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Via Electronic Delivery

March 31, 2004

Federal Trade Commission
Office of the Secretary
Room 159-H
600 Pennsylvania Avenue, NW
Washington, DC 20580

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

To Whom It May Concern:

MasterCard International Incorporated (“MasterCard”)¹ submits this comment letter in response to the Advance Notice of Proposed Rulemaking published by the Federal Trade Commission (“Commission”) requesting comments to assist the Commission in preparing a congressionally mandated report setting forth “a plan and timetable for establishing a nationwide marketing Do-Not-E-Mail registry.” MasterCard appreciates the opportunity to provide its comments to the Commission.

Background

Section 9(a) of the CAN-SPAM Act directs the Commission to prepare a report (“Report”) that includes a plan and a timetable for establishing a nationwide marketing “Do-Not-E-Mail” registry (“Registry”). The Report must also include an explanation of “any practical, technical, security, privacy, enforceability, or other concerns that the Commission has” with such a Registry, and an explanation of how the Registry would be applied with respect to children with e-mail accounts. Section 9(b) authorizes, but does not require, the Commission to establish and implement a Registry. The Commission is seeking comments that would assist it in preparing the Report.

General Position

MasterCard is a strong supporter of providing consumers with the appropriate tools to stop unwanted commercial e-mail. In this regard, under the CAN-SPAM Act, every commercial e-mail must, among other things, provide a consumer with the opportunity to opt out of receiving commercial e-mail from the sender of such e-mail.

¹ MasterCard is a SEC-registered private share corporation that licenses financial institutions to use the MasterCard service marks in connection with a variety of payments systems.

We believe that the CAN-SPAM Act has provided an appropriate balance between the interests of consumers in keeping their e-mail accounts free from unwanted e-mails and those seeking to conduct commerce legitimately via the Internet. A Registry, on the other hand, would produce few real benefits for consumers and may actually harm legitimate businesses. In this regard, consumers may add themselves to the Registry in an effort to avoid the commercial e-mails sent by fraudulent operators and other so-called "spammers." As we discuss below, however, the Registry will have little effect on these types of businesses. The Registry would, however, prevent legitimate businesses from using e-mail to offer new products and services to consumers who use the Registry to stop illicit e-mails but would be willing to receive e-mail from legitimate businesses.

We believe the better approach to protecting consumers is to enforce vigorously the existing provisions of the CAN-SPAM Act. The following sets forth some of our more significant concerns regarding the Registry.

Specific Issues to Consider

"Security"

MasterCard notes that the establishment of a Registry would create unique security concerns for the Commission. In order to allow the Registry to be useful for businesses, the Commission would need to make the Registry available to businesses through a web-based mechanism, similar to how the telemarketing registry is made available. As with any database that can be accessed through a web-based mechanism, the Registry would be susceptible to unauthorized access and intrusions. Unlike the telemarketing registry, which is simply a list of phone numbers with no names and therefore has less value than a phone book, the Registry would be an enormous list of valid e-mail addresses. In fact, the Registry has the potential to be one of the largest, if not the largest, publicly available databases of functioning e-mail addresses in the world. Therefore, the Registry may become a prime target for spammers and other fraudulent actors to access in an unauthorized manner for use in a spam campaign. Although we understand that the Commission would take every precaution to protect the Registry from such abuse, it would be difficult to make the Registry available to legitimate businesses without providing opportunity for those engaged in abusive practices.

"Privacy"

Although the goal of the Registry would be to protect consumers from receiving unwanted e-mail, we fear that it may have an opposite effect. As discussed above, the Registry would be at significant risk of being accessed by those with ill intent, making millions of consumers' e-mail addresses available to spammers and others. However, the greatest risk to consumers' privacy may not be from those who access the Registry illegitimately. The irony of the Registry would be that many spammers could subscribe to the Registry using legitimate pretexts, not to scrub their lists for opt outs, but

to look for a source of millions of valid e-mail addresses.² As discussed below, we have serious concerns about whether these spammers can be apprehended and prosecuted for their actions.

“Enforceability”

MasterCard does not believe that enforceability of any requirements associated with a Registry would be an issue with respect to legitimate businesses. Indeed, such businesses will strive to comply with the law, and the Commission or other enforcement agency will be in a position to enforce the law against these businesses. MasterCard believes, however, that the Commission and other enforcement agencies will have significant problems enforcing the requirements of the Registry against spammers and other unscrupulous entities that send commercial e-mails to consumers. For example, Chairman Muris has already described the frustrations the Commission has in enforcing *existing* laws against spammers, noting that, because of the anonymity the Internet provides, “we just wouldn’t know where [the spammers] are.”³

If the Registry is to have any impact, it must be enforceable. However, Chairman Muris has stated that 84% of “spam” is fraudulent and that *none* of such spam comes from Fortune 500 companies.⁴ In other words, at least 84% of unsolicited commercial e-mail *is already illegal but sent with apparent impunity*. Yet, enforcement action has not been taken against most of these spammers because of the difficulties inherent in prosecuting those whose acts are conducted in the virtual world. The Registry will do little if anything to address this issue.

Conclusion

We urge the Commission to consider carefully the risks inherent in a Registry, especially given the limited value, if any, it will actually provide to consumers. In particular, there are significant issues regarding the security of the Registry and protecting it against abuse. Moreover, although the subscriptions to the Registry would be driven by the behavior of the fraudulent spammers, the only entities who would be adversely affected by the Registry would be the law-abiding businesses that are trying to make consumers aware of legitimate products or services consumers may find of value. In light of the fact that consumers are given strong tools under the CAN-SPAM Act to limit commercial e-mails from such companies, we do not believe that the creation of a Registry would produce any real benefits that outweigh its significant risks and drawbacks.

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² Again, because the telemarketing registry has less value than a phone book, a similar risk does not apply with respect to unscrupulous telemarketers using the telemarketing registry as a source for a list of valid phone numbers.

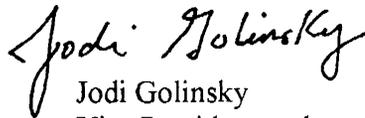
³ Remarks of Chairman Timothy J. Muris before the Women in Housing and Finance on December 10, 2003 as reported in the *BNA Daily Report For Executives*, December 11, 2003.

⁴ *Id.*

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If you have any questions concerning our comments, or if we may otherwise be of assistance in connection with this issue, please do not hesitate to call me, at the number indicated above, or Michael F. McEneney at Sidley Austin Brown & Wood LLP, at (202) 736-8368, our counsel in connection with this matter.

Sincerely,

A handwritten signature in black ink that reads "Jodi Golinsky". The signature is written in a cursive, flowing style.

Jodi Golinsky
Vice President and
Senior Regulatory Counsel

cc: Michael F. McEneney, Esq.