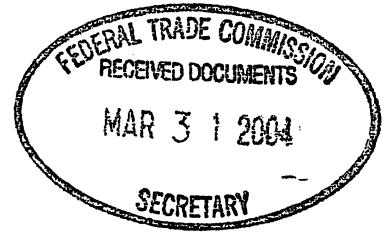


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March 31, 2004

By Hand Delivery

Federal Trade Commission
Office of the Secretary
Room 159-H
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: The CAN-SPAM Act Rulemaking, Project No. R411008—National Do Not E-Mail Registry

Ladies and Gentleman:

This comment letter is submitted on behalf of Visa in response to the request for comment on the National Do Not E-Mail Report in the Advance Notice of Proposed Rulemaking ("ANPR") issued by the Federal Trade Commission ("FTC") regarding the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act" or "Act"). We appreciate the opportunity to comment on this issue.

The Visa Payment System, of which Visa U.S.A.¹ is a part, is the largest consumer payment system, and the leading consumer e-commerce payment system, in the world, with more volume than all other major payment cards combined. Visa plays a pivotal role in advancing new payment products and technologies, including technology initiatives for protecting personal information and preventing identity theft and other fraud, for the benefit of its member financial institutions and their hundreds of millions of cardholders.

E-mail and related Internet communications increasingly have become an important means of communication for consumers to conduct their personal business including shopping, paying bills, borrowing, and investing. Although e-mail and the Internet have contributed greatly to the efficiency of these processes, the growth in unwanted, and in some cases offensive or misleading, commercial e-mail messages could threaten the efficiencies that already have been achieved, as well as the potential for future use of the Internet for consumer transactions and for providing consumer services. Although Visa strongly supports the efforts to further and to protect the benefits of the Internet, and Internet commerce in particular, Visa is concerned that premature restraints could impair rather than enhance these benefits. Thus, while the concept of

¹ Visa U.S.A. is a membership organization comprised of U.S. financial institutions licensed to use the Visa service marks in connection with payment systems.

a national marketing do not e-mail registry (“National Registry”) has a certain appeal as a step to control unwarranted e-mail, Visa believes that the FTC should consider the practical issues associated with a National Registry before a National Registry is established under the CAN-SPAM Act. In order to develop a National Registry, a number of issues first should be resolved in the context of individual company opt-outs. These issues include how the opt outs are implemented in the context of multiple “senders” of commercial e-mails and the scope of opt-out exceptions.

CAN-SPAM Act and Authority to Establish National Registry

In general, the CAN-SPAM Act applies to any “commercial electronic mail message,” which is defined as “any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service.”² The Act allows businesses to send e-mail advertisements to consumers; however, the sender must give the consumer the opportunity to opt out of receiving future e-mails from that sender.³ In particular, the sender must give the consumer the ability to send a reply message or other Internet-based communication to opt out of receiving e-mails. Once a consumer opts out, the sender must honor that request. The sender also is prohibited from selling or otherwise transferring the consumer’s e-mail address if the consumer elected to opt out.⁴ The Act’s opt-out approach is similar to the company-specific telemarketing do-not-call lists currently in effect.

Section 9 of the CAN-SPAM Act requires the FTC to provide a report to Congress that includes a plan and timetable for establishing a National Registry, an explanation of any practical, technical, security, privacy, enforceability, or other concerns that the FTC has regarding such a National Registry and an explanation of how the National Registry would be applied with respect to children with e-mail accounts. The FTC also *may* subsequently establish and implement the plan. Although the FTC is given the authority to establish and implement a National Registry, the FTC is not required to do so; the FTC is required only to submit a report to Congress regarding the development of a National Registry.

Importance of Understanding the CAN-SPAM Act and Relationship Between Specific Opt Outs and a National Registry

A National Registry may reduce unwanted commercial e-mail to consumers, but the development of a National Registry will also involve complex issues because it may interfere with e-mail that consumers want to receive. Under the CAN-SPAM Act, consumers will have the right to opt out of receiving e-mails from businesses.⁵ The FTC should monitor the effectiveness of the implementation of this opt-out scheme under the Act, as it did in the case of the telemarketing opt-out system, before determining whether it is appropriate to implement a National Registry. The Telemarketing Sales Rule (“TSR”), the FTC’s regulations implementing

² CAN-SPAM Act § 3(2)(A).

³ CAN-SPAM Act § 5(a)(4)(A).

⁴ CAN-SPAM Act § 5(a)(4)(A)(iv).

⁵ CAN-SPAM Act § 5(a)(5)(ii).

the Telemarketing and Consumer Fraud and Abuse Prevention Act, including the company-specific do-not-call lists, has been in operation since 1995. The FTC waited nearly seven years before determining that it was appropriate to implement the national do-not-call registry under the TSR.

Although the FTC already has implemented a national registry to restrict telemarketing calls, the idea of restricting commercial e-mail messages through a National Registry, as well as providing consumer opt outs for these messages under the requirements of the CAN-SPAM Act, are new. The issues relating to telemarketing and e-mail are likely to be different. For example, e-mail and related Internet communications provide greater communication capabilities than voice communication and are used for purposes and in ways that differ from voice communication. E-mail and related Internet communications increasingly have become a regular method of communication of account information for financial institutions and Internet transactions, including sales of goods and services and account openings, have grown enormously in recent years. Moreover, the Internet has greatly facilitated international communications, thereby raising the specter that local restrictions on commercial e-mail will disadvantage local businesses with only a minimum reduction in unwanted commercial e-mails. Accordingly, the FTC should gain experience with how the CAN-SPAM Act will operate with a company-specific opt out before addressing a National Registry.

Issues Arising Under the CAN-SPAM Act

The CAN-SPAM Act itself raises a number of issues with respect to limiting commercial e-mails that need to be explored in the context of company-specific opt outs before consideration of a National Registry. For example, the definition of "sender" raises questions as to the application of the opt outs. The definition of sender under the Act means "a person who initiates [a commercial e-mail] message and whose product, service, or Internet web site is advertised or promoted by the message."⁶ "Initiate" is defined to mean "to originate or transmit such message or to procure the origination or transmission of such message, but shall not include actions that constitute routine conveyance of such message."⁷ The Act expressly provides that more than one person may be considered to have initiated a message.⁸ "Procure" is defined to mean "intentionally to pay or provide other consideration to, or induce, another person to initiate such a message on one's behalf."⁹ Based on these definitions, it is clear that there may be multiple senders for a single commercial e-mail. For example, if a seller hires a financial institution to market its products or services by sending e-mail messages to the customers of the financial institution, both the seller and that financial institution may be senders under the Act if the financial institution identifies itself in the e-mail. This is a growing practice on the part of financial institutions and offers positive benefits to consumers in terms of increased privacy protection because customer lists are not provided to the third party.

⁶ CAN-SPAM Act § 3(16)(A).

⁷ CAN-SPAM Act § 3(9).

⁸ *Id.*

⁹ CAN-SPAM Act § 3(12).

Multiple Senders

The potential for two, or more, senders of a single e-mail that is subject to an opt-out right raises complex issues. Is the consumer to be offered one opt out for both companies or should two opt outs be provided? An e-mail with two opt outs would have to explain the roles of the parties in order to be meaningful. However, lengthy explanations and multiple opt outs in individual messages may be viewed as confusing to the consumer. On the other hand, a single opt out will increase the possibility that consumers will elect an opt out that is, in fact, inconsistent with their actual preferences. For example, where a seller uses a separate marketing company that is identified in the e-mail, if the consumer's opt out applies to both the seller and the marketer, that opt out may affect other sellers that use that marketer and that the consumer would be interested in hearing from. The consumer will not be able to identify those sellers when determining whether to exercise his or her opt out that applies to the marketer.

The move from the company-specific opt-out approach established in the CAN-SPAM Act to a National Registry does not avoid these problems. Rather, the establishment of a National Registry merely shifts the focus from opt outs to the application of exceptions to the National Registry and to opt ins that may be obtained at Web sites or otherwise.

Transactional or Relationship Messages

Unintended limitations on the use of the Internet as a means of communicating with consumers could have a significant adverse effect on Internet commerce. As previously discussed, e-mail and related Internet communications are important to consumers as well as to businesses that communicate information about products and services via e-mail rather than over the telephone or on paper. Although the CAN-SPAM Act recognizes the importance of many of these communications through an exception for "transactional or relationship messages," this exception is narrow and the operation of this exception is uncertain and untested.

The limitations on unsolicited commercial e-mail messages in the CAN-SPAM Act do not apply to "transactional or relationship messages." This exception is related to, but different from, exceptions to marketing limitations in other federal laws. For example, the TSR, which limits telemarketing calls, exempts those telemarketing calls where an established business relationship exists. The recently enacted Fair and Accurate Credit Transactions Act of 2003 ("FACT Act"), which will restrict the use of affiliate information for marketing purposes, also provides an exception for those situations where a pre-existing business relationship exists. Although the purposes of these marketing limitations and the exceptions are similar to the limitations and exceptions in the CAN-SPAM Act, the language is different. Differences among these limitations are necessary in order to reflect the different nature of the marketing limitations and the different media to which they apply, but it is by no means clear that the scope of the exception for transactional or relationship messages is adequate for even sender specific opt outs, let alone a National Registry.

In the case of the CAN-SPAM Act, the exemption for “transactional or relationship messages,”¹⁰ includes, *inter alia*, e-mails sent to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender, and to provide notification concerning a change in terms or features of a subscription, membership, account, or loan.¹¹ The scope of this exception is narrower than the existing business relationship and related exceptions in the FACT Act for affiliate marketing requirements and in the TSR, because it does not address recent past business relationships, consumer inquiries, and the like.

However appropriate the scope of the exception for “transactional or relationship messages” is for sender-specific opt outs, this exception would be far too narrow for a National Registry. Exceptions to a National Registry would need to take into account expressions of interest, as well as actual relationships. It is in the interest of consumers, as well as providers of goods and services, for providers to be able to follow-up on direct consumer inquiries and other less formal expressions of interest. Moreover, exceptions to National Registry would need to take into account these expressions of interest in the particular context of Internet commerce, where the expressions of interest can include express requests for additional information, as well as patterns of viewing, or taking preliminary steps to acquire products or services. While the Act authorizes the FTC to modify the definition of “transactional or relationship message” as needed to accomplish the purposes of the Act,¹² it would be premature to undertake this task until the FTC has substantial experience with this exception in the context of the sender-specific opt-out system in the CAN-SPAM Act.

An appropriate definition for “transactional or relationship messages” will be particularly significant for the provision of financial services. Financial services typically involve the establishment of relationships as opposed to the individual sale of products or services. The essence of financial services involves ascertaining a consumer’s financial needs and finding or tailoring products or services to meet those needs. Further, for regulatory reasons, these products may be provided by affiliates or partners of the entity with which the consumer originally dealt. Any National Registry needs to consider the special nature of financial services relationships in fashioning the appropriate scope of the “transactional or relationship messages” exception. This exception should not limit e-mails from business partners, including affiliates, that are required to be legally separate from the entity delivering the initial product or service to the consumer, particularly where these entities are identified to the consumer.

Consumer Consent

In addition, the FTC should consider the importance of consumer consent with respect to the receipt of commercial e-mails. Under the TSR, the FTC exempts from the national do-not-call registry telemarketing calls where the consumer gave “prior express invitation or permission.” The FACT Act affiliate marketing provisions except using information in response to solicitations authorized or requested by the consumer. The CAN-SPAM Act provides that if a

¹⁰ CAN-SPAM Act § 3(2)(B).

¹¹ CAN-SPAM Act § 3(17)(A).

¹² CAN-SPAM Act § 3(17)(B).

consumer first opts out of receiving e-mails, that consumer can later "affirmatively consent" to receiving e-mails.¹³ The definition of "affirmative consent" under the CAN-SPAM Act means that the consumer expressly consented to the receipt of e-mails, either in response to a clear and conspicuous request for such consent or at the consumer's own initiative.¹⁴

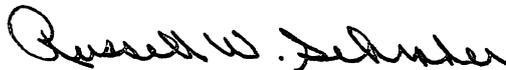
Consent in the context of a National Registry should reflect those situations where the consumer expressly or implicitly consented to the receipt of e-mails both before and after the consumer places his or her e-mail address on any National Registry. Although the consent to withdraw a prior opt out with respect to a particular sender may need to be clear because the consumer has previously made a contrary decision that is specific to that sender, the circumstances under a National Registry are different. The consumer would have expressed a general interest in curtailing commercial e-mail, but the consumer's preference with respect to any particular e-mail is uncertain. In these circumstances, a less definite expression of consent by the consumer should overcome the presumption that the consumer wishes to forego the opportunity to consider e-mails from a particular provider of goods or services.

Specifically, the method of the consumer's consent to receive e-mails should be broad and should include both written or oral expressions of consent, as well as the existence of a prior business relationship. For example, if a consumer walks into a bank to open a deposit account, and the consumer is then asked if he or she would like to apply for a credit card and the consumer responds in the affirmative, this oral response should suffice as consent to receive information via e-mail if that consumer provided an e-mail address on the application. In this way, consumers would have the benefit of receiving e-mails regarding products in which they are interested. Moreover, the consumer's consent should continue to be effective until the consumer revokes the consent by specifically requesting that e-mails no longer be sent to his or her e-mail address, similar to a company-specific telemarketing do-not-call list.

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Once again, we appreciate the opportunity to comment on this important matter. For the reasons stated above, Visa believes that a National Registry should not be considered until there is greater experience with the sender-specific opt outs under the CAN-SPAM Act. If you have any questions concerning these comments or if we may otherwise be of assistance in connection with this matter, please do not hesitate to contact me at (415) 932-2178.

Sincerely,



Russell W. Schrader
Senior Vice President
and Assistant General Counsel

¹³ CAN-SPAM Act § 5(a)(4)(B).

¹⁴ CAN-SPAM Act § 3(1).