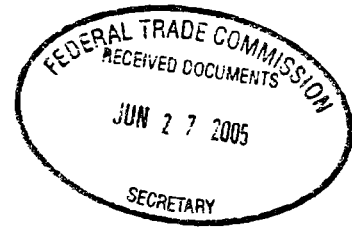


BANK

June 27, 2005



Federal Trade Commission/Office of the Secretary  
Room H-159  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

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

Ladies and Gentlemen:

Discover Financial Services, which includes Discover Bank (collectively "Discover") appreciates the opportunity to comment on the Commission's Notice of Proposed Rulemaking ("NPRM") to amend and clarify certain definitions and substantive provisions under the Controlling the assault of Non-Solicited Pornography and Marketing Act of 2003 (the "CAN-SPAM Act"), specifically:

1. Defining the term "person," which is not currently defined under the Act;
2. Modifying the definition of "sender" to address scenarios in which a single email message contains advertisements from multiple entities;
3. Clarifying that Post Office boxes and private mailboxes established pursuant to United States Postal Service regulations are "valid physical postal addresses;"
4. Shortening from ten days to three the time a sender may take to honor a recipient's opt-out request; and
5. Clarifying that to submit a valid opt-out request, a recipient may not be required to pay a fee, provide information other than his or her email address and opt-out preferences or take any steps other than sending a reply email message or visiting a single Internet Web page.

Other topics addressed in the NPRM include the definition of "transactional or relationship message;" the Commission's views on how the CAN-SPAM Act applies to certain e-mail marketing practices, including "forward to a friend" e-mail marketing campaigns; and the Commission's determination not to designate additional "aggregated violations" under section 7704(c)(2) of the Act.

Discover Financial Services, a business unit of Morgan Stanley, operates the Discover Card with more than 50 million Cardmembers, the Discover Network, with more than 4 million merchant and cash access locations and the PULSE ATM/Debit network currently serving over 4,000 banks, credit unions and savings institutions.

Following is Discover's response to the Commission's request for comment:

## Questions on Proposed Specific Provisions

### 1. Section 316.2 – Definitions

**a. Does the proposed definition of “person” clarify those individuals and entities that are covered by the Rule and the Act? Should the proposed definition be modified? If so, how?**

Discover believes that proposed definition of “person” adequately clarifies that “any individual, group, unincorporated association, limited or general partnership, corporation or other business entity” is covered by the Rule and the CAN-SPAM Act and that it does not need to be further modified. Discover agrees that it would be beneficial to clarify in the CAN-SPAM Act that the term “person” is broadly construed, and is not limited solely to a natural person.

**b. Does the proposed definition of “sender” clarify who will be responsible for complying with the CAN-SPAM Act when a single e-mail contains content promoting or advertising the products, services, or Web sites of multiple parties? Should the proposed definition be modified? If so, how? Do the proposed criteria provide adequate guidance to establish who is the sender when there are multiple advertisers?**

Discover believes that the proposed definition of “sender” does help to clarify who will be responsible for complying with the CAN-SPAM Act when a single e-mail contains content promoting or advertising the products, services, or Web sites of multiple parties. Discover agrees with the Commission that this change would benefit both companies sending commercial e-mail messages and consumers. However, Discover believes that the proposed definition should be further clarified in order to provide more specific guidance as to who “controls the content” of an e-mail message in the case when more than one person’s products or services are advertised or promoted in a single e-mail message. Discover believes that it is critical that the criteria established to determine who is the sender is clear and concise and does not leave room for different interpretations, given the consequence that if another advertiser satisfies any one of the three proposed criteria, that advertiser will be also deemed a “sender.” If another advertiser were to be deemed a “sender,” significant time and coordination between the senders would be necessary to suppress the opt-outs collected from both senders. Discover recommends that the Commission clarify that the mere fact that an advertiser has the right to approve the specific content in an e-mail message or offer relating to that advertiser’s product or service, does not by itself deem the advertiser to “control the content” of the message and thereby make it a “sender”.

**c. Should opt-out obligations be extended to third-party list providers who do nothing more than provide a list of names to whom others send commercial e-mails? If so, how could this be accomplished, given the statutory language which defines “sender” in terms of an entity that both initiates a message and advertises its product, service, or Internet web site in the message?**

Discover believes that opt-out obligations should be extended to third-party list providers who provide a list of e-mail addresses to which others send commercial e-mails. Discover believes that if it is not clear to recipients that an e-mail is being sent because the recipients opted-in to receive e-mail communications from the third-party list provider, they might wrongfully think that the advertiser, with whom they have no direct relationship, is sending unsolicited e-mail. Discover believes that this could be partially remedied if the Commission were to modify or clarify the definition of “sender” to include third party list providers who provide a list of e-mail addresses to which others send commercial e-mails.

**d. Should the Commission adopt a “safe harbor” with respect to opt-out and other obligations for companies whose products or services are advertised by affiliates or other third parties? If not, why not? If so, what would be the appropriate criteria for such a safe harbor?**

Discover believes that the Commission should adopt a “safe harbor” with respect to opt-out and other obligations for companies whose products or services are advertised by affiliates or other third parties. Discover believes that if an advertiser has no direct relationship with a recipient, the third party who actually has the direct relationship should be solely responsible for providing the opt-out mechanism, since the advertiser’s message is simply content in a communication that was delivered as a result of the recipient’s relationship with the third party.

**e. Does the proposed definition of “valid physical postal address” clarify what will suffice under the Act’s requirement that a sender include such an address in a commercial e-mail? Should the proposed definition be modified? If so, how?**

Discover believes that the proposed definition of “valid physical postal address” adequately clarifies what will suffice under the Act’s requirement that a sender include such an address in a commercial e-mail and that it does not need to be further modified.

Discover agrees with the Commission’s proposal that the CAN-SPAM Act’s requirement of a “valid physical postal address” should be interpreted as including a Post Office box. Many valid reasons exist for senders not to be required to include a street address in a commercial e-mail message. Numerous companies use Post Office boxes to manage receipt and distribution of mail to assure accountability and control. In addition, many companies are justifiably concerned that the publication of street addresses could needlessly put their employees’ safety at risk. We therefore urge the Commission to clarify that a Post Office box is a valid physical postal address under the CAN-SPAM Act.

**f. Should CAN-SPAM apply to e-mail messages sent to members of online groups? What types of online groups exist? How are they formed? Does formation typically address the use of unsolicited commercial e-mail with respect to the group? How are e-mail messages transmitted or posted to an online group?**

**Should members be able to opt-out of unwanted commercial messages while continuing to receive messages relating to the subject matter of the group? Does this analysis change depending on whether the message is sent by a group member or a source outside the group? Does this analysis change depending on whether the message is unrelated to the subject matter of the online group? Does this analysis change if the online group has a moderator who decides which message to forward to the group?**

**2. Section 316.2(o) – “Transactional or Relationship Message”**

**a. If an e-mail message contains only a legally mandated notice, should this message be considered a transactional or relationship message? Which, if any, of the existing categories of transactional or relationship message would such a message likely fit into? If such a message were considered not to have a transactional or relationship purpose, would it be exempt from regulation under the Act?**

Discover strongly believes that an e-mail message that contains only a legally mandated notice should be exempt from regulation under the CAN-SPAM Act because its primary purpose is not “the commercial advertisement or promotion of a commercial product or service.”

**b. Should debt collection e-mails be considered “commercial”? Or should debt collection e-mails be considered transactional or relationship messages that complete a commercial transaction that the recipient has previously agreed to enter into with the sender? Such an interpretation assumes that the entity with whom the recipient transacted business is the entity sending the collection e-mail, or that the term “sender” can be interpreted to encompass a third party acting on behalf of one who would otherwise qualify as a sender. Can a third-party debt collector be considered a “sender”?**

Discover strongly believes that debt collection e-mails should be exempt from regulation under the CAN-SPAM Act. Debt collection e-mails are sent well after a relationship has been entered into, and are not the type of messages contemplated by the CAN-SPAM Act, since their primary purpose is not “the commercial advertisement or promotion of a commercial product or service.”

In addition, Discover believes that the company with which the customer is doing business should be considered the sender, not a third party debt collector. As the Commission stated on page 20 of the NPRM , ...

”the Act reflects Congress’s determination that the obligation of the ‘sender’ will fall only on an entity whose products or services are advertised in the message, even though other parties may also transmit or procure the transmission of the message. The Act’s definition of ‘sender’ simply does not apply to entities that do nothing more than provide a list of names or transmit a commercial e-mail

message on behalf of those whose products or services are advertised in the message.”

Since a debt collector is retained by a company simply to collect a debt from a customer on behalf of the company and the primary purpose of the e-mail communication is not to advertise a product or service, Discover believes a debt collector should not be considered a “sender.”

**c. Are there any messages that fall outside of the reach of the proposed Rule that should not? If so, how might this be remedied?**

Discover is not aware of any such messages.

**d. Can a “commercial transaction” under section 7702(17)(A)(i) exist even in the absence of an exchange of consideration?**

Discover believes that a “commercial transaction” under section 7702(17)(A)(i) can exist even in the absence of an exchange of consideration if the parties are entering into a mutual obligation, such as a consumer submitting a credit card application to a financial institution or enrolling to use a free service.

**e. If the primary purpose of an e-mail message is to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender, it is a transactional or relationship message under section 7702(17)(A)(i). Should messages from affiliated third parties that purport to be acting on behalf of another entity (the one with whom the recipient transacted) be considered transactional or relationship messages under this provision?**

Discover believes that if the primary purpose of an e-mail message is to facilitate, complete or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender, it is a transactional or relationship message under section 7702(17)(A)(i). Discover also believes that such messages from affiliated third parties that purport to be acting on behalf of another entity should be considered transactional or relationship messages under this provision.

**f. Under what, if any, circumstances should an e-mail message sent to effectuate or complete a negotiation be considered a “transactional or relationship message” under section 7702(17)(A)(i)?**

Currently, the CAN-SPAM Act provides under section 7702(17)(A)(i) that the term “transactional or relationship message” means “an electronic mail message the primary purpose which is to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender.” Discover believes that this definition should be expanded to include not only situations in which a deal has closed, but also situations in which the parties are effectuating or completing an ongoing negotiation (for example, one party provides a counter-offer).

**g. Is it appropriate to classify messages offering employee discounts or other similar messages as transactional or relationship messages that “provide information directly related to an employment relationship”? Is a relevant factor the employer’s provision of the e-mail address to which such message are sent to the employee? For example, should all messages sent from an employer to an employee at the employer-provided e-mail address be considered transactional or relationship under section 7702(17)(A)(iv)?**

Discover believes that an e-mail message that offers employee discounts or other similar messages should be exempt from regulation under the CAN-SPAM Act when the message is sent to an employer-provided e-mail address. Discover believes that a company should be permitted to send e-mail communications to an employee in its sole discretion if those communications are sent to a company-provided e-mail address, since the e-mail address is not the property of the employee. A company-provided e-mail address is a tool created by an employer to allow the company, in its sole discretion, to facilitate communication to its employees. However, if the e-mail message is sent to an employee’s personal e-mail address, Discover believes the message should be considered a transactional or relationship message that “provide(s) information directly related to an employment relationship” under section 7702(17)(A)(iv).

**h. The Commission believes that an e-mail message sent on behalf of a third party, even with the permission of an employer, is not “transactional or relationship.” Is there any such scenario in which the e-mail message at issue could be considered “transactional or relationship”? If so, explain.**

**i. For purposes of section 7702(17)(A)(iv) of the Act, should “provid[ing] information directly related to an employment relationship” include providing information related to such a relationship after an offer of employment is tendered?**

Discover believes that for purposes of section 7702(17)(A)(iv) of the Act, “provid[ing] information directly related to an employment relationship” includes providing information directly related to such a relationship after an offer of employment is tendered, since parties generally engage in negotiations regarding an offer of employment until the parties reach an agreement as to the final terms of the offer and the offer is accepted.

**j. Where a recipient has entered into a transaction with a sender that entitles the recipient to receive future newsletters or other electronically delivered content, should e-mail messages the primary purpose of which is to deliver such products or services be deemed transactional or relationship messages?**

Discover is concerned that if the primary purpose of a newsletter were to automatically be deemed to be a transactional or relationship message, unscrupulous companies could take advantage of this exception, since they would not be legally required to provide an













