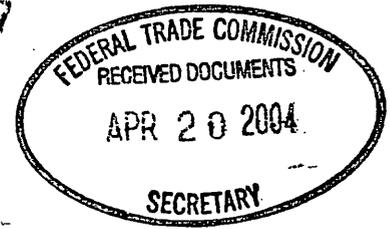


001047



April 20, 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

Ladies and Gentleman:

This comment letter is submitted on behalf of Visa U.S.A. Inc. in response to 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") and certain aspects of the 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.

Background

Internet-related activities, particularly e-mail, have become increasingly important to both consumers and businesses as a means of communication for personal and commercial purposes. For example, consumers rely on e-mail to learn about products and services, shop, pay bills, and invest. Because e-mails themselves, and therefore efforts to control unsolicited commercial e-mails, are relatively new, efforts to restrict e-mail should proceed with caution lest the benefits of e-mail and related Internet communications be impaired by the very efforts to preserve their benefits.

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.

At the outset, it is important to note that there are significant differences between commercial e-mail messages and telemarketing messages. Unlike telemarketing calls that can disrupt a dinner hour or a quiet evening at home, commercial e-mails are only a problem that affects individuals when they seek to use their computer. The problem individuals face at that time is that they can be confronted with a torrent of unwanted and sometimes offensive and harmful messages and attachments that they must sort through in order to find the messages that they actually want. Technology already has begun to address this issue. The sorting process is often aided by "junk e-mail" filter programs that, in effect, allow individuals to opt out from receiving e-mail messages from certain identified senders, or to send commercial e-mail messages generally to a separate file and to review the separate file at leisure for routing errors, or even to prevent delivery of certain e-mails that may contain harmful viruses or tout illegal or suspect offers. It is likely that the tools for conducting this type of screening will become increasingly efficient and common.

In this evolving environment, Visa believes that the initial focus of the FTC's efforts to implement the CAN-SPAM Act should focus on the most significant manifestation of the spam problem—the flood of e-mail messages that are initiated by senders who have no prior relationship with the recipient and include little or no pretense that the e-mail messages are anything but commercial. This view is supported by the Congressional Findings and Policy stated in the CAN-SPAM Act itself. Congress specifically noted in the Congressional Findings and Policy that the purpose of the Act was to reduce "unsolicited" and "unwanted" e-mails, most of which are "fraudulent or deceptive in one or more respects."² The e-mails that Congress intended to target through implementation of the Act are those e-mails that are "vulgar or pornographic in nature," e-mails where senders "purposefully disguise the source of such mail," and e-mails that include "misleading information in the messages' subject lines in order to induce the recipients to view the messages."³ Congress also intended to preserve the reliability and usefulness of e-mail to the recipient.⁴

Visa member financial institutions and other legitimate businesses often send e-mails to their current and past customers and to others whom they have reason to believe are interested in the particular product or service being offered. Some of these e-mails are solely for the purpose of commercial advertisement or promotion, but many serve other purposes, such as providing account information or other information of more general interest. The services provided by these e-mail messages are continuing to evolve and e-mail will continue to increase in importance as a means of communicating about all aspects of financial relationships, including the prevention of fraud and identity theft. At the same time that many of these e-mail messages provide information that is important to consumers that is not for commercial advertisement or promotion, the e-mail messages also may include information that might be characterized as for the purpose of advertisement or promotion. The CAN-SPAM Act raises the difficult issue of determining when the primary purpose of an e-mail message is the commercial advertisement or promotion of a commercial product or service.

² CAN-SPAM Act § 2(a).

³ *Id.*

⁴ *Id.*

In one sense, virtually all e-mail messages from a commercial entity to its customers are for the purpose of promoting that entity's products or services. Although legal requirements may dictate that a financial institution provide a customer with an account statement at certain intervals, the choice to make that statement available by e-mail is at the discretion of the financial institution and the customer and, therefore, is a discretionary component of the level of service that the financial institution provides to the customer. The primary reason that financial institutions are concerned about the level of service that they provide is to promote and maintain customer relations so that those customers will remain customers and so that those customers will consider acquiring other products or services from the financial institution. However, it is clear that the CAN-SPAM Act does not contemplate that the opt-out provisions of the Act apply to all e-mails sent by commercial entities, such as financial institutions. Commercial e-mail is not defined in the CAN-SPAM Act as simply e-mail being sent by a commercial company to a customer or a prospective customer. Rather, the definition of commercial e-mail is limited to e-mail the primary purpose of which is the commercial advertisement or promotion of a commercial product or service. The reference to a commercial product or service should be read as an advertisement or promotion of a particular identified product or service. Commercial companies often sponsor newsletters or other programs that may involve the use of e-mail messages that the companies believe will be of interest to their customers. Financial institutions may disseminate newsletters, or notices of educational programs on financial issues including market conditions, financial planning, and basic financial literacy. Even though these e-mail messages might be viewed as promoting the image of the financial institution sending the e-mail messages, these e-mail messages do not identify a particular product or service and, therefore, should not be considered as messages for the purpose of advertising or promoting a commercial product or service.

Even if an e-mail message is for the purpose of advertising or promoting a particular product or service, the definition of commercial e-mail message does not include "transactional or relationship messages." Accordingly, in order to implement the CAN-SPAM Act, it is necessary to be able to identify those e-mails where the primary purpose is advertisement or promotion of products or services and that do not fit within the exception for transactional and relationships messages. This task is complicated by the fact that individual e-mails from a single sender may be viewed as serving multiple purposes. For example, an account statement may be accompanied by information about alternate products that appear to a financial institution to be more suited to the account activity of a customer than the current account terms. The financial institution may want to give a customer a choice as to whether or not to move to the new account terms. While a conventional change in account terms imposed unilaterally by the financial institution would be a transactional or relationship message that is not considered to be a commercial e-mail message, the offering of a separate new account on an optional basis, even though more beneficial to the consumer, might be considered to be the advertising or promotion of the separate account. Under the CAN-SPAM Act, it will be necessary to determine the primary purpose of this and other e-mails that may be viewed as serving more than a single purpose. The complexity of this task increases as the number of different messages that may be viewed as having different purposes in a single e-mail increases, which can be complicated further by the fact that under the CAN-SPAM Act, a single e-mail can have multiple senders.

The task of distinguishing which e-mail messages are subject to the opt-out requirement under the CAN-SPAM Act will be daunting for the FTC in the rulewriting process and for commercial entities in the implementation process. Nevertheless, this distinction is vital because an overly broad application of the opt-out provisions of the CAN-SPAM Act to messages that, in hindsight, a prospective recipient would not have wished to avoid, would frustrate the very purposes for which that individual accessed the Internet in the first place—increased access to information.

In order to further the purpose of the CAN-SPAM Act of preventing unwanted commercial e-mail, while preserving the increased access to information offered by the Internet, Visa believes that it is necessary for the FTC to clarify the criteria for determining “the primary purpose” of a commercial e-mail message, the definition of “transactional or relationship message,” the application of the Act where a single e-mail is sent by multiple senders, the time period for processing opt-out requests and other issues discussed below.

Criteria for Determining The Primary Purpose

As noted above, 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.”⁵ The Act requires the FTC to issue regulations defining the relevant criteria to facilitate the determination of “the primary purpose” of an e-mail message.⁶ The definition of primary purpose is significant because it determines whether a particular e-mail message is subject to the Act’s requirements. In addition, the primary purpose of the e-mail message relates to who may be considered a sender of the e-mail, and in turn, the exceptions to the definition of commercial e-mail message, as well as the application of the sender-specific opt-out requirements.

The FTC has raised a number of questions as to how it should interpret the term “primary purpose” and how the term should be applied. The FTC has proposed three different quantitative interpretations of primary purpose. In ascending order of the importance of the commercial purpose of the message, the FTC asks whether the primary purpose of an e-mail message should be commercial advertisement or promotion if that purpose is (1) more than incidental; (2) more important than any other single purpose; or (3) more important than all other purposes of the e-mail message combined. The FTC also asks whether the relative importance of various purposes in an e-mail message should be determined based on a subjective “net impression” standard, and whether the fact that a commercial aspect supports the e-mail message financially and whether the identity of the sender should determine the primary purpose.

Visa believes that the importance of the commercial purpose of an e-mail message should be high for an e-mail message to be considered a commercial e-mail message under the CAN-SPAM Act. Of the standards proposed by the FTC, Visa believes that the “more important

⁵ CAN-SPAM Act § 3(2)(A) (emphasis added).

⁶ CAN-SPAM Act § 3(2)(C).

than all other purposes” is the most appropriate. A lesser standard would mean that the purposes other than commercial advertisement or promotion would be more important than the commercial advertisement or promotional purpose of the e-mail message, thus significantly increasing the probability that blocking that message would block the delivery of other information that would be important to the recipient of the e-mail message. However, Visa believes that even this standard alone will result in inappropriately interfering with the access to information that gives the Internet its unique value.

Visa believes that the FTC should supplement the “more important than any other purpose” standard with a “but for” requirement for interpreting the primary purpose of an e-mail message. Based on this additional test, an e-mail would not be considered to be for the primary purpose of advertising or promoting a commercial product or service unless the advertising or promotional purpose was more important than all other purposes and, but for the inclusion of the advertisement or promotion in the e-mail message, the e-mail message would not be sent to the individual. Under this approach, e-mails that would be sent for information purposes, but which also include promotional material, would be excluded from the limitations of the CAN-SPAM Act. This standard would have the benefit of limiting the coverage of the CAN-SPAM Act and, thereby, the Act’s potential to interfere with the use of the Internet to disseminate information. The standard would exclude from the definition of commercial e-mail message newsletters or other information even though those e-mails also include advertisements or promotions that identify particular products or services.

Visa believes that the analysis of the primary purpose of an e-mail message should not depend on how any particular e-mail message is funded. For example, the fact that advertising revenue makes a newsletter possible does not detract from the fact that the newsletter is designed to convey other information. Where a newsletter is sent by an organization other than a particular commercial entity, the authors of the newsletter are likely to be relatively indifferent as to the advertising that helps to pay for the e-mail. The circulation of the newsletter should not be affected by the identity of those parties advertising in the newsletter. Similarly, all e-mails that are sent by commercial companies are ultimately funded from commercial activity. This fact should not convert all e-mail messages sent by commercial companies into commercial e-mail messages.

Finally, Visa does not believe that a net impression standard is the appropriate way to determine the primary purpose of an e-mail message. A net impression standard is subjective, based on the impressions of a hypothetical recipient of an e-mail message. This standard is inherently difficult to apply from the standpoint of the senders of e-mail messages that must comply with the requirements of the CAN-SPAM Act. Senders will tend to view the purpose of e-mail messages based on the purposes that they intend. Judging those messages from the impression that the messages create will grade the senders on how effectively they achieved their intended purpose with the potentially draconian result that e-mail messages that are not intended to be primarily for advertising or promotion, but that inadvertently give the impression that they are intended to be primarily for advertising or promotion, will be viewed as subject to the Act. This difficulty is compounded by the fact that marketing material presented in electronic form is

different from marketing material presented by other means, such as written material. Often times, e-mail messages include links to certain explanations and the placement and appearance of the marketing material will vary from sender to sender. Accordingly, a subjective standard from the standpoint of an observer would not be practical for a sender to apply.

Transactional or Relationship Messages

As noted above, unintended limitations on the use of the Internet as a means of communicating with consumers could have a significant adverse effect on benefits of the Internet, including Internet commerce. 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 the 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 Telemarketing Sales Rule (“TSR”), the FTC’s regulations implementing the Telemarketing and Consumer Fraud and Abuse Prevention Act, which limit 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 scope 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 clear that the scope of the exception in the CAN-SPAM Act for transactional or relationship messages is not adequate even for sender-specific opt outs.

In the case of the CAN-SPAM Act, the exemption for transactional or relationship messages,⁷ 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.⁸ 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.

⁷ CAN-SPAM Act § 3(2)(B).

⁸ CAN-SPAM Act § 3(17)(A).

The Act authorizes the FTC to modify the definition of transactional or relationship message as needed to accomplish the purposes of the Act,⁹ and the FTC requests comment on how the definition should be modified. The scope of the exception for transactional or relationship messages is too narrow. Visa believes that the FTC should modify the definition by expanding the definition in order to reflect more appropriately the importance of ongoing customer relationships. A broader 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 limitation on commercial e-mail messages needs to consider the special nature of financial services relationships in fashioning the appropriate scope of the transactional or relationship messages exception. In addition, the 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.

More specifically, part of the definition of transactional or relationship message includes an e-mail message to "facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender." However, the reference to a transaction that the consumer has previously agreed to could exclude circumstances where a financial institution informs a current customer about potential changes in the account relationship that may be to the customer's benefit. Visa believes that the FTC should expand the definition of transactional or relationship message to include the advisory and informational aspects of financial services relationships so that the exception includes advising consumers about additional products or services that are functionally related to an existing financial relationship between an individual and a financial institution.

This expansion of the definition of transactional or relationship message would be consistent with other parts of that definition. For example, the definition of transactional or relationship message includes e-mail messages that "provide warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient." Like product recalls, communications from financial institutions to their customers about potential changes on an account and new opportunities are critical to consumers' well being—in this case, their financial well being—and, therefore, these communications also should be considered to be transactional or relationship messages.

Similarly, the definition of transactional or relationship message includes e-mail messages to provide notice regarding a change in the terms or features of, a change in the recipient's standing or status with respect to, or account balance information or other type of

⁹ CAN-SPAM Act § 3(17)(B).

account statement with respect to, a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender. While this language covers changes in account terms or features, it could be read to exclude offerings of related or alternative financial relationships that may be in the individual's interest. Ironically, by changing the terms of an account relationship, a financial institution could bring an e-mail message announcing the change in terms within the scope of this language. There is no policy reason to distinguish between changes in terms that are mandatory and those that are optional.

Transactional or relationship messages also include e-mails to provide information "directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled." This exception recognizes that any messages related to certain relationships—in this case, the employment relationship—should be exempt from the limitations of the CAN-SPAM Act. This same standard should apply to financial services relationships. Finally, the definition of transactional or relationship message includes e-mails to "deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender." Again, this part of the definition is limited to goods and services in connection with an existing transaction, but, in the context of financial services, should be extended to financial products and services that relate to existing products or services.

Business-to-Business E-Mail

As noted above, the definition of transactional or relationship message is narrow but may be expanded by the FTC. For example, the definition does not include an exception for e-mail communications from one business to another business. When the TSR was first implemented in 1995, the FTC established an exemption for business-to-business calls from the restrictions on telemarketing calls. This exception has continued notwithstanding the FTC's subsequent amendments to the TSR. Therefore, the FTC clearly has recognized the importance of business-to-business communications in the context of telemarketing. Similarly, the FTC should establish an exemption for business-to-business e-mail communications. Visa believes that under a cautious approach to implementation of the CAN-SPAM Act, the FTC should provide an exemption from the definition of commercial e-mail message for business-to-business e-mail communications.

Definition of Sender

The FTC requests comment on the definition of "sender," the costs and burdens that may be imposed on entities where there are multiple senders, and the costs and burdens that may be imposed on consumers if only the entity originating the e-mail is determined to be the sender. Visa believes that the FTC should clarify who meets the definition of sender.

The definition of sender raises issues with respect to the application of the opt outs under the CAN-SPAM Act. 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.”¹⁰ “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.”¹¹ The Act expressly provides that more than one person may be considered to have initiated a message.¹² “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.”¹³ Based on these definitions, there could be multiple senders for a single commercial e-mail message, even though the statutory language does not expressly state that there may be multiple senders. 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 could be viewed as senders under the Act if the financial institution identifies itself in the e-mail. This type of marketing 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.

The potential for two, or more, senders of a single e-mail message that includes an opt-out right raises questions as to the mechanics and effect of opt-out choices. Is the consumer to be offered one opt out for both companies or should two opt outs be provided? An e-mail message 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 e-mail 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 message, 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 affects the marketer.

The FTC should clarify that the sender of a commercial e-mail message is the sender who is related to the primary purpose of the e-mail message and whose specific products or services are identified and advertised and promoted in the e-mail message. In the context of the example of a financial institution marketing a product on behalf of a third party, that person would be the third party. In addition, circumstances may arise where a commercial e-mail message includes more than one commercial advertisement for specific products or services. Visa believes that the FTC should clarify that a commercial e-mail message subject to the Act can have only one sender; this clarification would be consistent with the statutory language. Specifically, the Act defines “sender” as “a person who initiates [a commercial e-mail] message

¹⁰ CAN-SPAM Act § 3(16)(A).

¹¹ CAN-SPAM Act § 3(9).

¹² *Id.*

¹³ CAN-SPAM Act § 3(12).

and whose product, service, or Internet web site is advertised or promoted by the message.”¹⁴ It appears that the Act is designed to apply to only one sender, particularly because the statutory language makes no reference to multiple senders, as is the case where the Act provides that more than one person may be considered to have initiated a message. In addition, other provisions of the Act, such as the provisions pertaining to opt outs, refer to “the” sender of the e-mail message, rather than implying that there could be multiple senders. Accordingly, Visa recommends that the FTC clarify that a commercial e-mail message can have only one sender—and that one sender is the predominant sender of the e-mail message.

Where multiple promotions or advertisements are contained in a single e-mail message, it will be necessary to identify the single sender. The most workable approach to address multiple advertisements or promotions in a single e-mail would be to apply the opt out to the party who is responsible for the e-mail. Under this approach, the e-mail message could designate the sender responsible for the e-mail message. This type of designation would protect consumers and simplify the opt-out process. For example, an e-mail message promoting a service that can be used at many merchants and that identifies those merchants in the e-mail message could designate the service provider as the sender. The provider of the service would not be required to consult the opt-out lists of each merchant, with the attendant costs and implications for consumer privacy. An opt out for the provider of the service would stop further e-mails. The identified merchants would not have sent the e-mail message on their own. In the absence of this designation in a commercial e-mail message, the criteria for determining the responsible sender could include factors, such as whose return address or other identifying information appears on the message or who appears to control the e-mail message.

Time Period for Processing Opt-Out Requests

The CAN-SPAM Act allows businesses to send e-mail advertisements to consumers, provided the sender of the e-mail gives the consumer the opportunity to opt out of receiving future e-mails from that sender.¹⁵ 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 and process the request within 10 business days after receipt of the request. During this 10-business-day period, senders may continue to send e-mails to the consumer. However, after the expiration of the 10-business-day period, the sender may not initiate the transmission of an e-mail to that consumer who opted out.¹⁶

The Act authorizes the FTC to issue regulations modifying the 10-business-day period for processing consumer opt outs if the FTC determines that a different time period would be more reasonable after taking into account the purposes of the Act’s requirements for transmitting e-mail messages, the interests of recipients of e-mail messages, and the burdens imposed on

¹⁴ CAN-SPAM Act § 3(16)(A) (emphasis added).

¹⁵ CAN-SPAM Act § 5(a)(4)(A).

¹⁶ CAN-SPAM Act § 5(a)(4)(A)(i).

senders of lawful commercial e-mail messages.¹⁷ The FTC specifically requests comment on whether the 10-business-day period is an appropriate deadline for acting on an opt-out request.

The 10-business-day period specified in the CAN-SPAM Act appears to assume that the entity receiving an electronic request to opt out of receiving commercial e-mails from a sender will be the sender itself. This is not necessarily the case. Opt outs may be received by service providers acting on the sender's behalf or even on behalf of other senders. Even within the same institution, it may be necessary to communicate among lines of business when those lines of business are not treated as separate senders. For example, where a financial institution utilizes a third party to send e-mails to consumers including information about two separate products and services, such as insurance and credit cards, and the third-party sender receives opt-out requests from consumers, the financial institution will need to receive those requests from the third-party sender and then update the financial institution's own lists for both the insurance marketing material and the credit card marketing material. The 10-business-day time period is not long enough for entities to effectively communicate consumer opt-out requests within or between entities. Further, financial institutions typically update their customer files on a batch process, rather than on a flow process. This means that consumer opt outs are collected over time and then integrated into the appropriate files. As a result, delays may occur between the time an institution receives an opt-out request and the time that the request is processed and effective. The length of the delay likely varies from institution to institution, as well as from the channel of communication.

The FTC addressed a similar issue with respect to processing opt-out requests in connection with the Gramm-Leach-Bliley Act ("GLBA") privacy requirements. In that case, the FTC determined that it was not appropriate to establish a bright-line standard for processing opt-out requests in connection with the GLBA privacy notice and opt-out requirements. Accordingly, the FTC and the federal banking agencies, in promulgating the final rules implementing the GLBA notice and opt-out requirements, required entities to comply with a consumer's opt-out direction "as soon as reasonably practicable" after receiving the request under the GLBA.¹⁸ In the supplemental information accompanying the FTC's final rule implementing the GLBA privacy requirements, the FTC explained that "it is appropriate to retain a more general rule in light of the wide range of practices throughout the various financial institutions within its jurisdiction."¹⁹ Similarly, because the restrictions on e-mail along with the required opt-out provisions in the CAN-SPAM Act are new, it is important for entities to establish opt-out procedures that best suit their standard practices, as well as that are consistent with their capabilities. Therefore, mandating a specific time period, particularly a time period of 10 days that is extremely short, is not feasible for many institutions. Instead, entities required to comply with the CAN-SPAM Act should have flexibility in processing opt-out requests—flexibility that is consistent with their business operations and processing schedules. Visa therefore urges the FTC to modify the 10-business-day period to ensure that entities maintain the flexibility necessary to process opt-out requests.

¹⁷ CAN-SPAM Act §§ 5(c)(1)(A)-(C).

¹⁸ 16 C.F.R. § 313.7(e).

¹⁹ 65 Fed. Reg. 33,646, 33,665 (May 24, 2000).

Sender's Valid Physical Postal Address

The CAN-SPAM Act requires that commercial e-mail messages include "a valid physical postal address of the sender."²⁰ The FTC requests comment on how this required disclosure should be interpreted and whether a P.O. Box should be considered a valid physical postal address. Visa believes that a P.O. Box should be considered a valid physical postal address under the Act. Financial institutions typically use P.O. Boxes, rather than street addresses, to receive customer inquiries and complaints. P.O. Boxes ensure that mail from customers are handled effectively, as well as assist financial institutions in delivering timely responses to their customers. Requiring that street addresses be included in a commercial e-mail message would impede, rather than facilitate, non-electronic communication between financial institutions and their customers.

Forward-to-a-Friend Messages

The FTC also solicits comment on the application of the Act to forward-to-a-friend messages and similar marketing campaigns that rely on customers to refer or forward commercial e-mails to someone else. Forward-to-a-friend messages are not a type of spam that the Act is designed to control. Forward-to-a-friend messages provide a simple means for one person to tell another about a product or service. For example, forward-to-a-friend messages are useful to those consumers who shop on the Internet and send links to certain products and services to their friends for their information. The consumers are the ones who send the links to the products and services to other consumers, and the e-mails are not sent for a commercial purpose. Accordingly, because these messages are not initiated for the primary purpose of advertising or promoting a product or service, these messages should not be subject to the Act's requirements.

Study of Subject Line Labeling

The CAN-SPAM Act requires that the FTC submit a report to Congress that sets forth a plan for requiring commercial e-mail to be identifiable from its subject line through the use of "ADV" or other comparable identifier, or an explanation of any concerns that the FTC has to recommend against the plan.²¹ The FTC requests comment on the efficacy of this labeling. Visa believes that the FTC should recommend that this type of labeling requirement not be adopted. The Act already imposes a requirement on senders to include in the commercial e-mail message a "clear and conspicuous identification that the message is an advertisement or solicitation."²² Any additional labeling requirement for the subject line will unnecessarily impair Internet communication.

²⁰ CAN-SPAM Act § 5(a)(5)(A)(iii).

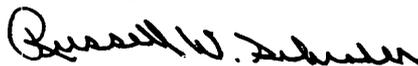
²¹ CAN-SPAM Act § 11(2).

²² CAN-SPAM Act § 5(a)(5)(A)(i).

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Once again, we appreciate the opportunity to comment on this important matter. 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,

A handwritten signature in black ink, appearing to read "Russell W. Schrader". The signature is written in a cursive style with a large initial "R".

Russell W. Schrader
Senior Vice President
and Assistant General Counsel