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Via Electronic Delivery

April 20, 2004

The Federal Trade Commission
Office of the Secretary
Room 159-H
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: CAN-SPAM Act Rulemaking, Project No. 411008

To Whom It May Concern:

MasterCard International Incorporated ("MasterCard")[1] submits this comment letter in response to the Advance Notice of Proposed Rulemaking, and the request for public comment, ("Proposal") issued by the Federal Trade Commission ("Commission") with respect to several aspects of the Controlling the Assault of Non-Solicited Pornography and Marketing Act ("CAN-SPAM Act" or "Act"). The Proposal covers a variety of topics under the CAN-SPAM Act, and MasterCard appreciates the opportunity to provide its comments on the Proposal.

In General

MasterCard appreciates the Commission's willingness to review the CAN-SPAM Act to consider how to identify an electronic mail message's ("E-Mail's") "primary purpose" and to determine whether any other discretionary regulatory changes are appropriate. We believe it is important that the Commission provide businesses with an objective standard to apply when determining the primary purpose of an E-Mail. We also believe that the Commission should consider adopting certain, modest regulatory changes to the Act to implement the intent of the Act more fully. As discussed below, however, there are a number of provisions discussed in the Proposal that we believe should not be adopted. Our detailed comments are provided below.

[1] MasterCard is a SEC-registered private share corporation that licenses financial institutions to use the MasterCard service marks in connection with a variety of payments systems.

"Primary Purpose" Rulemaking

The CAN-SPAM Act imposes new requirements on the use of commercial electronic mail messages ("Commercial E-Mails"). A Commercial E-mail 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 (including content on an Internet website operated for a commercial purpose)." As part of the Act, Congress directed the Commission to issue regulations "defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message." The Commission has requested comment on how to determine an E-Mail's primary purpose, including comment on criteria that would facilitate such a determination.

As the Commission has noted, the determination of an E-Mail's primary purpose is a key factor in determining whether the E-Mail is subject to the Act. If an E-Mail has a singular purpose, it is likely apparent whether the E-Mail is a Commercial E-Mail or not. For example, if the E-Mail is simply providing an account statement to the consumer, it would not be a Commercial E-Mail because it is a "transactional or relationship message" as defined in the Act ("Relationship E-Mail"). On the other hand, many E-Mails sent to consumers include multiple types of content such as an account statement that includes information about a product in which the consumer may be interested ("Mixed Purpose E-Mail").

It is critical that the Commission provide companies with objective guidance that can be used for determining whether a Mixed Purpose E-Mail is subject to the Act. In this regard, we note that "balancing tests" or other similar subjective guidance are of little benefit because they leave too much uncertainty for companies seeking to comply with the law. Furthermore, such subjective guidance increases the likelihood that the Act will be interpreted and enforced differently by multiple enforcement agencies, including the state attorneys general. This is obviously not the congressional intent, and does not appear to be the Commission's intent either.

We believe that the most objective manner in which to judge a Mixed Purpose E-Mail's primary purpose is to analyze whether the E-Mail would have been sent if certain content in the E-Mail were not included. In other words, would a company, whether it is the "sender" or whether it "initiates" the E-Mail, as such terms are defined in the Act ("Sender" and "Initiator" respectively), have sent the Mixed Purpose E-Mail but for specific content in the E-Mail. For example, a company may send a consumer an E-Mail that includes a monthly account statement and a message that is an advertisement for a commercial product. The applicability of the Act to the Mixed Purpose E-Mail should depend on whether the company would have sent the E-Mail but for either of the messages included in the E-Mail. If the company would not have sent the E-Mail but for the monthly account statement, the primary purpose of the E-Mail is to provide the monthly account statement. Therefore, the Mixed Purpose E-Mail in this example would not be a Commercial E-Mail under the Act because its primary purpose was to provide an account

statement, which is not a "commercial advertisement or promotion of a commercial product or service," and therefore not a Commercial E-Mail.[2]

The Commission has requested comment on a variety of other methods to determine an E-Mail's primary purpose. We applaud the Commission for considering several possible approaches to determining the primary purpose of an E-Mail. These methods include a determination of what message is more "important" in the E-Mail, what the "net impression" of the E-Mail would be with respect to a "reasonable observer," or whether the commercial content in the E-Mail is "incidental." While each of these standards may or may not be reasonable in the abstract, MasterCard does not believe that any of these standards provide Senders or Initiators with sufficiently objective criteria with which they can evaluate the Act's applicability to an E-Mail. A determination of what is "important" or "incidental" is inherently subjective, and there is no readily apparent yardstick by which to judge what a "reasonable observer's" net impression of an E-Mail would be. Therefore, we strongly urge the Commission to reject these approaches and instead adopt the "but for" objective test discussed above.

The Commission also queries whether the primary purpose for an E-Mail can be discerned by whether the "commercial aspect of the [E-Mail] financially supports the other aspects" of the E-Mail. The Commission provides an example of an electronic newsletter being funded by advertising and then noting that such advertising "arguably would not constitute the primary purpose of the" E-Mail. We agree that such advertising is not the E-Mail's primary purpose. The primary purpose of an E-Mail cannot be judged on whether any portion of the E-Mail is expected to generate revenue. Indeed, such a test could have the unusual result of qualifying any E-Mail as a Commercial E-Mail simply because it includes a commercial message. This was not the intent of Congress, which provided that the commercial content must be the E-Mail's primary purpose in order to be a Commercial E-Mail, and we commend the Commission for rejecting this approach.

The Commission also seeks comment on whether the identity of a Sender should affect the determination of an E-Mail's primary purpose. MasterCard does not believe the identity of the Sender is a dispositive fact with respect to whether an E-Mail is a Commercial E-Mail. Simply because a Sender is "for profit," as provided in the Commission's example, does not imply that the E-Mail is a Commercial E-Mail. The question is more appropriately focused on the content of the E-Mail, not on the nature of the Sender. Congress stated in the Act that a Commercial E-Mail has the primary purpose of a "commercial advertisement or promotion of a commercial product or service," not that a Commercial E-Mail is an E-Mail sent "by a commercial entity." Had Congress intended for the determination to be based on the "for profit" status of the Sender or Initiator, the definition of a Commercial E-Mail would have reflected such an intent.

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[2] An account statement is also a Relationship E-Mail, which is excluded from the definition of a Commercial E-Mail.

Transactional and Relationship Messages

The CAN-SPAM Act designates five categories of messages as Relationship E-Mails. Under the Act, a Relationship E-Mail is excluded from the definition of a Commercial E-Mail, and is therefore excluded from most of the substantive provisions in the Act. The Commission has the authority to expand or contract the categories of E-Mails that are treated as Relationship E-Mails. The Commission seeks comment on additional categories of E-Mails that warrant designation as Relationship E-Mails to accomplish the purposes of the Act. The Commission also seeks comment on the existing categories of Relationship E-Mails and whether, due to changing technology or practices, any might be inappropriate to exclude from coverage under the CAN-SPAM Act as Relationship E-Mails. As a threshold matter, we urge the Commission to clarify that the Act applies only to E-Mails advertising products for personal, family, or household purposes. In this regard, it would be unusual to apply the types of protections provided under the Act to legitimate business-to-business transactions and it does not appear that Congress intended a different result in this context.

Consumer's Consent

We believe that an E-Mail received by a consumer pursuant to the consumer's consent, including pursuant to the consumer's request, should be considered a Relationship E-Mail. For example, if a consumer requests information about a loan from a local bank manager, the local bank manager should be permitted to respond quickly to the consumer's request. However, if the local bank manager's E-Mail is deemed to be a Commercial E-Mail, the local bank manager's ability to respond may be inappropriately limited by fears of inadvertent noncompliance with the CAN-SPAM Act. A consumer could also provide a more general consent to receive E-Mails from a Sender. We also believe the need for the protections provided in the Act is substantially mitigated when a consumer provides his or her consent to receive E-Mails from the Sender. If the consumer no longer wishes to receive such E-Mails, the consumer would be able to revoke his or her consent, or request, to receive the E-Mails if the consumer so chooses.

E-Mail Sent by Employer

MasterCard does not believe that Congress intended to allow employees to opt out of receiving E-Mails from their employer or its affiliates when such E-Mails are sent to the e-mail address provided by the employer or its affiliates (*i.e.*, their work e-mail address). The same exception should also apply with respect to independent contractors that are retained to perform services for the employer and are provided the ability to use the employer's network in a manner similar to the uses conducted by employees to perform services on behalf of the employer. It does not seem logical that an employer cannot use its own communications network to communicate to its employee or independent contractor, regardless of whether the E-Mail is a Commercial E-Mail or not. Therefore, such a communication should be a Relationship E-Mail and be excluded from coverage under the Act.

Existing Relationships

We believe that a Relationship E-Mail should include any E-Mail related to a consumer's existing relationship with a business. For example, if a consumer has a credit card with a credit card issuer, an E-Mail from the issuer to the consumer describing available enhancements to that credit card (*e.g.*, an opportunity to upgrade to a Platinum card) should be a Relationship E-Mail. We believe it is appropriate to distinguish such an E-Mail from Commercial E-Mails because the E-Mail is related to a product or service the consumer has already agreed to obtain. In other words, if the consumer has already decided that he or she would benefit from a product or service, any E-Mails explaining opportunities involving the product, etc., should be deemed to be a Relationship E-Mail. Indeed, such E-Mails discuss an existing relationship between the consumer and the company sending the E-Mail.

Do Not Eliminate Existing Categories of Relationship E-Mails

We also believe it would be premature to eliminate any of the existing categories of Relationship E-Mails provided in the statute. In this regard, the existing categories of Relationship E-Mails are E-Mails to: (i) facilitate, complete, or confirm a transaction; (ii) provide product safety information; (iii) provide notifications of changes, or periodic information, pertaining to a product; (iv) provide information related to an employment relationship; and (v) deliver goods or services. None of these E-Mail categories raises the types of issues raised by Commercial E-Mails and all of these categories should continue to be considered Relationship E-Mails.

10-Business-Day Period for Processing Opt-Out Requests

The CAN-SPAM Act prohibits Senders and persons acting on their behalf from initiating a Commercial E-Mail to a consumer if the consumer has opted out of receiving Commercial E-Mails from the Sender at least 10 business days prior to the date on which the Commercial E-Mail is sent. However, the Act gives the Commission the discretionary authority to issue regulations modifying the 10-business-day period for processing consumers' opt-out requests if the Commission determines that a different time period would be more reasonable. In so doing, the Commission must take into account: (i) the purposes of subsection 5(a) of the Act; (ii) the interests of recipients of Commercial E-Mails; and (iii) the burdens imposed on senders of lawful Commercial E-Mails.

We believe that the Commission should issue regulations allowing for a 31-day period to implement consumers' opt outs as a more reasonable alternative to the 10-business-day requirement. In this regard, legitimate companies may need more than 10 business days to receive an opt out, process the opt out, ensure that "outdated" lists are not used within the company or by outside service providers, and to remove the customer's e-mail address from lists that may be provided to others. Marketing done in an electronic environment is not synonymous with instantaneous processing. For example, it is our understanding that many e-mail marketing vendors may require receipt of a list of e-mail

addresses several business days prior to the first e-mail being sent (*e.g.*, to provide time for uploading, quality control, and other processing). Even before the list is provided to the vendor, the Senders may need to determine which addresses to use, run the appropriate suppressions, and perform the necessary quality control checks. Reliance on vendors and the need for additional time may be especially relevant for smaller businesses. It simply may not be possible to thoroughly update e-mail lists, including those that have already been sent to service providers, in two weeks' time. Therefore, the Commission should permit Senders to receive and process a consumer's opt out under the Act within 31 days.

MasterCard firmly believes that a 31-day requirement is consistent with the purposes of section 5(a) of the Act. When enacting the CAN-SPAM Act, Congress intended, among other things, to provide consumers with a mechanism to opt out of receiving Commercial E-Mail. Allowing legitimate Senders a reasonable period of time to process a consumer's opt out will not detract from consumers' fundamental rights under the Act. Indeed, we do not believe that, in enacting section 5(a), Congress intended to impose unreasonably difficult obstacles for companies to use electronic communications when communicating with consumers. However, some companies may be required to expend a prohibitive amount of resources to comply with the 10-business-day requirement.

When determining an appropriate timeframe under which opt outs should be implemented, the Commission must take into account the interests of recipients of Commercial E-Mails. We do not believe that allowing a 31-day period to implement opt outs will have a detrimental impact on consumers. Generally, the difference between 10 business days and 31 days is not so great as to result in any significant harm to consumers before their opt outs are effectuated. We also note that a 31-day requirement is consistent with the Commission's requirement under its recently revised Telemarketing Sales Rule with respect to implementing a consumer's opt out for telemarketing. We believe a 31-day requirement is just as protective of consumers in an electronic communication context as it is in a telemarketing one.

"Forward-To-A-Friend" Scenarios

The Commission has specifically requested comment on whether it would further the purposes of the CAN-SPAM Act, or assist the efforts of companies and individuals seeking to comply with the Act, if the Commission were to adopt rule provisions clarifying the legal obligations of parties involved in "forward-to-a-friend" marketing campaigns. MasterCard believes that the Commission could provide helpful guidance to preserve this consumer-friendly marketing option.

Under one interpretation of the Act, if a company sends a Commercial E-Mail to its customer, and "induces" its customer to forward the offer included in the Commercial E-Mail to the customer's friend, the company could be deemed to violate the Act if its customer sends the E-Mail to a friend who has opted out of receiving Commercial E-Mails from the company. The customer could also be liable if he or she knew that his or her friend has opted out of receiving Commercial E-Mails from the company. We do not

believe that Congress intended to limit the ability of a friend to share ideas or offers with another friend via e-mail, and therefore we urge the Commission to clarify the application of the CAN-SPAM Act in this context.

MasterCard believes that the simplest approach to clarifying this situation would be to exclude from the definition of a Commercial E-Mail an E-Mail sent by one person to another, when such persons have a personal relationship. This would permit a person to share a commercial offer with a friend via e-mail without the person who sends the E-Mail, or the company whose product is the subject of the E-Mail, risking a violation of the law. In this regard, when enacting the CAN-SPAM Act, Congress intended to regulate communications between commercial entities and consumers. It did not intend to regulate E-Mails sent among friends, especially when one friend has reason to believe the other would have an interest in the content of the E-Mail. MasterCard recognizes that the Commission must be careful not to create a loophole that allows an illegitimate spammer the ability to send an E-Mail to a "friend" only to have the "friend" (*i.e.*, another spammer) send the E-Mail to millions of recipients and escape the requirements of the Act. We believe that the interpretation should apply only in those circumstances in which the original recipient of the Commercial E-Mail has a personal relationship with the person to whom the recipient forwards the E-Mail. Such an interpretation would permit legitimate "forward-to-a-friend" campaigns without creating a loophole for spammers.

We are aware of an alternative to the "forward-to-a-friend" approach which has a clearer treatment under the Act. Under this approach, the Sender (or Initiator) will ask the recipient of an E-Mail to provide the e-mail addresses for his or her friends who may be interested in a particular offer. The Sender or Initiator will then "scrub" the e-mail addresses it receives against the Sender's opt out list, and forward the offer to the remaining e-mail addresses. MasterCard believes this is a viable alternative to the "forward-to-a-friend" scenario, but that it should not be the only alternative available. In this regard, some consumers may not feel comfortable providing their friends' e-mail addresses to a third party, while the "forward-to-a-friend" option allows the recipients to forward materials directly to their friends without having to divulge information to a third party. We urge the Commission to preserve the ability to provide information to consumers using either of these legitimate mechanisms.

Multiple "Senders"

The Commission specifically asks how an E-Mail that may have several simultaneous "Senders" should be treated under the Act. The example provided by the Commission is an E-Mail that promotes an upcoming conference and also includes advertisements from the companies sponsoring the conference. Under one interpretation of the Act, such an E-Mail could be a Commercial E-Mail with multiple Senders, requiring each Sender to scrub its opt out list before the E-Mail could be sent. This provides an unworkable situation for any type of E-Mail with multiple advertisements included in it.

To address this situation most appropriately, MasterCard urges the Commission to adopt an analysis that provides that there is only a single Sender for an E-Mail. A determination of who is the Sender could be similar to the one proposed above for determining an E-Mail's primary purpose. In this context, the analysis would depend on which Sender is the "primary" Sender. Using the Commission's example, the primary Sender would be the one promoting the upcoming conference, because the E-Mail would not have been sent but for the upcoming conference. In other words, no E-Mail would have been sent if it were only the advertisements from the companies sponsoring the conference without details about the conference itself. In determining the Sender in this context, it may also be instructive to determine who the consumer believes sent the E-Mail. Again, in the Commission's example, the Sender would be the promoter of the upcoming conference.

We urge the Commission to adopt an approach that does not result in multiple Senders. Any approach that involves multiple senders would be unnecessary from a consumer protection perspective and would be impractical from an operational perspective. For example, if each advertiser in an E-Mail were required to provide its suppression list, the amount of time necessary to compile the final marketing list could be enormous. Furthermore, the treatment of each advertiser as a Sender could result in an E-Mail having several opt-out mechanisms appended to it, resulting in the consumer receiving confusing and inordinately long E-Mails. We do not believe that Congress intended such a result.

Valid Physical Postal Address

The Act requires the disclosure of "a valid physical postal address of the [S]ender" in each Commercial E-Mail. The Commission has asked whether a post office box or a commercial mail drop should be considered a "valid physical postal address" for purposes of the Act. MasterCard believes that any address to which postal mail may be sent to the Sender meets the definition of a "valid physical postal address" under the Act. In this regard, it would appear that Congress felt it important that a consumer be able to reach a Sender using a "postal" address, such as a post office box or other similar address. We also note that post office boxes provide companies a reliable and efficient mechanism to receive a wide variety of mail from consumers. In fact, many entities have only post office box addresses for consumer mail purposes. For example, one post office box may be used for complaints or inquiries, and another post office box may be used to receive payments. Such an arrangement allows companies to receive a variety of mail and have it delivered by the post office in a presorted manner. In other words, the mail is not delivered to one address, requiring the business to sort the mail based on content. We believe this approach is efficient and consumer friendly. Therefore, any address at which the Sender may receive mail should be deemed sufficient for the requirement in the Act to provide "a valid physical postal address" of the Sender on a Commercial E-Mail.

Identifying Commercial E-Mail in Its Subject Line

The CAN-SPAM Act requires the Commission to submit a report that sets forth a plan for requiring Commercial E-Mail to be identifiable from its subject line, or an explanation of any concerns the Commission has that cause it to recommend against the plan. The Commission seeks comment on preparing this report.

MasterCard urges the Commission to recommend against requiring a Commercial E-Mail to be identified as such in the subject line. We believe such a requirement would harm legitimate senders of Commercial E-Mail while having no impact on those who send millions of fraudulent or otherwise unscrupulous offers. In this regard, we are concerned that many Internet Service Providers or other systems through which consumers receive an E-Mail would establish filters or similar mechanisms to block the receipt of any E-Mail labeled with "ADV" in the subject line (or any similar notation required by law). Such a result would essentially eliminate the use of electronic mail by law abiding companies. However, the fraudulent spammers who send the vast majority of Commercial E-Mail[3] will likely not label their Commercial E-Mails appropriately, and therefore evade any such filters. Therefore, the net effect on requiring Commercial E-Mails to be labeled in the subject line could be to eliminate the use of e-mail to promote legitimate products and services without affecting how spammers advertise their fraudulent or unscrupulous schemes. In light of consumers' ability to opt out of receiving Commercial E-Mails from legitimate Senders, we do not believe that a labeling requirement provides consumers with sufficient benefits that outweigh the obvious potential detriment to legitimate businesses.

Providing Rewards for Information About Violations

The Commission must submit a report to Congress that "sets forth a system for rewarding those who supply information about violations of the Act" including "procedures for the Commission to grant a reward of not less than 20 percent of the total civil penalty collected for a violation of this Act" to the first person that identifies the violator and supplies the information to the Commission that leads to the successful collection of a civil penalty by the Commission. Although MasterCard recognizes the need to enforce the Act, we are concerned that the establishment of a "bounty" system may lead to inappropriate results. As a general matter, we do not believe that individuals will need an incentive to forward instances of violations to the Commission. For example, the Commission has received thousands of "tips" from consumers in connection with its enforcement of the Telemarketing Sales Rule without offering consumers bounties. There is also significant cooperation among Internet service providers and others to pursue spammers. Although a bounty system would likely not improve enforcement of the Act, we fear that a bounty system could serve as a mechanism to threaten and coerce legitimate

[3] Chairman Muris has stated that 84% of Commercial E-Mails are already fraudulent and that none of such spam comes from Fortune 500 companies. Remarks of Chairman Timothy J. Muris before the Women in Housing and Finance on December 10, 2003 as reported in the *BNA Daily Report For Executives*, December 11, 2003.

businesses, similar to many threats associated with class action liability. We urge the Commission to recognize these issues in its report to Congress.

Effectiveness and Enforcement of the CAN-SPAM Act

The Act requires the Commission to submit a report to Congress providing a detailed analysis of the effectiveness and enforcement of the Act and the need, if any, for Congress to modify the Act. The report must be submitted by December 16, 2005. In light of the fact that the Act is relatively new, and therefore that the Commission and other interested parties do not have much experience with respect to the effectiveness and enforcement of the Act, MasterCard urges the Commission to reissue a request for comments on such a report at a later date. The request should be issued as late as possible while still providing the Commission with sufficient time to draft a report based on the comments received.

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If you have any questions concerning our comments, or if we may otherwise be of assistance in connection with this issue, please do not hesitate to call me, at the number indicated above, or Michael F. McEneney at Sidley Austin Brown & Wood LLP, at (202) 736-8368, our counsel in connection with this matter.

Sincerely,

Jodi Golinsky

Jodi Golinsky
Vice President and
Senior Regulatory Counsel

cc: Michael F. McEneney, Esq.