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*MasterCard  
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*Via Hand Delivery*

June 27, 2005

The 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

To Whom It May Concern:

MasterCard International Incorporated ("MasterCard")<sup>1</sup> submits this comment letter in response to the Notice of Proposed Rulemaking, and the request for public comment, ("Proposal") issued by the Federal Trade Commission ("Commission") with respect to several aspects of the Controlling the Assault of Non-Solicited Pornography and Marketing Act ("CAN-SPAM Act" or "Act"). The Proposal covers a variety of topics under the CAN-SPAM Act, and MasterCard appreciates the opportunity to provide its comments on the Proposal.

**Three-Business-Day Period for Processing Opt-Out Requests**

The CAN-SPAM Act prohibits a sender, or persons acting on its behalf, from initiating a commercial e-mail to a consumer if the consumer has opted out of receiving commercial e-mails from the sender at least ten business days prior to the date on which the commercial e-mail is sent. However, the Act gives the Commission the discretionary authority to issue regulations modifying the ten-business-day period for processing consumers' opt-out requests if the Commission determines that a different time period would be more reasonable. In so doing, the Commission must take into account: (i) the purposes of subsection 5(a) of the Act; (ii) the interests of recipients of commercial e-mails; and (iii) the burdens imposed on senders of lawful commercial e-mails. The Proposal would require an opt out to be implemented within three business days of its receipt. MasterCard does not believe that the Commission has sufficiently justified this

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<sup>1</sup> 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.

requirement, nor would such a change appear to take into account the three factors cited by Congress as necessary when making such a change.

The purpose of subsection 5(a) of the Act, as it relates to effectuating an opt out, is to allow a consumer to opt out from receiving unwanted e-mail. Taking this purpose into account when deciding to shorten the opt-out period, one would need evidence that consumers receive unwanted e-mails that would be reduced if the opt-out time frame were reduced. Based on comments to the Commission's Advance Notice of Proposed Rulemaking ("ANPR"), however, it appears that this is not a concern. In fact, according to the Commission, "some commenters expressed concerns that under the current ten-business-day time frame, senders would legally be allowed to 'mail-bomb' recipients for ten business days during the opt-out period... *These concerns were not supported by factual evidence that such practices actually occur, or that these practices would be eliminated by a shorter processing period.*" (Emphasis added.) Therefore, it would appear that a reduction in the time allowed to implement an opt out is not necessary to effectuate the purposes of subsection 5(a) of the Act.

With respect to taking into account the interests of recipients of commercial e-mails, the analysis is similar to that pertaining to the purpose of subsection 5(a) of the Act. Basically, are consumers receiving commercial e-mails that they would not otherwise receive if there were a shorter opt-out implementation time frame? As discussed above, the Commission does not appear to believe so. Furthermore, it does not appear that consumers have a unified position on this matter. According to the Commission, "[n]early half of consumers who commented [on the ANPR]... indicated that ten business days is an appropriate time period for processing opt-out requests." Therefore, given that consumers are not "mail bombed," nor are they demanding a shorter time frame, it would not appear that "the interests of recipients of commercial e-mail" dictates, or even suggests, a shorter implementation time frame.

The final consideration mandated by Congress is that the Commission consider the burdens on the senders of lawful commercial e-mail. According to the Commission, "the majority of industry members, including small businesses, recommend[ed] that [the ten-business-day period] be kept at ten business days or lengthened." The justifications for this, according to the Commission, were "complex business arrangements, the use of third-party marketers, and the maintenance of multiple e-mail databases." Although the Commission laments the fact that these comments did not provide specific information relating to the burdens of the ten-business-day period, it seems clear that industry is concerned with the existing burdens in general. It is not clear how much weight the Commission gave these comments when proposing a reduction to three business days.

We would like to take the opportunity to provide detail to the concerns raised as part of the ANPR. Reputable companies use a mechanism, one that we understand to be common, that can sometimes take close to ten days to implement a consumer's opt-out request. In particular, a company's opt-out database is uploaded daily for use in the e-mail file preparation process. E-mail addresses are "scrubbed" against this list, and the file is prepared for an e-mail vendor, including testing the list for errors. The file is then sent to an e-mail vendor, which prepares and tests the files, including for appearance and content.

The company having the e-mails sent also reviews the “final” e-mails for quality control and makes necessary changes. This entire process can take several days, and would be difficult if not impossible to do in three business days.<sup>2</sup> We believe the statutory timeframe should be retained to allow for this type of arrangement, especially because it allows for several quality control and compliance checks.

In justifying the reduction to three business days in the Proposal, the Commission states: “the fact that many commenters already are able to process opt-out requests virtually instantaneously supports the conclusion that the opt-out period can and should be shortened.” While we do not disagree with the fact that some companies may be able to process e-mail opt outs in a shorter period of time, we do not believe that the fact that it is *possible* for technologically sophisticated entities to do it in a shorter time justifies *requiring* all entities to conform. Furthermore, Congress intended for a review to consider the requisite burdens, not simply whether compliance with a shorter time period was technologically feasible.

In sum, the Commission states that the Proposal “furthers the key policy objective underlying [the Act] to afford e-mail recipients maximal privacy consistent with reasonable compliance costs.” However, it is difficult to reconcile this finding with the fact that, according to the Commission, the record does not have “factual evidence” that reducing the time period would, in fact, reduce unwanted e-mail (*i.e.*, produce “maximal privacy”).<sup>3</sup> Furthermore, the record does not appear to include any discussion of the costs that would be imposed on companies, especially smaller businesses that manually process opt outs or do not use technologies that allow for instantaneous processing (*i.e.*, “consistent with reasonable compliance costs”). We respectfully urge the Commission to review this portion of the Proposal in the context of the three specific considerations enumerated by Congress. In so doing, we believe the more appropriate result is to retain the ten-business-day time period.

### **Definition of “Sender”**

The Act defines a “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.” The Commission’s regulations implementing the Act adopt, by reference, this same definition. We are pleased that the Commission is proposing to address an issue that is raised by this definition in the context of e-mails that include advertisements or promotions for more than one person’s products or services. We do not believe that Congress intended the Act to prohibit, in effect, e-mails with multiple commercial messages due to the complexity of the compliance obligations, many of which are discussed by the Commission in the Proposal.

The Proposal would address this situation by retaining the definition of “sender” as it is in the Act. However, if more than one person’s products or services are advertised or

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<sup>2</sup> In the event of an e-mail with multiple senders, the three-business-day period becomes even more difficult, if not impossible, to implement.

<sup>3</sup> We also believe that legitimate senders would not engage in such a practice, and illegitimate senders are unlikely to comply with the Act in any event.

promoted in a single e-mail, each such person who is within the Act's definition would be a "sender," except that if only one such person both is within the Act's definition and meets one or more specified criteria, only that person would be deemed to be the sender. The criteria are: (i) the person controls the content of the message; (ii) the person determines the e-mail addresses to which such message is sent; (iii) the person is identified in the "from" line as the sender of the message.

We believe the Commission's proposed definition is helpful, and we ask for two clarifications. First, it is not clear to us what is deemed to be "control" with respect to the content of the e-mail. At the very minimum, the fact that multiple entities are allowing their intellectual property (*e.g.*, trademarks, logos, etc.) to be included in the message indicates some modicum of control over part of the e-mail. Therefore, a strict reading of the Proposal obliterates the Commission's intended usefulness, as each of the potential senders would have some control of the message, thereby making all of them "senders" under the Act.

To make the proposed definition useful, we believe the Commission should clarify its application to situations involving more than simple usage of intellectual property. Indeed, if companies are willing to associate themselves with an e-mail, they will likely also have rights with respect to approval of ad copy, general types of content in the e-mail, items promoted within the e-mail, and other similar "control." Therefore, we urge the Commission to clarify that "control" relates to the ability to make ultimate decisions relating to the content as a whole or sending of the e-mail. If this clarification is not made, we believe this prong of the definition should be deleted, as it would render application of the Commission's intent virtually impossible.

We ask for similar clarification with respect to whether or not a company "determines" the e-mail addresses to which an e-mail is sent. For example, if an e-mail with multiple advertisements is sent, it is likely that each of the senders has at least consented to the types of e-mail addresses to which the e-mail will be sent (*e.g.*, persons with certain demographic characteristics). We do not believe that the Commission intends for such arrangements to qualify as "determining" the e-mail addresses to which the e-mail is sent. Rather, we believe the Commission intends to cover only those companies who determine the *specific* e-mail addresses to which the e-mail will be sent.

#### **Definition of "Valid Physical Postal Address"**

The CAN-SPAM Act requires a commercial e-mail to include "a valid physical postal address of the sender." As part of the ANPR, the Commission asked whether the term "valid physical postal address" could include a Post Office box or a private mailbox and whether the Commission should clarify the scope of the term. In our comments on the ANPR, we advocated that the Commission provide that a Post Office box or any other address to which mail is delivered satisfy the requirement of the Act. Therefore, we applaud the Commission for proposing that a sender may comply with the relevant requirement in the Act by using any of the following: (i) the sender's current street address; (ii) a Post Office box the sender has registered with the United States Postal

Service (“USPS”); or (iii) a private mailbox the sender has registered with a commercial mail receiving agency (“CMRA”) that is established pursuant to USPS regulations.

Although we believe the Proposal includes helpful clarifications, we reiterate our recommendation that the Commission allow a sender to include an address to which mail is delivered as the “valid physical postal address.” In this context, the objective of the Act is achieved—the consumer has a mechanism to contact the sender other than by e-mail. So long as the sender provides this mechanism, we believe it should be deemed to be in compliance with the relevant requirement.

If the Commission retains the clarification provided in the Proposal, we ask for two minor modifications. First, we do not believe that it is necessary that the sender has registered the Post Office box with the USPS so long as it is a Post Office box at which the sender receives mail. For example, it may be that several affiliated corporate entities receive mail at the same Post Office box, while not all of them have registered with the USPS. It may be also that an individual has registered with the USPS but also receives mail for his or her separately incorporated sole proprietorship at the Post Office box. We do not believe the Commission intended to disqualify these circumstances with respect to listing a valid Post Office box in a commercial e-mail.

We also note that the Proposal would require that a private mailbox the sender registers with a CMRA must be established pursuant to USPS regulations.<sup>4</sup> Such a requirement may place a compliance determination on the sender for which the sender has no expertise. In particular, if the private mailbox (or the CMRA) is not established pursuant to USPS regulations, the address would not meet the Commission’s standard for compliance. We respectfully suggest that it is not reasonable to require the sender to make a determination as to whether or not the establishment of the mailbox meets every potentially applicable regulatory requirement. The sender reasonably expects the CMRA to establish the mailbox in an appropriate and legal manner. The sender should not be held liable for violations of the CAN-SPAM Act simply because the CMRA is not complying with regulations unknown to the sender—especially because senders who use CMRAs are likely to be smaller businesses who will not have the resources to perform the due diligence required by the Proposal.

### **Forward-to-a-Friend Scenarios**

The ANPR discussed the Act’s applicability to “forward-to-a-friend” (“FTF”) scenarios. MasterCard provided comments to the ANPR, which we repeat here. In particular, MasterCard believes that the simplest approach to clarifying this situation would be to exclude from the definition of a commercial e-mail an e-mail that is sent pursuant to a bona fide FTF program. This would permit a person to share a commercial offer with a friend via e-mail without the person who sends the e-mail, or the company whose product is the subject of the e-mail, risking a violation of the law. In this regard, when enacting the CAN-SPAM Act, Congress intended to regulate communications

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<sup>4</sup> It is not clear to us whether the mailbox must be established pursuant to USPS regulations or the CMRA must be so established.

between commercial entities and consumers. It did not intend to regulate e-mails sent among friends, acquaintances, co-workers, etc., especially when a person has reason to believe his or her friend would have an interest in the content of the e-mail. MasterCard recognizes that the Commission must be careful not to create a loophole that allows an illegitimate spammer the ability to send an e-mail to a “friend” only to have the “friend” (*i.e.*, another spammer) send the e-mail to millions of recipients and escape the requirements of the Act. We believe that the interpretation should apply only in those circumstances in which a legitimate FTF campaign is being conducted.

We believe that the above clarification is critical. For example, we note that the Commission’s discussion of this issue has not addressed situations in which the consumer is allegedly “induced” through means other than e-mail. For example, by the Commission’s interpretation, it would appear that if a bank places a sign in its branch encouraging its customers to e-mail their friends about the bank’s products (*e.g.*, “E-mail your friends about our on-line bill payment service!”), the bank could be deemed to violate the Act because any resulting e-mails generated by its customers would not contain the necessary disclosures or be “scrubbed” against the bank’s opt-out list.<sup>5</sup> This simply cannot be what Congress intended—nor do we believe the Commission intends for such a result. Indeed, in this situation, it seems clear that the recipient would not receive the e-mail from the bank, begging the question as to why the Act should apply to the bank in this circumstance. Nor would the recipient have expectations for the protections provided by the Act if he or she receives an e-mail from a friend or acquaintance about a bank’s product. Rather, the e-mail would be a private communication between two individuals who have some legitimate relationship with one another and therefore outside the scope of the Act altogether. We do not see a material distinction between “inducements” provided orally, on a sign, or via e-mail. Therefore, we do not believe it is as simple as applying the Act to “inducements” that are made by e-mail and not applying it when inducement is through other means. We also note that there are significant constitutional concerns relating to the First Amendment as well as fundamental due process that come into play with respect to whether a law can effectively prohibit a business from encouraging an individual to communicate with another individual about the lawful activities of such business, or holding the business liable for the content of a private communication between individuals, the content over which the business has little to no control.

If the Commission retains its general approach as outlined in the Proposal, we urge the Commission to indicate that, in the context of FTF scenarios, an e-mail is not “induced” if there is no consideration paid between the company and the consumer who forwards the e-mail. If this approach is taken, the Commission would preserve the ability to engage in legitimate FTF programs while limiting the chances that spammers will use claims of FTF activities in order to evade coverage under the Act. In so doing, however, the Commission will eliminate a company’s ability to provide consumers discounts or

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<sup>5</sup> Actually, an aggressive enforcement posture by the Commission or state attorney general could allege that the sign need not even specify that the communication be by e-mail. Rather, so long as the customer sent an e-mail in response to the encouragement to “tell a friend,” the bank would allegedly be liable for violations of the Act. MasterCard disagrees with such an interpretation, but such an allegation could be made.

other benefits in connection with an FTF program. We do not believe this is in consumers' best interests, but better than eliminating FTF programs altogether.

### **Prohibition on Imposing Requirements on Recipients Who Wish to Opt Out**

The Proposal would prohibit the imposition of any fee to implement an opt out under the Act. We applaud the Commission for proposing to prohibit explicitly the imposition of an "opt out" fee. We believe this is consistent with the intent of Congress and we urge its retention in the final rule.

The Proposal would also prohibit any requirement to provide personally identifying information (beyond one's e-mail address) or any other obligation as a condition of accepting or honoring a recipient's opt-out request under the Act. MasterCard agrees with the Commission that a sender should not be able to thwart a consumer's desire to opt out by making the process unnecessarily complicated or frustrating. However, there are legitimate reasons as to why a sender may request the consumer to provide more than an e-mail address. For example, if the consumer has an on-line account with the sender, the sender may ask that the consumer make his or her opt-out preference through the on-line account mechanisms, which may require passwords, PINs, etc. This gives the consumer and the sender a greater deal of certainty. By requesting the consumer to log into their account, the consumer may feel more confident that the entire process is not a "phishing" or similar scam simply trying to uncover valid e-mail addresses or other information.<sup>6</sup> The sender also has better certainty that it is implementing the wishes of its consumer, benefiting both parties. For example, on a joint e-mail account, one person may attempt opt out even though the other does, in fact, want information from the company with which he or she has an account. Requiring the requester to log in to the appropriate account would reduce these misunderstandings.

Nonetheless, we share the Commission's overall concern. The opt out process should not require unnecessary processes or the collection of information not reasonably necessary to provide the opt out. MasterCard believes that requesting a consumer to log in to an existing account, for example, would not violate this policy. We urge the Commission to consider these and similar situations.

### **Duration of Opt Outs**

The Proposal does not propose a time limit on the duration of an opt out. We urge the Commission to provide for such a limit. In particular, we believe a consumer's opt out under the Act should expire after five years. Such a limit is consistent with similar privacy protections offered by the Commission, most notably under the national do-not-call list. We believe similar justifications are present with respect to the Act. For example, like telephone numbers, e-mail addresses change frequently and can be reassigned. Therefore, it seems unusual that once an e-mail address has been added to an opt-out list, it must be retained forever. Second, without allowing for opt outs to expire, managing opt-out lists could become quite challenging for large senders. It is not unreasonable to believe that

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<sup>6</sup> For example, a financial institution may adopt an anti-phishing program and inform consumers that it will never request information from them in an on-line setting unless certain codes are provided or received.

some opt-out lists will include tens of millions of addresses to be maintained and “scrubbed.” Third, we do not believe that there is a significant burden to consumers to renew an opt out under the Act every five years. In fact, the reminder to renew the opt out on an e-mail (*i.e.*, the receipt of one) is far less burdensome than the reminder to renew the opt out on telemarketing (*i.e.*, the receipt of telemarketing calls for a month). Therefore, we request the Commission to consider adopting a five-year time limit on the duration of an opt out.

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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,

  
Jodi Golinsky  
Vice President and  
Senior Regulatory Counsel

cc: Michael F. McEneney, Esq.