Securities Industry Association
1425 K Street, NW • Washington, DC 20005-3500 • (202) 216-2000, Fax (202) 216-2119 • www.sia.com, info@sia.com

April 20, 2004

By E-Mail

Federal Trade Commission
Office of the Secretary
Room 169-H
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

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

Ladies and Gentlemen:

The Securities Industry Association ("SIA")[1] appreciates the opportunity to comment to the Federal Trade Commission (the "FTC") on the FTC's advanced notice of proposed rulemaking under the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the "CAN-SPAM Act" or "Act"). 69 *Fed. Reg.* 11776 (March 11, 2004). The proposal requests public comment on various issues relating to the implementation of the CAN-SPAM Act, including definitions, reporting requirements and establishment of a national do not e-mail registry.

The CAN-SPAM Act was passed by Congress last year and went into effect on January 1, 2004. While the Act is aimed primarily at "spammers" -- senders of e-mail containing materially false header information and e-mail intended to mislead recipients as to their origin -- the Act does impose obligations on legitimate users of commercial e-mail. The Act requires senders of "commercial" e-mail to provide recipients with an opportunity to opt-out from receiving additional e-mails from the sender. Commercial e-mail is defined to cover e-mail the primary purpose of which is the advertisement or promotion of a commercial product or service.

[1] The Securities Industry Association, established in 1972 through the merger of the Association of Stock Exchange Firms and the Investment Bankers' Association, brings together the shared interests of nearly 600 securities firms to accomplish common goals. SIA member-firms (including investment banks, broker-dealers and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. According to the Bureau of Labor Statistics, the U.S. securities industry employs more than 800,000 individuals. Industry personnel manage the accounts of nearly 93-million investors directly and indirectly through corporate, thrift, and pension plans. In 2003, the industry was projected to generate $142 billion in domestic revenue and $283 billion in global revenues. (Additional information about SIA is available on its home page: www.sia.com)

SIA commends the FTC for initiating this proposal to consider ways in which implementation of the CAN-SPAM Act can be made more effective, and SIA is supportive of the Act's goal of providing consumers with the opportunity to control the receipt of commercial electronic mail messages. The securities industry recognizes the importance of respecting customers' electronic mail, and our member firms are working to effectively implement the provisions of the CAN-SPAM Act that apply to them.

Our recommendations are focused on ensuring that the Act's provisions effectively deter spammers without interfering with the normal flow of legitimate business electronic messages. To that end, SIA recommends that: 1) electronic mail message should be regarded as a "commercial electronic mail message" only if the message would not have been sent but for the commercial advertising or promotional portion of the electronic message; 2) the "transactional or relationship message" exception -- that allows certain e-mails to fall outside the Act's opt-out requirements -- should be clarified and expanded to include, among other things, the operational exceptions recognized by the Gramm-Leach-Bliley Act, all billing and account information, and to cover e-mails sent with consent or within a pre-existing business relationship; 3) the ten business day period for processing opt-out requests should be increased to twenty business days; 4) firms should be able to use valid Post Office box addresses on commercial e-mail to satisfy the Act's requirement that the physical address of the sender be on such e-mail; 5) subject line labeling should not be required; 6) companies should not be regarded as senders simply because their products and services are advertised along with those of other companies in a commercial e-mail sent by another person; and 7) a do not e-mail registry should not be established at this time.

Accordingly, SIA is pleased to provide the following comments to the FTC.

DEFINITION OF "PRIMARY PURPOSE" OF ELECTRONIC MAIL MESSAGE

- ***COMMERCIAL ELECTRONIC MAIL MESSAGE***

The FTC seeks comment on how to determine an electronic mail message's primary purpose. The FTC is required to issue regulations within 12 months of enactment of the Act defining the relevant criteria for determining the "primary" purpose of an electronic mail message. This determination is key because the Act's opt-out provisions generally only apply to "commercial" electronic mail messages, which are defined 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). CAN-SPAM Act § 3(2)(A).

SIA believes that an "electronic mail message" should be regarded as a "commercial electronic mail message" only if the message would not have been sent but for the commercial advertising or promotional portion of the electronic message. In other words, if the message would not have been sent with only the commercial advertisement or promotion part, then the primary purpose should not be "commercial." Similarly, e-mail messages that would not have been sent but for the transactional or relationship

component would not have a primary purpose that is "commercial." This standard avoids unnecessary and difficult review of the content within a message, and provides a more predictable standard for companies to apply in determining whether or not the CAN-SPAM Act applies to messages they send.

Other standards suggested by the FTC will not provide the certainty firms need to determine whether the CAN-SPAM Act will apply. For example, it would be cumbersome and difficult for companies to determine whether the commercial advertising or promotional content portion of the message is more important than any other single portion of the e-mail. Similarly, judging the message based upon the "net impression" that the material as a whole makes on the reasonable observer is a vague and ambiguous standard to apply, and would undoubtedly result in considerable confusion and uncertainty for companies and recipients.

Moreover, the FTC should clarify that certain "informational" messages, including newsletters, reports, and others that provide information to customers, concerning such things as investments or advice, do not have a primary purpose that is commercial in nature. The FTC should also make clear that a message that would not have been sent but for the transactional or relationship part should not be deemed a "commercial" message – i.e., a transactional or relationship message is not a commercial electronic mail message even if it advertises or promotes a commercial product or service.

Accordingly, SIA recommends that the FTC adopt the standard suggested above which provides ample flexibility to companies to determine whether a message should be regarded as a commercial electronic mail message.

- ***TRANSACTIONAL OR RELATIONSHIP MESSAGE***

The FTC also asks what standards should apply in determining when the primary purpose of a message is such that it will constitute a "transactional or relationship message." A message that is a "transactional or relationship message" is not regarded as a "commercial electronic mail message," and therefore, is not subject to most of the requirements applicable to commercial electronic mail messages. CAN-SPAM Act § 2(B). A "transactional or relationship message" is defined as an electronic mail message the primary purpose of which is to facilitate, complete or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender, as well as for other operational purposes. CAN-SPAM Act § 3(17).

The FTC asks whether it should clarify what is meant by a transactional or relationship message. There are additional aspects of transactions and relationships between companies and their customers that are critical to the smooth functioning of the securities industry and the financial and securities markets that the FTC should include as part of the definition of transactional or relationship messages.

SIA believes that the FTC should regard a transactional or relationship message as encompassing a message that is necessary: (1) to protect against or prevent actual or

potential fraud, unauthorized transactions or other violations of law; or (2) to comply with federal, state or local laws, rules or other legal requirements. These additional operating provisions are set forth in § 502(e) of the Gramm-Leach-Bliley Act, 15 U.S.C. § 6802(e), and in the FTC's Rules 16 C.F.R. §§ 313.14, 313.15.

In the securities industry, some notices are required by law and, as a consequence, they should be encompassed within the definition of transactional or relationship messages. Moreover, messages providing information concerning investments and advice to a customer should be clarified as transactional or relationship messages, or as not having a commercial primary purpose, as discussed earlier. In addition, e-mail messages that provide account balance information or other types of account statement should not have to be provided "at regular intervals" to be part of a transactional or relationship message. Such information may be provided irregularly (e.g., at the customer's request, due to an event or triggered by law) and still be considered a "transactional or relationship message."

The FTC should make clear that where an individual or entity has requested, products, services or information (e.g., a prospectus), fulfilling such a request would indeed meet the definition of "facilitate, complete or confirm" a commercial transaction between the recipient and the sender. Thus, the FTC should clarify that a transactional message includes a company's message that responds to such requests. The same treatment should be given to information sent where the customer has given his consent to receive such information.

SIA also believes the FTC should also modify Section 17(A)(i) to permit parties "to negotiate a commercial transaction" in addition to facilitating, completing or confirming a commercial transaction that the recipient has previously agreed to enter into with the sender.

Finally, SIA believes that there should be an exception to the Act's provisions for those recipients with whom the business has a pre-existing business relationship, including business-to-business relationships. Such an exception would facilitate the distribution of information by a company to its pre-existing customers. More importantly, such information would be of value to customers who are doing business with senders because such customers are typically interested in receiving information about products and services from companies with which they do business. In this regard, SIA recommends that the FTC adopt a definition of "transactional or relationship message" that includes electronic mail messages sent to persons with whom the sender has a pre-existing business relationship.

SIA proposes that the definition of "pre-existing business relationship" would be a relationship between a person, or a person's licensed agent, and a client or consumer, based on (1) a financial contract between parties which is in force; (2) the entering into a financial transaction, including opening or holding an active account or a policy in force or having another continuing relationship, between the customer and that business during the 18-month period immediately preceding the date on which the consumer is sent an electronic mail message; or (3) an inquiry, request or application by the customer or

client regarding a product or service offered by that business, during the 3-month period immediately preceding the date on which the consumer is sent an electronic mail message. This standard is substantially similar to the exception for pre-existing business relationships which Congress adopted in the Fair and Accurate Credit Transactions Act of 2003 (FACT Act)(Pub. L. 108-159).

THE TEN BUSINESS DAY PERIOD FOR PROCESSING OPT-OUT REQUESTS SHOULD BE INCREASED

The FTC has also asked whether the requirement that senders process within ten business days a request from a recipient to cease sending ("opt-out") commercial electronic mail messages should be modified. SIA supports increasing the time period for processing opt-out requests to twenty business days. Companies often require a minimum of ten business days to process opt-out requests and frequently require more time because of internal processes or because third party service providers are used to process consumer opt-out requests. This may be especially true for smaller firms that do not have continuous processing procedures in place due to the associated expense. The current required processing period is a hardship on many of these companies, particularly smaller companies that are forced to bear additional expenses associated with more frequent processing of their lists by service providers. The additional burden realized by maintaining a ten-day time frame far outweighs the small gain in consumer benefit. Therefore, the FTC should increase the period to twenty business days, which is a reasonable period given the myriad processing arrangements that companies employ.

VALID PHYSICAL POSTAL ADDRESS

The FTC has asked whether use of a Post Office box rather than a street address satisfies the Act, which requires that commercial electronic mail messages include a valid physical postal address of the sender. SIA believes that Post Office boxes, which are used for many legitimate business purposes, should satisfy this requirement.

Most significantly, SIA believes that there are legitimate reasons for not requiring senders to include a street address in a commercial electronic mail message. Firms use Post Office boxes as a method of controlling the receipt and ultimate distribution of mail received by the company. The use of Post Office boxes assists in assuring accountability and control. Access to Post Offices boxes is typically limited to those who are responsible for retrieving and safekeeping mail that has been sent to the company's box. This helps assure that correspondence will not be misplaced or lost, and that letters reach the correct destination in the company for response or follow-up. In addition, companies with multiple locations throughout the country may find it difficult to determine the most appropriate street address to post on the electronic mail message.

The use of Post Office boxes should not present any difficulty for the FTC or other agencies in locating legitimate senders. The U.S. Postal Service application for Post Office boxes requires renters to provide their street address. Therefore, in the event a sender's street address is needed, and not available from some other source, such as the internet, it will be relatively simple to locate the street address through the Postal Service.

Accordingly, SIA urges the FTC to clarify that a Post Office box is a valid physical postal address under the CAN-SPAM Act.

SUBJECT LINE LABELING

The FTC is required to prepare a report that sets forth a plan for requiring commercial e-mail messages to be identifiable from the subject line or gives an explanation as to why such a requirement should not be adopted. SIA opposes any requirement that commercial e-mail messages be labeled because it will interfere with the marketing strategies of legitimate firms. Such a requirement is not necessary because there is very little burden on a recipient of a commercial e-mail message to determine its contents and make a decision as to whether or not to read, retain or delete it. Moreover, SIA is concerned that requiring subject line labeling will result in automatic deletion of commercial e-mail by recipients who will assume that a commercial e-mail message with a subject line advertising labeling is of no value. Such a result would likely reduce commerce because senders will have diminished opportunity to market products and services to consumers. Moreover, a subject line labeling requirement may even have the unintended effect of providing a competitive advantage to spammers who do not comply with the requirement.

Furthermore, subject line labeling is not necessary because the FTC has authority to enforce the Act's provision (Section 5(a)(2)) making it unlawful to knowingly put a subject heading on an email message likely to mislead a recipient about the contents or subject matter of the message. Accordingly, SIA urges the FTC to oppose a subject line labeling requirement.

FORWARD TO A FRIEND PROGRAMS

The FTC has asked for comment on whether a sender of a commercial electronic mail message that asks customers to forward the commercial e-mail to others should be regarded as having initiated commercial e-mails that its customers send to others. These programs are commonly referred to as "forward to a friend." SIA does not believe that the company that is the sender of the first e-mail to its customers should be regarded as the sender of subsequent e-mails that customers may send to others. As a practical matter, the sender of the original e-mail might never know to whom its customers forward e-mails. Moreover, because the company does not have the third parties' e-mail addresses, there is little likelihood that consumers will receive additional e-mails from the company. Additionally, recipients of e-mails from friends will have the opportunity to request that the original sender not send additional e-mails to them. On the other hand, we see considerable benefit to consumers in permitting such programs because they facilitate the distribution of information to persons who friends determine may be most interested in receiving the information. Accordingly, we believe that companies that participate in forward to a friend programs should not be regarded as senders of e-mails that are forwarded by recipients.

MULTIPLE SENDERS

The FTC has also asked for comment on whether more than one person should be regarded as a sender of commercial e-mail if the e-mail contains reference to more than one company. SIA believes that companies should not be regarded as senders simply because their products and services are advertised in the e-mails which contain information about the products and services of other companies. Treating companies as senders simply because their products and services are included along with others in an e-mail sent by a third party would be unduly complicated and impose considerable operational burden on the parties.

We believe that the sender should be the person that originated or transmitted the e-mail, not companies whose information may be contained in the e-mails. These companies would have no way of knowing who the recipients of the e-mails are, and would not have recipients' e-mail addresses. Thus, there is little likelihood that recipients will receive additional e-mails from these companies. Additionally, recipients will have the opportunity to request that the sender not send additional e-mails to them, thereby eliminating the possibility of receiving additional promotional e-mails from the originator. SIA recommends that the FTC treat only the originator of such e-mails as the sender, and for the FTC to monitor such arrangements to determine whether action needs to be taken at some future time.

THE FTC SHOULD NOT ADOPT A NATIONAL DO NOT E-MAIL REGISTRY

SIA does not see the necessity at this time for the adoption of a national do not e-mail registry, which the Act authorizes the FTC to implement. There is no evidence that adoption of such a registry will accomplish more than the opt-out provisions of the Act. Companies are obligated to honor such opt-out requests, and it is our understanding that legitimate companies have established procedures to ensure that consumers' requests are honored. SIA believes that the current procedure for permitting consumers to opt out provides a reasonable balance between ensuring that consumers are not unduly intruded upon or unnecessarily burdened, and the need of legitimate businesses to keep consumers advised of their products and services.

SIA does not believe that the rationale that applies to a do not call registry for telemarketing applies to e-mails. We believe that the receipt of commercial electronic mail messages is far less intrusive than telephone solicitations, which require consumers to answer the telephone and listen to a telemarketing script before responding to the caller. Consumers can delete an electronic mail message, and the procedures set forth in the CAN-SPAM Act for removal of the recipient's address from the sender's list are simple and straightforward. Moreover, electronic mail leaves an audit trail that facilitates the ability of the FTC and others to determine whether the sender has complied with the recipient's instructions. In contrast, telephone solicitations do not provide such a trail, thereby making it more difficult to determine if a telemarketer has complied with a consumer's instructions to remove the consumer from the telemarketer's call list.

SIA believes that a national do not e-mail registry will not result in a material reduction in spam. A national do not e-mail registry may even provide spammers with a ready-made list of e-mail addresses to add to their lists, and this may have the unintended effect of increasing the amount of spam that consumers experience. Accordingly, SIA believes that the FTC should expend its scarce resources on assuring that companies comply with the existing provisions of the CAN-SPAM Act rather than expending resources to establish a do not e-mail registry that will likely not be effective in achieving a reduction in spam. In this regard, we note that even Commission Chairman Muris has voiced skepticism about the utility of a national registry. Last August, Chairman Muris stated that "[t]here is no basis to conclude that a Do Not Spam list would be enforceable or produce any noticeable reduction in spam,"[2] and he recently reaffirmed this view."[3]

* * * *

SIA appreciates the FTC's consideration of our views. If we can provide additional information, please contact the undersigned at (202) 216-2000.

Sincerely,

Alan E. Sorcher
Vice President and
Associate General Counsel

[2] Remarks by Timothy J. Muris, Chairman, Federal Trade Commission at the Aspen Summit, Cyberspace and the American Dream, The Progress and Freedom Foundation, August 19, 2003.
[3] Remarks of Timothy J. Muris before the Consumer Federation of America, March 12, 2004, reported at http://news.findlaw.com/ap_stories/a/w/1152/3-12-2004/20040312061503_37.html