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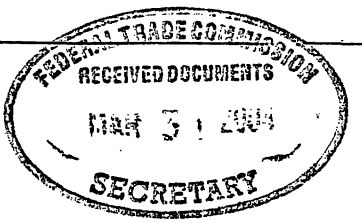

PMA
PROMOTION MARKETING ASSOCIATION, INC.

March 31, 2004

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

Sent Via Courier

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

Dear Mr. Secretary:

By Federal Register Notice dated Thursday March 11, 2004 (Federal Register/Vol. 69/No 48/ pages 11776-11782) the Federal Trade Commission ("Commission") requested public comment in Advance Notice Of Proposed Rule Making ("NOPR") in the above referenced Project. As part of that NOPR the Commission requested comments addressing the establishment of a "National Do Not E-mail" Registry ("Registry") pursuant to the authority of Section 9 of the `Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003', or the `CAN-SPAM Act of 2003' ("Act").

The Promotion Marketing Association ("PMA") appreciates the opportunity to respond to that request and accordingly files the comments below.

Introduction

The PMA has been the leading non-profit association representing the promotion marketing industry since 1911. The PMA has approximately 700 members representing diverse aspects of the industry, including Fortune 500 consumer goods and services companies, advertising and promotion agencies, and university faculty who educate about promotional activities as part of a business curriculum. The PMA's mission is to encourage the highest standards of excellence in promotion marketing. The objectives of the PMA are to educate its members on the laws that govern promotions and to act as a resource to state legislatures, state attorneys general, and federal regulatory agencies in drafting appropriate and focused legislation and rules to combat deceptive marketing and promotion practices.

Many PMA members currently follow an "integrated marketing" approach, which involves the use of a combination of different media and marketing tools to execute an overall marketing plan. E-tailing and other forms of marketing play an important role in such integrated marketing programs for many PMA members. The PMA thus

has a keen interest in ensuring both that the e-mail marketing remains free of abuses and that this channel not be subject to unnecessarily burdensome regulation.

As the Commission may recall, the PMA was actively involved in the rulemaking process during the promulgation and amendment of the original Telemarketing Sales Rules in 1995 and in 2002. At that time, the PMA's goal was to provide the Commission with a unique industry perspective on how various contemplated regulatory proposals affected many of the country's responsible marketers. The PMA looks forward to offering the same input and perspective in connection with the instant rulemaking proceeding.

The Issues Concerning Establishment of a National Do Not E-mail Registry

PMA supports the Commission's efforts to protect consumers from deceptive, misleading and unwanted electronic messages. PMA believes, however, that the recently enacted Can-Spam Act and the regulations to be promulgated thereunder will provide adequate protection to consumers by prohibiting false, misleading and deceptive e-mail messages and providing an efficient convenient mechanism for consumers to opt out of receiving future messages. PMA is concerned that the additional establishment of a National Do Not E-mail registry will severely restrict the ability of legitimate businesses to market efficiently and responsively to consumers, and thwart the growth and development and impose substantial burdens on the industry without any corresponding consumer benefit. PMA believes that there are far less restrictive measures that will provide the same consumer benefits as a National Do Not E-mail registry without unduly burdening the industry.

PMA urges the Commission not to equate the establishment of a Do Not E-mail Registry with the establishment of a National Do Not Call List. There are substantial differences between the two marketing methods which make it appropriate to address the problem of unwanted emails differently from the problem of unwanted telephone calls. First, while there is no doubt that spam clutters the Internet highways and is annoying to consumers, it does not have the same intrusive quality as an unwanted telephone call. The Commission's primary objection to unsolicited telephone calls was that such calls often disrupted family time or dinner hour, and subjected recipients to unwanted self pressure from the telephone operator. None of these circumstances exist in the case of e-mail marketing. E-mail marketing is by its nature less intrusive and becomes visible to the consumer only when the consumer affirmatively logs on to the computer. Moreover, unlike telephone calls, the consumer is not subject to any direct sales pressure. The consumer can easily eliminate the unwanted message by hitting the delete button, and under the new Can Spam Act, will be able to avoid any future messages from that sender by clicking on the legally required opt out mechanism.

PMA is also concerned that the establishment of a Do Not E-mail List will impose an undue burden on the industry without effectively protecting consumers from spam or effectively deterring spammers. Unscrupulous marketers ignore current laws by sending false and deceptive e-mail messages without giving consumers the ability to opt out or otherwise do not honor consumers' opt-out requests. It is, therefore, likely that even if the Commission were to establish a Do Not E-mail Registry, spammers will either ignore the law and continue to send deceptive and unwanted spam, or simply move their operations overseas to avoid being subject to U.S. jurisdiction.

Moreover, to the extent that the vast majority of unscrupulous spammers employ deceptive and misleading practices already prohibited under the Can Spam Act, the FTC already has the necessary

ammunition to seek enforcement against such parties. Indeed, the Act covers much ground in making various practices illegal (see Attachment A). The adoption of a Do Not E-mail registry is unlikely to provide any added enforcement benefit to the Commission while at the same time severely restricting the ability of legitimate marketers to communicate effectively and conveniently with consumers who may have a genuine interest in their products and services. To the extent that FTC enforcement is effective, it is unlikely to find a silver bullet in the form of a National Registry.

The Can-Spam Act already provides adequate protection by requiring businesses to give consumers the means to opt out of receiving future e-mails from the sender. This mechanism allows consumers the flexibility to make selective choices between those e-mails they do and do not wish to receive based on their interests and purchasing habits. As was the case with the Telemarketing Sales Rule, the industry is very concerned that the adoption of a Do Not E-mail registry will deprive consumers of the ability to make informed and selective choices with regard to their electronic communication. Given the relative ease with which consumers can utilize the opt-out mechanism, the Commission should support the notion of choice and flexibility in this case.

PMA is also concerned that a Do Not E-mail List will impose substantial costs on businesses without a corresponding consumer benefit. There is no question that the cost of establishing and maintaining a Do Not E-mail List will be significant. It is likely that a National Do Not E-mail registry will be even larger and more cumbersome to maintain than the Do Not Call registry because there are so many more e-mail addresses and such addresses tend to change frequently. In fact, the development and implementation of a Registry would require the investment of funds, both by the government and commercial e-mail senders.

The Government would need to develop and operate the Registry. It would therefore be required to build a comprehensive system to enable consumers to register (as well as file complaints), allow senders of commercial e-mail access to the Registry at minimum determined intervals to assure their currency (as well as maintain the privacy and security of those consumers who have registered), and permit access by those agencies charged with enforcement. Doubtless, as part of the establishment of the Registry, an educational outreach program would also be instituted to educate consumers, senders, and law enforcement regulators. To be effective, businesses would be required to develop and implement systems to access the Registry and scrub their lists against a very large number of e-mail addresses and to do so on a highly frequent basis as well as to maintain records of these activities for compliance purposes. While the precise economic impact to both government and senders in terms of actual dollars, time, and effort cannot at this point be quantified, there can be no argument that it will be substantial. Again, given the relative ease to a consumer of utilizing the opt-out mechanism, such an approach as presently contemplated in the Can-Spam Act seems to provide a much more equitable balance of resources.

Moreover, the Internet allows instantaneous communication world-wide. Anyone anywhere on the globe with a computer and a telephone line can transmit a message to anyone anywhere else on the globe in nanoseconds. And, while the ability to communicate globally in a heartbeat is among the wonders of the Internet, it also speaks loudly against the establishment of a Registry, which would simply not deter or inhibit commercial e-mail from being sent to anyone by a party outside the U.S.

Finally, PMA would respectfully alert the Commission to the fact that a Do Not E-mail registry may pose privacy risks to those on the list. It is quite possible that spammers could obtain the list and utilize it to send even more spam to those listed on the registry.

Conclusion

PMA looks forward to working with the Commission as it has in the past to promulgate regulations governing commercial e-mail solicitations that will strike the appropriate balance between protecting the needs of consumers, while not unduly restricting the growth of the important and emerging form of commerce. For the foregoing reasons, the PMA respectfully requests that the Commission advise the Congress that the establishment of a Registry is neither necessary or appropriate.

Respectfully submitted,

PROMOTION MARKETING ASSOCIATION, INC

By: _____

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Mickey Jardon, Chairman of the Board, PMA

ATTACHMENT A TO PMA'S COMMENTS
REGARDING CAN-SPAM RULE ACT RULEMAKING, PROJECT NO. R411008

Congress identified the purposeful disguise of the source e-mail, (including misleading information in the messages' subject lines to induce recipients to view messages), and senders failure to provide effective `opt-out' mechanisms, (or refusal to honor requests of recipients not to receive e-mail from such senders in the future, or both), as dangers to the benefits gained from e-mail; and as matters of policy concerns. These concerns are addressed with focus and particularity in Section 5 of the Act, "Other Protections For Users Of Commercial Electronic Mail."

Sections 5(a)(1) and 5(a)(2) of the Act make the purposeful disguise of the source of e-mail unlawful.

Section 5(a)(1) of the Act, "Requirements For Transmission Of Messages (1) "Prohibition Of False Or Misleading Transmission Information" makes it "unlawful for any person to initiate the transmission of a commercial electronic mail message, or a transactional or relationship message, ...that contains, or is accompanied by, header information that is materially false or materially misleading." The Section then proceeds to enumerate how header information is materially misleading, specifically, "(A) header information that is technically accurate but includes an originating electronic mail address, domain name, or Internet Protocol address the access to which for purposes of initiating the message was obtained by means of false or fraudulent pretenses or representations shall be considered materially misleading; B) a `from' line (the line identifying or purporting to identify a person initiating the message) that accurately identifies any person who initiated the message shall not be considered materially false or materially misleading; and, (C) header information shall be considered materially misleading if it fails to identify accurately a protected computer used to initiate the message because the person initiating the message knowingly uses another protected computer to relay or retransmit the message for purposes of disguising its origin."

Section 5 (a) (2) of the Act, "Prohibition Of Deceptive Subject Headings" makes it "unlawful for any person to initiate the transmission...of a commercial electronic mail message if such person has actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that a subject heading of the message would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message (consistent with the criteria used in enforcement of section 5 of the Federal Trade Commission Act (15 U.S.C. 45)."

Sections 5(a)(3) of the Act makes the omission of an e-mail or other Internet based mechanism to "opt-out" of receipt of future e-mails from the e-mail's sender unlawful; and specifies a minimum time period (30 days) for the continued activity of that e-mail address or mechanism.

Section 5 (a) (3) of the Act, "Inclusion Of Return Address Or Comparable Mechanism In Commercial Electronic Mail" makes it "unlawful for any person to initiate the transmission...of a commercial electronic mail message that does not contain a functioning return electronic mail address or other Internet-based mechanism, clearly and conspicuously displayed, that—(i) a recipient may use to submit, in a manner specified in the message, a reply electronic mail message or other form of Internet-based communication requesting not to receive future commercial electronic mail messages from that sender at the electronic mail address where the message was received; and (ii) remains capable of receiving such messages or communications for no less than 30 days after the transmission of the original message."

Section 5(a)(4) of the Act makes it unlawful for a Section 5(a)(3) "opt-out" request to be ignored, either by the sender of the original e-mail, or those working on the sender's behalf. The Section further makes it unlawful for any person who knows of the "opt-out" request to transfer the e-mail address except to comply with the Act.

Section 5 (a) (4) of the Act, "Prohibition Of Transmission Of Commercial Electronic Mail After Objection" states "(A) IN GENERAL- If a recipient makes a request using a mechanism provided pursuant to paragraph (3) not to receive some or any commercial electronic mail messages from such sender, then it is unlawful (i) for the sender to initiate the transmission to the recipient, more than 10 business days after the receipt of such request, of a commercial electronic mail message that falls within the scope of the request."

Section 5 (a) (4), by subsequent provisions in the Act is extended to "any person acting on behalf of the sender and 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."

Finally Section 5(a)(5) of the Act makes it unlawful for a commercial e-mail to be sent which is not identified as an advertisement, clearly gives notice of the "opt-out" opportunity, and contains a valid physical address of the sender

Finally Section 5 (a) (5) of the Act, "Inclusion Of Identifier, Opt-Out, And Physical Address In Commercial Electronic Mail"- states "(A) It is unlawful for any person to initiate the transmission of any commercial electronic mail message...unless the message provides (i) clear and conspicuous identification that the message is an advertisement or solicitation; (ii) clear and conspicuous notice of the opportunity under paragraph (3) to decline to receive further commercial electronic mail messages from the sender; and (iii) a valid physical postal address of the sender."

Congress, by the enactment of these Sections of the Act, with specificity and directness makes it unlawful for a sender of a commercial e-mail to purposefully disguise the source of such mail, include misleading information in the messages' subject lines in order to induce the recipients to view the messages, send commercial e-mail without an 'opt-out' mechanism, or refuse to honor the requests of recipients not to receive electronic mail from such senders in the future.

The completeness of the Statute relative to the concerns enumerated by Congress obviates any need for the establishment of a Registry, and satisfies the government's stated interests.