

Masterfoods USA...

A Division of Mars, Incorporated

800 High Street, Hackettstown, New Jersey 07840 Telephone: 908-852-1000

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

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

Masterfoods USA, a division of Mars, Incorporated (Masterfoods USA) is pleased to submit comments on the Notice of Proposed Rulemaking (NPRM) concerning Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act (CAN SPAM or the Act), which was published in the *Federal Register* on May 12, 2005.¹

We urge the Commission to reconsider its interpretation of "forward-to-a-friend" scenarios and declare that all such e-mail messages fall within the "routine conveyance" definition in the Act, as we believe Congress intended.

We also hereby submit comments on the FTC's proposal to shorten the period for honoring opt-out requests from ten business days to three business days. Although some reduction from the 10-day period is possible, we believe that three business days is an insufficient period of time to effectuate opt-out requests.

Background

Masterfoods USA, the United States food, snack and petcare operations of Mars, Incorporated, is one of the world's leading food manufacturers, with more than \$5 billion in annual sales in the United States. Headquartered in Hackettstown, NJ, Masterfoods USA employs more than 7,000 associates in the United States, with 15 manufacturing facilities nationwide. The company owns some of the world's favorite brands, including M&M'S® Brand, SNICKERS® Brand, UNCLE BEN'S® Brand, PEDIGREE® Brand Food For Dogs and WHISKAS® Brand Food For Cats.

Masterfoods USA's various brands operate individual websites, some of which are directed to children under age 13. These sites offer a variety of refer-a-friend features, including e-cards, which are popular with consumers. When it comes to e-mail marketing, we take a

¹ 70 Fed. Reg. 25426-25455 (May 12, 2005) ("CAN SPAM NPRM").

consumer-oriented, permission-marketing approach, and are committed to complying with the Children's Online Privacy Protection Act (COPPA) and the privacy guidelines of the Children's Advertising Review Unit of the National Advertising Division (CARU).

"Forward-to-a-Friend"

Masterfoods USA respectfully urges the FTC to reconsider its interpretation of refer-a-friend scenarios and adopt an interpretation of a "routine conveyance" that tracks the definition set forth in the Act and avoids inconsistencies with COPPA.

E-cards, including e-cards featuring the M&M's® spokescharacters or other brands, and other refer-a-friend features, are popular with consumers visiting the Company's websites.² We note in this regard that although, across our sites, we send many thousands of refer-a-friend messages, they are not viewed to constitute spam by consumers, and are not a source of consumer complaints.³ By providing their e-mail address and the e-mail address of their friends, individuals visiting Masterfoods USA websites can forward e-cards and other e-mail messages to their friends. Key aspects of all refer-a-friend messages are that the visitors themselves provide both their e-mail address and the e-mail addresses of the individual(s) to which the e-mail message will be sent. The site only collects the names of the sender and recipient to fulfill the request, *i.e.*, to send the friend the desired message. The sites do not retain any information on the sender or recipient (unless either affirmatively registers at the site).

We agree that the appropriate starting point for the Commission's analysis are the definitions under the Act, but we disagree with the FTC's interpretations. In our view, it is apparent that Congress intended to exempt from coverage under the Act any routine conveyance of a message, with routine conveyance defined as "the transmission, routing, relaying, handling, or storing, through an automatic technical process, of an electronic mail message for which another person has identified the recipients or provided the recipient addresses."⁴

However, instead of looking at the plain meaning of the definition of a routine conveyance and applying that definition to the normal refer-a-friend situation, the NPRM instead focuses on the definition of "procurement." The Commission's interpretation is that a person who intentionally pays, provides consideration to, or induces another to send on his or her

² The FTC has indicated that websites may send refer-a-friend messages such as e-cards to and from a child under 13 utilizing the "one time only" exception of COPPA. Under the one-time only exception, sites cannot retain e-mail addresses of consumers known or believed to be children for other purposes, including for purposes of maintaining an opt-out list, without obtaining verifiable parental consent. The Commission's interpretation that certain refer-a-friend e-mail messages must comply with CAN SPAM would create an obligation to maintain an opt-out list. The FTC's interpretation of refer-a-friend messages thus is potentially in conflict with COPPA, since as a practical matter our sites cannot collect e-mail addresses from individuals known to be under 13 for purposes of maintaining an opt-out list without obtaining parental consent.

³ Similarly, when we offer consumers the option to get extra chances to win in sweepstakes if a friend returns to a site to register, we have not received complaints from consumers that these messages are "spam." On the contrary, the friend seems to recognize that the message relates to something that might interest them, and that affirmative action is required on their part.

⁴ 15 U.S.C. §7702(15).

behalf a commercial e-mail message that advertises or promotes his or her product may be considered to have "procured" the origination of that message under the Act, and therefore should be deemed an "initiator" or "sender" fully subject to the Act because such activity does not constitute a "routine conveyance." Thus, any such e-mail message must comply with CAN SPAM, according to the NPRM,⁵ even though the Act clearly says that actions that constitute routine conveyance of a commercial e-mail message are excluded.

In the FTC's view, the offering of payment or other "consideration" (including coupons, discounts, awards, additional entries in a sweepstakes, etc.) to use a forwarding mechanism encourages web site visitors to send commercial e-mail to recipients who would not otherwise receive it.⁶ The Notice states that when payment or other consideration of any sort is offered to induce a visitor to forward a message to a friend, it is deemed to constitute coordinating the recipient addresses, even though the seller only transmits or routes the message and does not physically coordinate e-mail messages to which the message will be sent.⁷ We believe the Commission has failed to consider the distinction between a site that pays a third party to send e-mail messages to its own commercial list, either directly, or through a barter or other arrangement, and the normal refer-a-friend arrangement. The former is clearly covered by the Act, because the dissemination of the messages simply does not constitute a "routine conveyance" of the message. That, however, is an entirely different arrangement than the normal refer-a-friend scenario, whether it involves e-cards or situations where the friend is offered a benefit, such as an extra chance to win in a sweepstakes, by doing so. Our sites do not contact individuals via the refer-a-friend feature unless the sender or recipient opts-in by signing up for an activity or to receive information and offers from our brands.

The NPRM further states that even absent "consideration," as it has broadly defined the term, a site may "procure" the initiation of an e-mail message by encouraging or prompting the initiation of a commercial e-mail message. According to the NPRM, a sender "intentionally induce[s]" the initiation of a commercial e-mail message if it "affirmatively act[s] or make[s] an explicit statement that is designed to urge another to forward the message."⁸ According to the FTC, a message such as: "Tell-A-Friend - Help spread the word by forwarding this message to friends!" does not constitute a "routine conveyance." Virtually all refer-a-friend offerings would likely contain verbiage that could be interpreted to urge another to forward the message. The FTC's definition of the "primary purpose" of an e-mail message, coupled with its narrow view of a "routine conveyance," means that all branded e-cards could be deemed to constitute a commercial e-mail message. The result is that most such messages would be drawn within the ambit of CAN SPAM.

In our view, the FTC's interpretation, as described above, does not make practical sense, provides no public policy benefit, and will result in the potential elimination of popular features. As a result, we urge the Commission to reconsider its analysis and to apply a common sense rule

⁵ CAN SPAM NPRM at note 173.

⁶ *Id.*

⁷ CAN SPAM NPRM at 25442.

⁸ *Id.* at 25441.

to refer-a-friend arrangements. If a website sends e-mails in response to a friend's request, outside of any commercial arrangement involving commercial use of a third party's e-mail list, the message should be treated as a routine conveyance. A site that invites friends to send messages, whether or not some small consideration might be involved, should be exempt so long as the site does not use the e-mail addresses for any reason except to send the message.

Effectuating Opt-out Requests

Masterfoods USA deeply respects consumers' rights not to receive unwanted e-mail messages and makes every effort to honor e-mail preferences and effectuate opt-out requests in a timely manner. However, as a large company with many brands and platforms, we believe that the proposed three-business-day timeframe is unduly restrictive. In particular, requests sent via telephone, or unsubscribes submitted in connection with certain microsites, may require more time to be properly processed. We expect that both large corporations, with multiple, complex platforms, and smaller operations, particularly those that rely on third parties to assist in sending out e-mails and managing opt-out requests, may find it impractical to comply with such a shortened time mandate and request that the Commission reconsider the proposed period.

Mars appreciates the opportunity to submit comments in this important proceeding.

Respectfully submitted,

Ellen O. Kollar
General Counsel, North America