrangements

A common business model is the joint marketing arrangement entered into by a provider of goods or services ("provider") and an endorser. The provider may be a retailer, service provider, publisher, etc. The endorser may be a non-profit organization such as an alumni association or a for-profit organization such as a retailer. Under a joint marketing agreement, the provider and the endorser agree to jointly market the provider's product to the members or customers of the endorser. Frequently the product is marketed under the endorser's brand name or marketed jointly, e.g., co-branding. The endorser is compensated based on various formulas related to the amount of provider's products sold to endorser's members or customers as a result of this form of marketing. The endorser owns the list of e-mail addresses of its members or customers and is legally permitted to send commercial electronic mail messages ("CEMs") to them. The endorser is usually the transmitter of the e-mail messages.

Under the Act, the endorser "initiates" the CEM by transmitting it. The provider "procures" the transmission of the CEM. The provider is also the "sender" because its products are advertised or promoted. This means that the provider's disclosures and opt-out mechanism would be included in the CEM. However, where the product is branded with the name of the endorser, this causes confusion to some members or customers, who are expecting to be dealing with the endorser and, in fact, who are relying on the endorser's good will in responding to the marketing. The recipient is not expecting an opt-out disclosure and mechanism in the name of the provider.

There are variations on the joint marketing model, including:

- The endorser also markets its products along with the provider's products;
- The provider does not "procure" the sending of the CEM; the endorser transmits the CEM and chooses to include a promotion of the provider's products (because the endorser receives compensation for sales of the provider's products resulting from the CEM).

We recommend that in all variations of the joint marketing model the Commission require only one party be designated the "sender" for purposes of complying with the CAN-SPAM Act

disclosures and opt-out mechanism. This will greatly simplify compliance for marketers and satisfy the expectations of customers.

IV. From Line

Section VI.E.5 of the ANPR asks whether section 5(a)(1) of the Act is "sufficiently clear on what information may or may not be disclosed in the 'from' line." Section 5(a)(1)(B) requires that the "from" line accurately identify "any person who initiated the message."

Legitimate businesses commonly use different "from" lines in their various communications. They may be trade names, product line names, or division names, which are useful to the company in responding to any customer who replies to the e-mail.

The "from" line might include a name or other words in addition to the initiator's name. For example, an initiator may use a third party vendor/contractor to process or transmit e-mail messages, but the initiator would still be identified. In the joint marketing arrangement discussed above, either party (because both are initiators) would be identified in the "from" line. (It is clear that the sender need not be identified if another party initiating the CEM is identified.)

The Commission should retain this flexible standard. The Commission may want to clarify that:

- the use of legal trade names is permissible;
- the use of company abbreviations, division names, etc. is permissible if they do not mislead a customer; and
- the use of other words in addition to the initiator's name is permissible.

V. Subject Line

Section VI.I of the ANPR asks for comments on labeling and the use of the designator "ADV" on the subject line.

Subject lines are limited in length. The marketer is constrained to make the subject line clear, effective, and not misleading about a material fact regarding the contents of the message. (§5(a)(2).) In addition, only a limited number of characters can be displayed in a recipient's mailbox before the message is opened, further limiting the marketer. If labeling is required, then the working area of the subject line becomes even shorter, adding more difficulty to the marketer. We recommend that the Commission retain the flexibility of the rule contained in subsection 5(a)(2).

We oppose the use of designators such as "ADV," because it would result in the suppression of all commercial e-mail messages by various spam filters. It is too blunt an instrument to deal with the different categories of messages in such a way that wanted e-mails are delivered and unwanted e-mails are suppressed. We believe that the recipient's right to opt-out is the necessary and sufficient procedure to end unwanted messages from a sender.

VI. Limitation on the effective time of an Opt-Out

We recommend that the Commission adopt a rule analogous to the rule in the TSR, which makes telephone call opt-out effective for three years. In the e-mail context, it is important for the mailing list owners and the suppression list owners to keep their e-mail address lists current. Some research indicates that the average life for an e-mail address is less than a year. It would not take long for an owner's list to have a high percentage of inactive addresses, which would reduce the effectiveness of the list and add cost and inefficiency to the handling of the lists. Large companies manage millions of addresses. If e-mail opt-outs were made effective for some limited period of time, then the list owner would have a regular and effective way of purging the lists of inactive addresses.

We urge the Commission to provide such a time limitation and that it be for a time period less than three years.

VII. Ten-Business-Day Rule

Section VI.C of the ANPR asks for comments on the appropriateness of the ten-business-day rule provided in section 5(a)(4)(A)(i) of the Act. There are numerous operational and technical issues involved in meeting this time limitation and we therefore recommend that the Commission expand this time period to 30 calendar days, which will match the time period in the Telephone Consumer Protection Act of 1991, as amended, and will more accurately reflect the actual operational and technical issues involved in conducting e-mail marketing campaign.

Opt-out requests received via an opt-out link can be added to a suppression list immediately: however, it takes significantly more difficult to applying the opt-out requests to marketing lists in process. When marketing is frequent and regular (and for some businesses continual) there are always lists in process for the next mailing.

MBNA has joint marketing agreements with thousands of organizations. Our financial products are marketed to these organizations' lists of members and customers. For e-mail marketing, we develop all of the marketing materials, and the organization generally completes all of the steps to prepare their list for the mailing. Certain factors influence the amount of time required to prepare and transmit an e-mail campaign:

- Select leads from the organization's list
- Divide the list into segments to test different version of the offer
- Load the e-mail into the e-mail system that will send it
- Schedule this campaign around other e-mails that will be sent to the same list
- Determine the number of leads that can be sent per day
- Determine the capacity of the servers that will serve the images in the e-mail
- Determine the capacity of the servers that support the activities promoted in the e-mail

In addition to these steps, the organization's e-mail list must be suppressed against MBNA's opt-out database. We have re-engineered our e-mail process to integrate this suppression step. The organization sends its lists to our processing vendor to be suppressed. The list is returned to the organization to complete preparations for the e-mail campaign. We complete as many campaign

preparation tasks as possible before the file suppression step, so that the final file preparation and sending can occur within 10 days. Our experience shows it can take anywhere between 5 and 19 calendar days after suppression to send an e-mail campaign to an organization's list. The current 10-business-day time period is too short to allow for list processing for all marketing campaigns.

The following table summarizes the key steps and their associated time periods when MBNA engages in a joint-marketing campaign with one of its endorsing organizations. Typically the organization has built and maintained the mailing list of its members or customers. We provide the marketing material for the organization or vendor to transmit.
The key step is to process the MBNA's suppression list against the organization's mailing list.

Process	Time (business days)
Vendor runs organization list against suppression file; matches are dropped; list is returned to original format and put back on FTP site for pick-up (or output in alternate media and shipped)	1 to 2 days
Organization picks-up or receives list	1 day
Organization continues internal list processing, data processing, and e-mail delivery preparation	2 to 8 days
Organization sends test e-mails to MBNA; MBNA reviews html, links	1 to 2 days
Organization transmits e-mail message	1 to 7 days Larger lists take more days to send. For example, e-mail system may have capacity to send 2MM per day. If this is the case, suppression processing may need to be divided into multiple jobs so that all delivery can be accomplished within 10 days of suppression. In addition, as an industry best practice, many businesses have a regular schedule for e-mail communications with their members / customers. This regular communication allows a business to avoid over contacting their e-mail addresses. For the organization that sends its e-mails on Wednesday, for example, if they receive a post-suppression file on Thursday, they will hold it until the following Wednesday to send.

While the opt-out request may come from the recipient by various means (online link, e-mail communication, letter, phone request), the marketer has ten business days to acknowledge or recognize the request (i.e., ten days to apply the request to the e-mail list.) It is not simply a matter of adding the request to a list or database, which can be done within one or two business days. But this suppression list or database must be processed against any organization's list that may be conducting an e-mail campaign to its customers or members. It is this part of the process that makes the 10-business-day rule unrealistic.

If the time frame to act on opt out requests were shortened from the current 10 days; a hardship would be created for the business through lost opportunity and revenue. Many marketing campaigns could not meet this limitation and would have to be cancelled. Shortening the time period would also add considerable reengineering and systems costs.

The cost to add an e-mail address to a suppression file is negligible; however, the costs to run marketing files against a suppression database for each campaign can be significant. Current costs range from $0.25/1,000 leads to $7.00/1,000 leads depending on list size and the number of processing steps required. Suppression processing can add enough cost to a marketing campaign to make it no longer feasible or profitable. Cost can increase if campaign time frames go beyond the 10-day suppression window, because we must then bear the additional expense of running marketing lists through the suppression process second time.

Recipients of e-mail bear no hard cost for the receipt of e-mails, although it takes time deleting unwanted e-mails or responding to opt-out requests. The standard e-mail model in the industry is to provide the service for a monthly fee, regardless of the volume of e-mail delivered. Some free services limit the disk space of accumulated e-mails, and if exceeded, no new e-mails can be delivered to the inbox. Depending on the type of e-mail account a recipient has, a "full" mailbox may limit their ability to receive e-mails that they considered "wanted" or important. This is lost opportunity cost.

Businesses and organizations generally store and maintain e-mail lists in a database that may be centralized or distributed. E-mail address collection and storage may be distributed across different departments or subsidiaries, or may be centralized for more coordinated use. Methods of storage, maintenance, and usage will vary greatly depending on the size of the business, the infrastructure for collection, and the management systems. Some solutions are internal to the company, others are be out-sourced. These methods and infrastructure determine the amount of time required for various steps of the e-mail opt-out and suppression process.

As suppression file size increases, the transmission of these files takes longer in order to maintain a secure transmission environment (e.g., PGP, secure FTP, or hard media). In our experience, the only chance a marketer has to meet the 10 business-day time frame is to have a central suppression database, and even that structure alone does not ensure that all steps of a campaign can be completed within the 10 days.

If the business is an active e-mailer, then lists would be constantly "in process," requiring regular processing with the suppression database. An active e-mailer, particularly a large or well-funded one, would have the resources to develop systems to manage opt-out requests more quickly with a minimum of manual intervention. Smaller or less well-funded businesses will struggle to receive and process opt-out requests and apply them to marketing lists in a timely fashion. Where e-mail suppression databases are distributed, more time and resources are required to collect, coordinate, and process suppression. When third party e-mailers are employed, there are additional steps and time required.

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Thank you for your consideration in this matter. If you have any questions, please contact the undersigned.

Respectfully submitted,

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