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April 20, 2004

Federal Trade Commission
CAN-SPAM Act
Post Office Box 1030
Merrifield, VA 22116-1030

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

Ladies and Gentlemen:

This letter is submitted by the Center for Information Policy Leadership at Hunton & Williams (CIPL)[1] in response to the request for public comments in the Advance Notice of Proposed Rulemaking (ANPR) on the CAN-SPAM Act of 2003. This letter was prepared by Martin E. Abrams, Executive Director of CIPL; Margaret P. Eisenhauer, head of the Hunton & Williams Privacy and Information Management Practice; and Lisa J. Sotto, Hunton & Williams' Privacy Regulatory Practice Leader.[2] Please note that the views expressed herein are those of the authors alone, and do not necessarily reflect the views of CIPL member companies, Hunton & Williams, LLP or its clients.

The Center for Information Policy Leadership has an established CRM Education Project, which (i) examines all facets of privacy and information security in the context of customer relationship

[1] The Center for Information Policy Leadership provides a unique combination of strategic consulting, legal, and policy development services for information industry and information-dependent companies. The Center brings together business leaders, government officials, consumer advocates, and academic experts to provide thought leadership on a variety of information policy topics, including global privacy law development, privacy notices, public-private data sharing, and use of personal information for authentication. The Center's internationally-recognized privacy experts advise chief privacy officers and other senior executives on the implementation of global information management programs as well as the development of effective privacy laws.

[2] Mr. Abrams also serves as Senior Policy Advisor to the Hunton & Williams law firm. He is not a lawyer. Ms. Eisenhauer is admitted to practice law in Georgia and Florida. Ms. Sotto is admitted to practice law in New York and Washington, D.C.

management and consumer marketing and (ii) educates businesses, consumer leaders and policy makers about appropriate CRM and consumer marketing solutions. In particular, we have been exploring issues related to appropriate e-mail marketing and how companies can best meet consumer expectations in a balanced, effective manner. These comments reflect our understanding of how to accomplish these goals using the framework established by the CAN-SPAM Act of 2003. Our comments are focused on the following topics:

- preservation of necessary business-to-business communications,
- special communications that should not be considered commercial electronic mail messages, and
- managing sender responsibilities in multi-party email contexts.

We appreciate your consideration of our views on each of these topics.

I. Business-to-Business Communications

Commercial communications drive our competitive economy. Our founding fathers understood that unhindered communication was critical to American freedom and prosperity. Thus, they gave Congress the explicit power to establish the Post Office as part of our Constitution.[3] Commercial letters and advertisements to individuals and businesses provided the basis for the growth of commerce in this country.

The differences between traditional mail and email are speed and cost. Email is fast, inexpensive, flexible and efficient. Because of these advantages, email has become the principal way in which many companies exchange time-sensitive information. Email supports online commerce. Many individuals and businesses sustain long-term relationships based solely on e-commerce transactions. Additionally, many companies now require that current and potential vendors submit all information via email or other web-based data collection formats. Email has become the communications backbone for the global business community and for the individuals who participate in this robust online marketplace. Email provides a messaging medium with the convenience and immediacy of telephone and the permanence of written letters, at virtually no cost to the sender or recipient.

The very attributes that make email so valuable also make it a modern scourge. Because of its attributes, fraudulent and predatory offers can be widely disseminated. With traditional marketing media (mail and phone), the cost of the marketing required certain rates of response to be profitable. With email, response rates are largely irrelevant because the cost of transmitting

[3] Congress was granted power to establish Post Offices and post roads in Article 1, Section 8, the same section that granted Congress the power to levy taxes, enact laws, coin money, regulate commerce with foreign nations, and declare war. U.S. Const. art. I, § 8, cl. 7.

messages is too small to be calculable. The high volumes of fraudulent and predatory (not to mention irrelevant and disrespectful) email have crowded out legitimate communications in both the business and consumer settings. It is the sheer volume of this unseemly email that led Congress to enact the CAN-SPAM Act and to mandate that the Commission establish rules to help reduce the volume of unwanted predatory, pornographic and fraudulent emails.

The Commission appropriately has identified the need to maintain the flow of legitimate communications as a major objective of this rule-making process. While the CAN-SPAM Act provides an opportunity for the Commission to address the very real problems created by deceptive and harassing communications to individuals, it is vital that it not impede the very efficiencies that the Internet has created.

The CAN-SPAM Act and this regulatory process are meant to establish a framework for a communications system to facilitate "the development and growth of frictionless commerce."[4] For the continued vitality of commerce, the Act must be clarified to better distinguish consumer communications from traditional business-to-business communications. Unfortunately, the plain language of the Act does not lend itself to the challenging work of building a framework to support the needs of business-to-business communications. For instance, Section 3(17)(A) uses examples that are much more relevant in the business-to-consumer marketplace than the business-to-business domain. These comments explore how existing direct marketing precedents can guide the Commission in these areas.

A. *The Framework*

While the Internet has revolutionized the way we think about mail, the purpose of mail has not changed. Email, like traditional mail, enables individuals to develop and enhance relationships. An advertisement, even a targeted advertisement, is sent to a mass audience to generate interest in a particular product or service. Advertisements are not, however, the only communications that are used to facilitate commerce. Business people talk to customers and prospects on the phone and in person. They also send information about their products and services through the postal system and, increasingly, via email. In addition, consumers communicate with other consumers about products and services, which ones are valuable and which ones are not.

Over time, we have developed different legal and ethical protocols for individual and mass communications. These protocols typically differentiate among business-to-business, business-to-consumer, and consumer-to-consumer communications. As the Commission develops regulations to implement the CAN-SPAM legislation, it would be useful to keep these protocols in mind.

The plain language of the Act focuses on only one aspect of the communication -- the intended primary purpose of the communication. If the primary purpose of the email is to advertise or

[4] CAN-SPAM Act of 2003 at § 2(a)(1)

promote a commercial product or service, the email is regulated by the Act. While the concept of advertising is fairly clear, the concept of promotion is not. It encompasses activities (including advertising) that further the growth of a product or service. The Act requires the Commission to examine additional criteria in defining "primary purpose," not only because many emails include many messages, but also because the definition of "promote" needs to be limited -- especially in the business-to-business context -- to ensure the Act's rules are not applied to an unduly broad class of messages.

To build an appropriate framework, the nature of the recipient also must be considered. Is the recipient an individual operating in a business capacity or is it a consumer? Traditionally, we have provided privacy and intrusion protections to consumers that we have not provided to business people. In fact, the reach of most U.S. privacy laws (including the Telemarketing Sales Rule and the Do-Not-Call regulations) is specifically limited to consumers to ensure that business communications are not interrupted.[5] While the CAN-SPAM Act does not focus on the nature of the recipient, we encourage the Commission to consider this aspect of communication as it distinguishes between commercial and transactional emails.

The CAN-SPAM Act establishes two categories of email messages. The first, a "commercial electronic mail message" (CEMM), is an email message that primarily advertises or promotes a product or service. The second, a "transactional or relationship message" (TRM), is one that primarily informs the recipient about a transaction or provides information pursuant to an existing relationship between a sender and a recipient. CEMMs carry certain regulatory obligations that TRMs do not. As mentioned above, the definitions within the Act provide examples that are oriented toward a business-to-consumer relationship. As the Commission interprets the distinctions between CEMMs and TRMs, it should consider the business-to-business context as well.

B. *Enabling Business-to-Business Communications*

When the term "recipient" is used in the CAN-SPAM Act, there is no distinction made between an individual in a consumer capacity as opposed to a business capacity. As noted above, U.S. consumers have the right to block sales communications over the phone. In addition, there are long-standing self-regulatory codes (such as the DMA Privacy Promise) that help guide businesses to respect consumers' communication preferences. Policy makers traditionally have not provided equivalent rights to business recipients because the potential costs of interrupting (or adding uncertainty to) business communications is too great.

[5] The one exception to this trend is the Do-Not-Fax regulation promulgated by the Federal Communications Commission, which prohibit all unsolicited commercial faxes. Because of the high cost of receiving faxes, this rule was applied to business as well as consumer recipients. The expense burden distinguishes fax communications from all other communications, however, and justifies this outright prohibition.

The costs of hindering business email communications should not be underestimated. Consider how business processes have evolved over the past ten years. Many companies today will accept vendor information only via email, leaving no alternative for the sales process to proceed. The ANPR asks if there are any portions of the Act that would have a disparate impact on small businesses. We believe the lack of distinction between business-to-business and business-to-consumer communications could significantly impact small businesses.

This issue is accentuated by the structure of CAN-SPAM. "Commercial electronic mail message" is an inappropriate term for a business-to-business communication. The Act defines a CEMM as any electronic mail message the primary purpose of which is the advertisement or promotion of a commercial product or service. There is a bright line between an "advertisement" and other business communications. There is no such bright line between a "promotion" and other business communications.

For true corporate advertisements, none of the requirements for a CEMM should be a burden. The sending organization presumably will have a formal process for assuring that (i) the email advertisement contains all the required elements, (ii) the recipient list has been compared against the organization's do-not-email file, and (iii) there is an automated means of opting out.

For promotions communications, compliance is much more difficult. Many companies employ armies of individuals (sales representatives, for example) who send emails to their customers with information on new features, price changes, special deals and other information that facilitates the sales process. While sales representatives are the obvious example, these senders go beyond the sales force, and include senior executives and other professionals who view customer relations as part of their essential functions.[6] These are business-to-business emails whose purpose might well be the promotion of a product or service. While we could debate whether "promotion" is the primary purpose of such messages, there is no bright line to guide a company's internal compliance group or the Commission's enforcement staff.

It is important to note that, in the communications model described above, there is no centralized intra-company group sending outbound emails. Most sales representatives maintain their own customer lists, and they communicate with their customers freely. While a company may

[6] Consider the Hunton & Williams law firm as an example. The firm consists of nearly 900 professionals, most of whom maintain a list of current and potential clients. While the firm maintains a centralized database for conflicts management, professional development generally is done by practice groups (such as the privacy practice) and individual lawyers. Most lawyers control their own client relationship and development efforts, which often consist of sending current and potential clients small-volume emails attaching articles, client alerts, or other legal news. The purpose of the emails is, in part, to promote the services provided by the particular legal professional sending the email and, therefore, the services of the firm. But these emails have other purposes too, including education (notifying recipients of new legal requirements) and customer (or client) service.

maintain a centralized database for mailing corporate messages (including advertisements), this database often is not accessible to most corporate employees. The infrastructure generally does not exist within organizations to centralize business communications, yet the risk of not centralizing databases for opt out management will be high under CAN-SPAM's existing approach. Accordingly, companies must either invest in significant new infrastructure to manage these business communications or they must strictly limit the kinds of messages that individuals within the company can send via email. This is precisely the result Congress intended to avoid because it would severely impede frictionless commerce.

Consider the requirements that apply to CEMMs. The CAN-SPAM Act:

1. prohibits false or misleading header information,

2. prohibits deceptive subject lines,

3. requires that the email provide recipients an opt-out method (such as a functioning return email address) which permits the sender to process the opt-out within 10 days, and

4. requires that the CEMM be identified as an advertisement or solicitation and include the sender's physical postal address.

The first two of these requirements seem merely to codify good commercial practices, and it is not clear why these requirements would be limited to CEMMs. As a practical matter, no email (regardless of its purpose) should contain false or deceptive information.

The third and fourth requirements are more problematic when considered in light of the traditional company model where email communications from sales representatives, professionals and others are not centralized. For an organization to comply with these requirements, it must ensure that each employee who communicates business information via email understand exactly when an email should be characterized as a TRM or as a CEMM. If the email could be characterized as a CEMM, it must be labeled as such, and the employee must first compare the proposed email list, no matter how small, with a centralized opt-out file. If a recipient then opts out, the employee must provide the opt-out information to a centralized system. These requirements would be constant, even for sales representatives who travel and have limited (remote) access to the centralized corporate system. Imposing these requirements in a business-to-business context would be extremely costly as well as inefficient, and business communications would be severely impeded.[7]

[7] As a practical matter, as part of any centralization process, companies also must manage increased privacy and security risks that having such centralized systems might create. The costs of managing (or failing to manage) these risks should be considered by the Commission as well.

Please note that we are not suggesting that business people should not respect opt-out requests. Business ethics and good corporate citizenship require that companies honor requests from business customers to cease communications. Each company should implement procedures for collecting and respecting opt-outs, but each company should be able to tailor these procedures to its own systems and communications endeavors. Mandating such rules as part of the CAN-SPAM framework, however, provides an unnecessary and costly burden that contravenes Congressional intent as stated in the Act.

Section 3(17)(B) of the Act provides the Commission with the authority to expand or contract the definition of a transactional or relationship message to accomplish the purposes of the Act. To achieve the goal of using email to facilitate "the development and growth of a frictionless economy," we recommend that the Commission include in the definition of a TRM the types of routine business-to-business communications that occur outside of the traditional corporate advertising arena.

II. Special Communications that Should Not Constitute CEMMs

A. *Refer-a-Friend Promotions*

Satisfied consumers are the most effective sales people for a company's products and services. All companies encourage their consumers to tell others about their positive experiences. Consumers also receive satisfaction from sharing news with friends about good products and bargains.

This "word of mouth" advertising has evolved online into "refer-a-friend" promotions, where satisfied consumers can designate a friend to receive a promotional offering about particular products or services. The consumer provides the friend's email address in a "refer-a-friend" form or simply forwards (often at the company's suggestion) the company's email to a friend. Typically, where the email is actually transmitted by the company, the consumer who is referring a friend may include a personal message so the recipient of the promotion knows who made the referral. Additionally, the email address of the recipient is typically not reused by the company unless the recipient responds to the referral email with a request for additional contact.

The ANPR asks whether refer-a-friend messages could include more than one sender, i.e., the consumer and the business. As a general rule, we believe it is important for emails to have only one sender unless no other result can achieve the proper balance of interests. In a refer-a-friend scenario, even where an email is initiated by the company, the message actually is a communication between two consumers about a product or service the first consumer believes the second consumer may find of interest. In this case, the message should be deemed "sent" by the consumer only and should not be considered a CEMM at all.

Some organizations explicitly induce consumers to provide email names for referrals. These inducements may take the form of free products, sweepstakes entries, coupons or discounts that are available only if the consumer provides referral names. That situation is fundamentally different from a pure refer-a-friend promotion. In that case, if the company retains these names

for its own use, the company is actually purchasing the names and email addresses from the consumer. Emails to the "purchased" names would be CEMMs (assuming the other elements of the definition are met), and use of these names by the company should be subject to all the same requirements as any other purchased lists, including the application of suppress and opt-out lists.

B. *Subscription-Based Services*

The primary purpose of a subscription-based service, such as a newsletter or other regular communication based on opt-in consent, is to convey the requested content. These messages should always be considered TRMs. If the consumer has specifically requested the content, then delivery of that content is the transaction contemplated by the consumer, even if the content is generally promotional or advertising (such as an airline's weekly specials). While it is appropriate for companies to offer subscribers of these services the ability to opt-out (or unsubscribe), companies sending these requested emails should not be required to treat these emails as CEMMs, thereby potentially disrupting opt-in consumers' receipt of requested subscription-based communications.

Failure to make this distinction would deprive consumers of the ability to opt into limited levels of communications. For example, when subscribing to an airline's weekly fare specials mailing list, an airline might ask the consumer if it may send the consumer other types of advertising emails. The consumer may decline to receive these communications, but would still be able to obtain the weekly fare specials messages. If the fare specials message is considered a CEMM, the airline could not send it if the consumer otherwise opts out. This result would reduce consumer choice and flexibility. Accordingly, subscription and other opt-in communications should always be classified as TRMs.

III. Managing Sender Responsibilities in Multi-Party Email Contexts

The ANPR asks whether a CEMM that includes advertising content from more than one party can have more than one sender. The designation of sender is important because a sender has numerous compliance obligations under the Act. While it may not always be possible, it is preferable to limit the number of situations in which there are multiple "senders." Consumers typically expect one party to be accountable for a mailing and to manage any complaints about the mailing. Precedents from traditional direct marketing provide helpful guidance on ways the Commission may allocate responsibility for complying with the requirements applicable to the "sender." The scenarios set forth below provide useful examples.

A. *Email Messages Mailed by Third Parties*

Mailing houses traditionally have provided various services to the direct mail industry such as preparing advertisements for mailing, removing duplicate names from mailing lists, and sorting mailings for the most favorable postal rates. The Direct Marketing Association's rules require marketers to either run their own opt-out lists against mailings or require a mailing house to undertake this task. A similar situation exists on the Internet, and it is the marketer alone that should be responsible for complying with CAN-SPAM's "sender" requirements, such as

providing consumers with an opt-out opportunity and seeking to ensure that opt-outs are honored. While both the transmitter and the advertiser may be initiators, only the advertiser should be considered a "sender."

B. *Advertisements Included with Other Promotional Materials and Bundled Advertisements*

In both a the retail setting and online, stores advertise products from many different manufacturers. These advertisements may be found in catalogs or other consumer communications. The Direct Marketing Association requires that its member retailers maintain in-house suppression lists for catalogs and other business-to-consumer advertising. Consumers can easily contact the retailer to request that it not send further catalogs or other mailings. The consumer never contacts product manufacturers for this purpose, and there is no expectation, if a consumer chooses not to receive a retailer's catalog, that the consumer has opted out of receiving advertisements from other retailers for the manufacturer's products.

This same precedent should apply to email advertising. For example, if an electronics retailer is promoting a particular integrated computer systems (with hardware, software and accessories), the retailer's message would be a CEMM. The retailer would be the sender and would manage any opt-out requests and other compliance obligations. The companies that manufacture or license the hardware, software and accessories, are not senders, and they should not have any responsibility to manage opt-outs from consumers who communicate with the retailers. This is true even if the manufactures have a direct (reseller) relationship with the retailer (as discussed below).

Similarly, many companies mail consumers envelopes containing multiple advertisements and coupons. The bundler is not promoting its own product, but rather is delivering other companies' messages. The consumer's opt-out expectations rest with the bundler, not with the advertisers. The consumer would not expect the bundler to make use of all the participating advertisers' suppression lists. If the consumer wants to opt out of this type of communication, the consumer would opt out with the bundler. The same principle should apply with respect to Internet advertising.

C. *Email Messages Mailed by Resellers*

As noted above, many companies distribute products through reseller and value-added reseller channels. A company may provide its resellers with financial incentives to conduct advertising and promotional activities (including email and online activities), but the company typically has no control over the content or distribution of the promotional materials. The reseller is solely responsibly for managing its own customer relationships.

Additionally, because the company may have its own privacy and security policies that prohibit it from sharing consumer information that it may have collected, it generally cannot assist the resellers with opt-out management. In this case, as with bundled advertisements, it is critical for the CAN-SPAM rules to clearly allocate responsibility for compliance with the resellers who are

conducting the promotional campaigns. The resellers are the true "senders" of messages, even if financial support for the campaign came from the manufacturing company.

D. *Joint Marketers*

In joint marketing campaigns, two companies may collaborate on a promotion and jointly send a CEMM to the consumer. In this situation, both organizations are promoting a product or service and both could be considered the "sender." This situation necessitates that both entities have the obligation (as senders) to compare the email list against both companies' suppression files.

With regard to the other CEMM requirements, however, if the companies desire to do so, they should have the ability to designate one company as the primary sender of the CEMM so that opt-outs can be collected and shared in an appropriate, flexible manner. This would enable a single company to provide its address and its opt-out functionality. That company would then process the requests and share them with the other sender. This approach benefits the companies by providing flexibility for compliance, and benefits consumers because it enables companies to coordinate opt-outs and streamline the process by which consumers can exercise their rights under the Act. Accordingly, even when multiple senders may exist under the Act, we recommend that the Commission encourage senders to designate a primary sender that will manage the responsibilities of all the senders in a consumer-oriented fashion.

Alternatively, if it is feasible and desired by the advertisers, separate opt-out options could be provided for each company. Any opt-outs would then be managed independently by the relevant entity.

In each case described above, for email that references multiple parties, the Commission should develop regulations that will enable companies and consumers to identify easily the one discrete (or primary) sender. We believe this approach benefits consumers because they would be able to readily determine which party is responsible for managing opt-outs. This approach also benefits companies because it enables them to have certainty around their compliance obligations. In the case, each party's obligations and expectations can be managed appropriately, which will contribute to the frictionless commerce.

We also recognize that, while the direct marketing industry precedents provide a good starting point, the new marketing methods that result from the evolution email will require new compliance models to address new issues. We hope the Commission will work with industry and consumers on an ongoing basis to develop an analytical framework that weighs the many factors that are considered in developing an email campaign to determine who should be accountable for complying with the "sender" requirements of the Act.

IV. Conclusion

Congress enacted the CAN-SPAM Act to reduce the volume of fraudulent, misleading and unwanted email advertisements, and to create a framework for efficient business communications over the Internet. To meet these laudable goals, CIPL believes the Commission

will need to refine certain provisions of the CAN-SPAM Act. The following summarizes CIPL's views on a few of the issues confronting the Commission with respect to the CAN-SPAM Act:

- The Act does not differentiate between business-to-consumer and business-to-business emails. Because there is a fundamental difference between these types of communications, the Commission should seek to clarify the Act to distinguish one from the other and specify the compliance obligations that apply to each. We urge the Commission to define typical business-to-business emails from individuals within an organization to their customers and prospects as TRMs.

- There is a bright-line difference between refer-a-friend programs that explicitly induce consumers to provide advertisers with referrals and those that do not. Those that do not provide explicit inducement to the referring friend should not be considered CEMMs under the Act.

- If an individual requests content from a company (such as an opt-in subscription to an email service), delivery of that content constitutes completion of a transaction. Emails that deliver specifically requested content should be classified as TRMs under the Act.

- The need for accountability and clarity argue in favor of designating a single sender for multi-party CEMMs.

Thank you very much for your interest in this topic and for your consideration of our comments. If you have any additional questions, we would be pleased to respond.

Very truly yours,

THE CENTER FOR INFORMATION POLICY LEADERSHIP AT HUNTON & WILLIAMS

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