Electronic Financial Services Council

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VIA INTERNET (www.regulations.gov)

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

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

Dear Sirs and Madams:

The Electronic Financial Services Council ("EFSC"), a trade group of national companies dedicated to facilitating the electronic delivery of financial services,[1] appreciates the opportunity to submit its views to the Federal Trade Commission ("FTC") on certain issues regarding the CAN-SPAM Act ("Act").

We recognize that others, including some of our members, will be commenting extensively on many of the topics raised by the FTC. We would like to briefly highlight four points made by those commenters and to furnish one additional observation.

First, the EFSC would like to emphasize that the "primary purpose" of an e-mail should not be deemed to be "commercial" if it consists largely of informative materials, such as newsletters or topical articles, and the informative materials in the e-mail do not advertise or promote a commercial product or service. Second, an e-mail should be deemed to be a "transactional or relationship" e-mail if it provides legally-required information, such as regulatory disclosures. Third, the EFSC supports the extension of the time period for compliance with opt-out requirements beyond the current 10 day period. Fourth, the EFSC requests that the FTC consider allowing opt-out notices to expire after a reasonable period of time, such as 2-3 years.

In addition, as the FTC seeks to implement the Act, it is also important to keep in mind that legitimate commercial users of e-mail, particularly providers of financial services and their customers, must be assured of delivery of their electronic messages. While

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[1] For more information on EFSC see www.efscouncil.org.

consumers should be able to seek relief from spam, the successful growth of electronic commerce requires that legitimate business-oriented e-mails, including those that the customer has contracted to receive, are not blocked by internet service providers ("ISPs"). If these e-mails are blocked, even by ISPs acting with the best of intentions, then businesses and consumers may not be able to rely upon electronic communications, and many of the benefits of e-commerce and ESIGN may be lost.

When the CAN-SPAM bill was being debated by the Senate, we noted:

> [The] ESIGN Act was a vote of confidence by the Congress in the predictability and reliability of electronic communications. ESIGN envisions that individuals and businesses will be able to contract freely through electronic media, without having to worry about the enforceability of contracts that they enter into electronically. It also envisions that business will continue to be conducted electronically after the initial contracts have been signed, with records being freely transmitted in fully electronic relationships if the parties so desire. In the non-electronic world a third party cannot arbitrarily disrupt a contractual arrangement between two parties, and ESIGN envisions that this should not be able to happen in e-commerce either. However, we are concerned about reports that ISPs, in their eagerness to help their subscribers avoid receiving unwanted UCEs,[2] may block e-mails that the subscribers not only want, but have specifically contracted to receive as part of an electronic business relationship. This result would have a significant negative impact on the potential growth of electronic delivery of financial services. . .
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> It is in the interest of all who seek to promote e-commerce to preserve the sanctity of electronic contracts. If an electronic message which is not a UCE is not going to be delivered, at a minimum both the sender and the recipient should be notified by the ISP.[3]

We hope that as the FTC studies the impact of spam on commerce, it will keep in mind the need to ensure that ISPs facilitate the delivery of permission-based electronic communications.

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[2] Unsolicited commercial electronic mail.

[3] Testimony of Jeremiah S. Buckley, General Counsel of the Electronic Financial Services Council, Before the Senate Commerce Subcommittee on Communications at 4-5 (Apr. 26, 2001).

The EFSC thanks the FTC for the opportunity to present its views with the goal of reducing abusive, deceptive and misleading e-mails, while promoting uniform regulations that do not unduly constrain the legitimate uses of emerging technologies. Should the FTC have any questions, we would be happy to furnish additional information.

Sincerely,

Jeremiah S. Buckley
General Counsel