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June 27, 2005

By Electronic Delivery

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

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

Ladies and Gentlemen:

This comment letter is submitted on behalf of Visa U.S.A. Inc. in response to the Notice of Proposed Rulemaking ("Proposed Rule") 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. For calendar year 2004, Visa U.S.A. card purchases exceeded a trillion dollars, with over 450 million Visa cards in circulation. 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 Visa's member financial institutions and their hundreds of millions of cardholders.

Definition of Sender

The CAN-SPAM Act defines "sender" as "a person who initiates [a commercial e-mail message] and whose product, service, or Internet web site is advertised or promoted by the message."[2] The Proposed Rule defines the term "sender" as the term is defined in the Act, "*provided that*, when more than one person's products or services are advertised or promoted in a single [e-mail] message, each such person who is within the Act's definition will be deemed to be a 'sender,' *except that*, if only one such person both is within the Act's definition and meets one or more of the [specified] criteria . . . only that person will be deemed to be the 'sender' 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.
[2] 15 U.S.C. § 7702(16)(A).

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that message.[3] The criteria under the Proposed Rule are: the person controls the content of the e-mail message; the person determines the e-mail addresses to which such message is sent; or the person is identified in the "from" line as the sender of the e-mail message. The FTC explains in the supplemental information accompanying the Proposed Rule ("Supplemental Information") that under the Proposed Rule, only one of several persons whose products or services are advertised or promoted in an e-mail message would be the "sender" if the person initiated the message and was the only person who satisfied the criteria. The FTC explains that the Proposed Rule allows e-mail messages to be structured so that there is only one sender. The FTC also states that if no one person who meets the Act's definition of "sender" satisfies the criteria, then all persons who satisfy the definition of sender will be considered senders for purposes of the Act's compliance obligations.[4]

While Visa supports the FTC's efforts to allow sellers to designate a single sender for commercial e-mail messages, under the Proposed Rule, the proposed definition of "sender," including the criteria, will need to be applied strictly so that sellers do not inadvertently become senders by virtue of their influence over the type of content of messages or the types of e-mail addresses selected. For example, an advertiser in a newsletter may influence the content, particularly if the advertisement itself is considered to be part of the content, by choosing whether or not to advertise in that newsletter. Similarly, advertising contracts for a newsletter that target a particular market may require the newsletter to focus on that audience. In neither case would the advertiser actually choose the content of the newsletter or the e-mail addresses to which the newsletter is sent. Additionally, the quantity of the contribution to the e-mail content should be considered when more than one person provides such content. If the e-mail content is primarily or predominantly created by one person but contains minor input or a small minority of content provided by another person, the person that provided minor input or a small minority of content should not also become a sender by virtue of such limited contribution. In order to avoid these situations leading to determinations that there are multiple senders for an e-mail message, the term "control" must be read strictly to mean the determination of specific content, specific e-mail addresses, and preponderance of content.

In addition, the FTC solicits comment on whether a "safe harbor" provision should be added for companies whose products or services are advertised by affiliates or other third parties.[5] Visa recommends that the FTC include a "safe harbor," clarifying that companies are not liable for the practices of third parties with whom they contract to send commercial e-mail messages. Such a safe harbor could be based on examples demonstrating relationships that do not result in control of content or e-mail addresses.

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[3] 70 Fed. Reg. 25,426, 25,452 (May 12, 2005).
[4] 70 Fed. Reg. at 25,428.
[5] 70 Fed. Reg. at 25,431.

Transactional or Relationship Messages

The CAN-SPAM Act's exemption for transactional or relationship messages,[6] 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.[7] The Act authorizes the FTC to expand or contract the definition of "transactional or relationship message" as needed to accommodate changes in e-mail technology or practices and to accomplish the purposes of the Act.[8] However, the FTC has declined to expand or contract the definition of "transactional or relationship message" in the Proposed Rule because it does not believe that any such changes are warranted at this time.[9]

Even if the statutory criteria for expansion or contraction of the definition of "transactional or relationship message" is not met, the FTC still has authority to clarify ambiguity in that definition. Visa believes that the definition of "transactional or relationship message," as defined under the Act, is ambiguous and does not provide sufficient guidance to senders of commercial e-mail messages. Therefore, Visa believes that it is appropriate for the FTC to clarify the scope of the definition. The FTC has the authority, pursuant to its discretionary rulemaking authority, to "issue regulations to implement the provisions of [the] Act."[10] Implementation of the Act includes clarification. Clarification of the definition for a "transactional or relationship message" 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.

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."[11] Visa believes that the FTC should clarify that the reference to a transaction that the consumer has previously agreed to includes circumstances where a financial institution informs a current customer about potential changes in the account relationship. In addition, the FTC should clarify that the definition includes the advisory and informational aspects of financial services relationships, such as advising consumers about optional or additional products, services, or programs that are functionally related to an existing financial relationship between an individual and a financial institution.

This clarification of the definition of "transactional or relationship message" would be consistent with other parts of that definition. For example, the definition of "transactional or

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[6] 15 U.S.C. § 7702(2)(B).
[7] 15 U.S.C. § 7702(17)(A).
[8] 15 U.S.C. § 7702(17)(B).
[9] 70 Fed. Reg. at 25,432.
[10] 15 U.S.C. § 7711(a).
[11] 15 U.S.C. § 7702(17)(A)(i).

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."[12] 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, the FTC should clarify that these communications are 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 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."[13] While this language covers changes in account terms or features, the FTC should clarify that this language also includes offerings of optional, related or alternative financial relationships, products, services, or programs that may be in the individual's interest.

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.[14] Once a consumer opts out, the sender must honor that request and process the request within 10 business days after receipt of the request.[15] The Act authorizes the FTC to issue regulations modifying the ten-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 senders of lawful commercial e-mail messages.[16] The FTC proposes to shorten the opt-out period to three business days. Although the FTC explains in the Supplemental Information that the three-business-day period allows for adequate time for processing opt-out requests,[17] Visa believes that this proposed opt-out period is not sufficient. Visa, therefore, encourages the FTC to extend the time period for processing opt-out requests.

The ten-business-day period specified in the CAN-SPAM Act, and the three-business-day period established in the Proposed Rule, appear 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 always the case. Opt outs may be received by service providers acting on a sender's behalf

[12] 15 U.S.C. § 7702(17)(A)(ii).
[13] 15 U.S.C. § 7702(17)(A)(iii).
[14] 15 U.S.C. § 7704(a)(4)(A).
[15] 15 U.S.C. § 7704(a)(4)(A)(i).
[16] 15 U.S.C. §§ 7704(c)(1)(A)-(C).
[17] 70 Fed. Reg. at 25,444.

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. Further, financial institutions typically update their customer files on a batch process, rather than on a flow process, which 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.

Mandating a specific time period, particularly a time period of three 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 allow at least the full ten day statutory period to ensure that financial institutions have the time necessary to process opt-out requests.

In addition, the FTC solicits comment on whether there should be a time limit on the duration of opt-out requests since the statute does not specify one. The FTC has the authority to set a time limit on opt-out requests since the Act authorizes the FTC to "implement the provisions of the Act."[18] Visa believes that the FTC should limit the duration of an opt-out request to five years, unless a consumer revokes his or her request, consistent with the national do-not-call rules. Given the rapid rate of change in patterns of retail purchasing and marketing, a five-year period provides consumers an extended period of time to opt out of receiving commercial e-mail messages.

Forward-to-a-Friend Messages

The FTC addresses the applicability of the CAN-SPAM Act to scenarios involving forward-to-a-friend messages. In the Supplemental Information, the FTC explains that where a person forwards, or uses a Web-based mechanism to transmit, a commercial e-mail message to another, "the initiation of the message has been 'procured' if the person receives money, coupons, discounts, awards, additional entries in a sweepstakes, or the like in exchange for doing so."[19] In these cases, the seller or advertiser would be deemed the sender or initiator of the e-mail message and would be responsible for ensuring that the message contains an opt out. But, where there is no payment or consideration from the sender or initiator, the forwarding of the e-mail will not have been procured unless the recipient has been induced to forward the message. The FTC explains that "making available the means for forwarding a commercial e-mail message, such as using a Web-based 'click-here-to-forward' mechanism, would not likely rise to the level of 'inducing' the sending of the e-mail." Rather, the FTC states its belief that this conduct falls within the scope of "routine conveyance" under the Act, which does not constitute initiation of a commercial e-mail message.[20]

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[18] 15 U.S.C. § 7711(a).
[19] 70 Fed. Reg. at 25,441.
[20] *Id.*

Visa supports the FTC's view on the application of the Act to forward-to-a-friend messages because 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. 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.

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,

Russell W. Schrader
Senior Vice President and
Assistant General Counsel