ePrize

One ePrize Drive ■ Pleasant Ridge, MI 48069
t. 248.543.6800 f. 248.543.3777 ■ www.eprize.com

June 27, 2005

FEDERAL TRADE COMMISSION
RECEIVED DOCUMENTS
JUN 27 2005
SECRETARY

The Honorable Donald S. Clark
Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, NW
Washington, DC 20580

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

Dear Mr. Secretary,

I am pleased to submit these comments ("Comments") on behalf of ePrize, LLC ("ePrize") in response to the Federal Trade Commission's ("FTC" or "Commission") Notice of Proposed Rulemaking, published in the Federal Register, 16 C.F.R. 316, on May 12, 2005, regarding regulations to be enacted under the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act" or "the Act").

ePrize is a full-service promotion agency that provides the strategy, creative design, and technological implementation that allows its clients to carry out creative and successful online promotions. ePrize has created promotions for brands such as General Motors, Crest, Pampers, Black & Decker, Home Depot, Target, Coca-Cola, PETsMART, Hanes, Barnes & Noble, the states of Arizona and New Jersey, the United States Postal Service, and the United States Army, to name only a few. The most experienced interactive promotion agency in the world, ePrize has developed and managed more than 1,400 campaigns for major brands since 1999.

Because of ePrize's focus on quality electronic communication with consumers, the company remains strongly committed to reducing the burden of unwanted commercial e-mail on consumers and supports the goals of the CAN-SPAM Act. The problems caused by illegitimate "spammers" are daunting to both the regulatory community and the community of legitimate online marketers, and ePrize applauds the Commission for its continuing efforts to address these difficult issues and to develop regulations that will ensure effective implementation of the Act. To that end, ePrize provides the following Comments in an effort to provide insight into the practical effect of the Commission's proposed interpretation of the Act with respect to "Forward-to-a-Friend" e-mails.

Forward-to-a-Friend marketing provides an effective and welcome alternative to traditional mass e-mailing methods of communication with consumers. Legitimate marketers, like ePrize's clients, develop their online promotions in such a way as to ensure that the only consumers who receive e-mails about the promotion are those who are likely to be interested in the promotion. Therefore, a popular component of these promotions is the "Forward-to-a-Friend" feature, which allows participants in the promotion to send a message to friends they think are likely to be interested and refer them to the promotion Web site.

In ePrize-designed promotions, "Forward-to-a-Friend" e-mails do not contain any commercial advertisements, nor do they contain content about its clients' products or services. These e-mails simply inform the friend about a skill- or chance-based contest and provide a link to the contest Web site.[1] The person sending the e-mail could send the same e-mail to her friend via her own e-mail service provided by her internet service provider or through any number of "free" e-mail services. Alternatively, she could use the "Forward-to-a- Friend" mechanism. Either way, she is able to communicate rapidly. And, either way, the marketer sponsoring the contest is satisfied because the person sending the email is spreading news about the promotion.

ePrize's version of "Forward-to-a-Friend" conveyance is called "Tell-a-Friend." Tell-a-Friend is easier and more immediate than if the participant had to cut and paste the link to the promotion and then send it to her friend. In addition, the Tell-a-Friend component is integrated into the promotional experience. In these promotions, the promotion Web site typically prompts registrants to tell friends about the contest and earn extra entries and provides a form where they may enter up to a certain number of friends' names and e-mail addresses, typically no more than five. ePrize's server then automatically transmits the Tell-a-Friend message to the referred friend, identifying the original registrant in the "from" line and personalizing the e-mail with the sender and recipient's names. ePrize's server retains that information in an unreadable format, then deletes it permanently at the conclusion of the promotion. No lists are compiled with this information, no e-mails are ever sent by ePrize or its clients to these recipients, and none of this information is transmitted to or otherwise shared with ePrize's client. The sole purpose of this mechanism is to automatically transmit e-mails from registrants to their friends. If the recipient of a Tell-a-Friend e-mail were to click the "reply" button in her e-mail program, the reply e-mail would transmit directly back to the referring friend.

Tell-a-Friend e-mails are sent in extremely low volumes, but produce effective results for ePrize's clients. In ePrize-designed promotions, an average of 27% of participants refer friends to the promotion, and each referrer sends an average of only 3.7

---

[1] A typical sample Tell-a-Friend e-mail, taken from a recent ePrize-designed promotion, included the following text:

> Hi Courtney,
>
> I just entered for a chance to win an all expenses paid trip to Italy for 2 people for 4 nights from Zagat Survey in the Upgrade your Experience Sweepstakes. The good news is that you can enter for a chance to win too!
>
> Just go to http://www.zagat.com and you could be the lucky Grand Prize Winner! Good luck!
>
> Your Friend,
>
> Raquel Vaughan

e-mails to friends via the mechanism on the promotion Web site. An average of nearly 10% of total registrants in each promotion learn of the promotion from Tell-a-Friend e-mails. In all of the promotions ePrize designed and administered in 2004, between 7.5 and 10 million Tell-a-Friend emails were sent.[2]

ePrize's clients also typically employ a range of protections to minimize the potential for abuse. Promotions typically limit each registrant to a maximum of five or fewer Tell-a-Friend e-mails during the entire promotion. Promotions also often include a mechanism to ensure that a participant does not send a Tell-a-Friend e-mail to the same person multiple times or abuse the system to harass another person. Finally, the rules of a promotion, which participants must agree to in order to participate, always require that they may forward these messages only to actual friends, people with whom they have a personal relationship.

The Act Does Not Apply to All "Forward-to-a-Friend" Transmissions

Although the CAN-SPAM Act does not address "Forward-to-a-Friend" e-mails, the Commission has expressed certain viewpoints regarding how these e-mails should be interpreted under the language of the Act. Under the plain language of the Act, the transmission of "Forward-to-a-Friend" e-mails constitutes "routine conveyance" and is therefore exempted from the requirements of the Act. The appropriate analysis under the language of the Act when determining whether an e-mail has been "initiated" is to first consider whether the action falls within the definition of "routine conveyance." If it does, then that activity is an exception to the definition of "initiate" and, thus, to the requirements under the Act. Because "Forward-to-a-Friend" mechanisms simply transmit, through an automatic technical process, messages for which another person has identified and provided the recipient addresses, these transmissions fall well within the statutory definition of "routine conveyance" and are exempted from regulation by the terms of the Act.

This interpretation of the Act not only tracks the plain language of the statute, but is also consistent with Congress' desire to balance the efficiency and convenience of e-mail communication with the concerns related to the dangers and intrusions of massive amounts of unsolicited e-mail. Furthermore, this interpretation will not eviscerate the Act because it will still apply to e-mail marketing methods that use referral techniques to develop e-mail databases for marketing purposes—the real danger that Congress sought to regulate when it passed the CAN-SPAM Act.

---

[2] Contrast this number to the 180 million e-mails sent out every 12 hours by only one "spammer," Scelson Online Marketing, an e-mail marketing company whose owner testified before the Full Committee Hearing on the CAN-SPAM Act in the Senate Committee on Commerce, Science & Transportation (Hearing Transcript available at http://commerce.senate.gov/hearings/testimony.cfm?id=773&wit_id=2094). This company is just one example of the high-volume online marketers at whom the Act was targeted. By comparison, the number of Tell-a-Friend e-mails is *de minimis.*

1. The "Routine Conveyance" Definition Does Not Include the Concepts of "Consideration" or "Inducement"

In the Notice, the Commission differentiates between "Forward-to-a-Friend" opportunities that provide inducement or consideration and those that do not, specifying that the former are not routine conveyance.[3] Neither the statutory definition of "routine conveyance" nor the legislative history behind it differentiate between what is and what is not a routine conveyance based on whether consideration or inducement is provided. Consideration and inducement are factors that are mentioned in the statute to determine whether an e-mail has been "initiated," but "routine conveyance" is a category of activity that is wholly excepted from the definition of "initiate" by the statute.

The Commission's analysis focuses on language from the Report of the Senate Committee on Commerce, Science, and Transportation.[4] There, the definition of "initiate" is explained more fully, noting that "a company that merely engages in routine conveyance, such as an ISP that simply plays a technical role in transmitting or routing a message and is not involved in coordinating the recipient addresses for the marketing appeal, shall not be considered to have initiated the message."[5] In the Notice, the Commission explains its interpretation of this language, noting that "[i]n such cases [where a seller offers payment or consideration for the sending of an e-mail], the Commission believes that the seller is 'involved in coordinating the recipient addresses for the marketing appeal.'"[6] However, there is nothing in the legislative history to indicate that Congress believed that providing consideration for the sending of an e-mail was tantamount to "coordinating the recipient addresses for the marketing appeal." This language should be read to mean exactly what it says—taking some affirmative action to provide or coordinate the recipient addresses for the e-mail. "Forward-to-a-Friend" opportunities, whether incentivized or not, do not involve the promoter's participation in providing or coordinating the recipient addresses. Therefore, "Forward-to-a-Friend" opportunities, whether incentivized or not, fall within the category of routine conveyance and are exempted from the application of the statute.

Of course, the scenario fundamentally changes where a company in addition to offering an incentive for registrants to refer friends, then retains and compiles the referred names and e-mail addresses for its own use, as described below on page 8 of this Comment. This type of program is, at bottom, simply the purchase and compilation of e-mail addresses. In these situations, the company's action would rise to the level of "coordination," and the "routine conveyance" exception should not apply. However, "Forward-to-a-Friend" mechanisms that do not compile or collect data, like ePrize's Tell-a-Friend, do fall within the "routine conveyance" exception because no action is taken on the part of the promoter to "coordinate[e] the recipient addresses for the marketing appeal."

---

[3] 70 Fed. Reg. at 25442.

[4] S. Rep. No. 108-102, at 15 (2003).

[5] *Id.*

[6] 70 Fed. Reg. at 25442.

2. "Forward-to-a-Friend" Transmissions are "Routine Conveyance" Under the Act

The Act provides a clear definition of "routine conveyance," one which should require little refinement from the regulatory process. The Act defines "routine conveyance" as follows:

> The term "routine conveyance" means 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* [emphasis added].[7]

This definition sets forth specific key elements: that the transmission of the message is carried out via an "automatic technical process" and that the recipients and recipient e-mail addresses have been provided by "another person." At no point does this definition specify that a transmission is not a "routine conveyance" if it is induced or incentivized.

The basic "Forward-to-a-Friend" model, as described above, is well within this definition of a "routine conveyance." Forwarded e-mails are transmitted via an automatic process by the promoter's computer servers, and no person at the promoter participates in this sending process or is even aware that it is happening. Similar to an ISP, the promoter's server is simply used as a technical vehicle to easily convey the forwarded message from one friend to another. Furthermore, the promoter plays no role in identifying recipients or recipient addresses. As the definition specifies, "another person," the friend in this situation, identifies the recipient and provides the recipient address. Therefore, this basic "Forward-to-a-Friend" opportunity falls clearly within the definition of a "routine conveyance" and is, under the language of the statute, exempted from regulation under the Act.

Congress Did Not Intend to Regulate These Types of E-mail

The interpretation of "Forward-to-a-Friend" opportunities as falling within the category of routine conveyance is consistent not only with the statutory language, but also with Congress' intent. As Congress articulated in the Congressional Findings and Policy section of the Act, it was attempting to balance the importance, convenience, and efficiency of e-mail as a means of communication against the dangers posed by rapid growth in the volume of unsolicited, often fraudulent or deceptive, commercial e-mails.[8] "Forward-to-a-Friend" e-mails do not pose any of the problems that concerned Congress when it passed the Act, and so the application of the Act's exception for routine conveyance to these types of e-mails is entirely consistent with the purposes of the Act.

In providing an exception for routine conveyance, Congress clearly intended to exempt any company, "such as an ISP that simply plays a technical role in transmitting or routing a message and is not involved in coordinating the recipient addresses for the

[7] 15 U.S.C. § 7702(15) (2005).

[8] 15 U.S.C. § 7701(a)(1)-(2) (2005).

marketing appeal."[9] The typical example of a routine conveyance is MSN Hotmail, a free, Internet-based e-mail provider. Hotmail transmits e-mails from its users to their friends and colleagues, all transmissions are done in a technical, automatic way, and Hotmail plays no role in coordinating the recipient addresses for these e-mails. There are many similar free e-mail providers, and it seems clear that Congress intended for the routine conveyance exception to encompass just this sort of activity.

However, under the Commission's current reading of the "routine conveyance" exception, all of these e-mail providers would be considered to be the senders of commercial electronic mail messages and should be subject to all the requirements the Act. Hotmail places, at the bottom of e-mails that it transmits, advertisements for MSN services.[10] Furthermore, Hotmail provides valuable consideration in exchange for this conveyance of an advertisement—a free e-mail account, with a number of special features, to the user.[11] Thus, under the Commission's analysis, because Hotmail provides consideration to its members in exchange for conveyance of its advertisements via e-mails from members to their friends, these e-mails would not be considered routine conveyance and could be subject to all the regulations of the Act.[12]

Evite, another free online service, would also fall outside of the definition of "routine conveyance," under the Commission's definition. Evite provides free Web space and design assistance, allowing users to create online party invitations, invite people to the party, and track responses from invitees. As on Hotmail's service, members enter the e-mail addresses of the recipients, and Evite has no control over the recipient addresses. However, the e-mails that are sent via Evite's service include only the title of the party and a link to the specific Evite party invitation site, a commercial site that includes a great deal of advertising. Evite provides consideration—the free use of its Web site and server space—to members in exchange for placing advertising messages on the online invitations. Evite currently provides registered users the option of opting out of future invitations from a specific user, but it provides no opportunity to opt-out of all future invitations sent via Evite.

---

[9] S. Rep. No. 108-102, at 15 (2003).

[10] When tested on June 23, 2005, a Hotmail e-mail included an advertisement for MSN search capabilities, telling the recipient: "Don't just search. Find. Check out the new MSN Search!" This advertisement also provided a link to the promotional page for the new MSN Search. Another promotional tagline at the bottom of a Hotmail e-mail advertised the company's MSN Messenger service.

[11] A free MSN Hotmail account includes a 250 MB inbox, Microsoft's "SmartScreen technology" junk e-mail filter, virus-scanning, MSN Calendar Sharing, address book, "MSN Designer E-mail," MSN Messenger service, and a dictionary, thesaurus, and spell check service.

[12] Hotmail, since its inception, has been seen by many industry experts as a textbook example of a "viral marketing" success story. *See* Emanuel Rosen, THE ANATOMY OF BUZZ: HOW TO CREATE WORD OF MOUTH MARKETING 22 (2002) (describing how Hotmail acquired 12 million users in its first 18 months using only word-of-mouth marketing, placing promotional taglines at the bottom of every e-mail sent by the service, advertising itself to recipients).

The incentivized "Forward-to-a-Friend" campaigns used by ePrize's clients and described in this Comment are no different in form or function from the services provided by Hotmail and Evite, and Congress clearly intended to exempt all such services under the "routine conveyance" exception. "Forward-to-a-Friend" opportunities like the ePrize Tell-a-Friend feature provide consideration, in most cases extra sweepstakes entries, to registrants who forward on a message to their friends about the sweepstakes and not about any particular goods or services. This is no different from Hotmail providing a free e-mail account to members who allow Hotmail to attach advertisements to every e-mail they send, or from Evite providing free online party planning to users who send links to advertising-laden Evite sites to their friends. The real difference between "Forward-to-a-Friend" opportunities and services like Hotmail or Evite is that the consideration or inducement involved is much smaller, and the number of people reached by the advertising message is much lower.[13]

Congress made a very specific policy decision to exempt e-mails that fall within the category of "routine conveyance" from regulation under the statute, reflecting an understanding that ISPs and similar providers who have no influence or control over the recipient addresses for those e-mails should not be regulated. Specifically, the statutory definition for "routine conveyance" does not differentiate based on whether or not consideration or inducement was provided. Rather, this definition focuses on the technical, automatic nature of the conveyance, a focus that makes sense in light of Congress' intent to regulate only the entity that "coordinate[es] the recipient addresses for the marketing appeal." Therefore, both the plain language of the statute and Congress' intent behind providing the "routine conveyance" exception support the conclusion that "Forward-to-a-Friend" e-mails, whether incentivized or not, should not be regulated under the statute.

Congress Did Not Intend to Hinder Legitimate Commercial Uses of E-mail

In passing the CAN-SPAM Act, Congress intended to protect legitimate commercial uses of e-mail, not to hinder or effectively eliminate those uses. In the Congressional Findings and Policy section, the statute describes the "unique opportunities" offered by e-mail "for the development and growth of frictionless commerce," and expresses Congress' concern that, if left unchecked, unsolicited commercial "spam" would overwhelm the e-mail system and destroy the value of the e-mail medium. The use of "Forward-to-a-Friend" campaigns to spread the word about a promotion is just the sort of legitimate, non-

[13] A single Evite invitation, created by a single person, can include hundreds of invitees. On the site's "Evite Facts" page, it cites an average of 200,000 events per month with 8 million invitations sent, numbers that average out to about 40 invitations per event. Evite Facts (available at http://www.evite.com/pages/gt/advertise/ad_facts.jsp). In February 2004, Evite announced that "in 2003, the site had over 865 million page views, hosted almost 2 million events, and delivered over 65 million email-based invitations." Press Release: Evite announces 100% year-on-year traffic growth (available at http://www.evite.com/pages/gt/press/pressReleases/020404.jsp). In contrast, typical "Forward-to-a-Friend" programs allow only a limited number of emails to be sent by a single user, typically fewer than five.

threatening use of e-mail that Congress was trying to protect, not hinder, when it passed the Act.

"Forward-to-a-Friend" campaigns are the electronic equivalent of customer loyalty programs or referral bonuses that go on every day in American business. A popular Washington, DC hair salon offers a free haircut for every two referrals a client brings in,[14] for example, and sales of certain brands like Avon or Mary Kay rely almost entirely on word-of-mouth marketing, often incentivized.[15] Providing a small incentive for a promotion participant to forward the promotion to a friend is no different, only it takes place via e-mail.

Furthermore, compliance with the various requirements of the CAN-SPAM Act would destroy the essentially "friend to friend" nature of these e-mails. Disrupting transmission of an e-mail to scrub it against an opt out list, providing opt-out information in the e-mail, and providing the physical address for the promoter and other information in the email makes it more commercial in nature, lessening the "word of mouth" credibility that attaches to it. At bottom, these e-mails are messages from one friend to another, telling the friend about a promotion in which he may be interested. This kind of referral, "word of mouth" marketing goes on every day via in-person or telephone communications, and it would be contrary to Congress' intent to remove e-mail as a communication option for these messages.

The "Routine Conveyance" Exception Does Not Swallow the Rule

The application of the statute's exception for "routine conveyance" to e-mail transmissions that legitimately fall within that definition will not hinder the enforcement of the Act against actual spammers. The definition of "routine conveyance" contains two major requirements: that the transmission be carried out via an "automatic technical process" and that "another person has identified the recipients or provided the recipient addresses."[16] If a promoter merely provides the mechanism by which an e-mail can be sent and provides some incentive for people to use it, but retains no control over when, how often, or even if these e-mails will be sent out by the server, that mechanism is an "automatic technical process." Further, if "another person," such as a registrant in a promotional contest, enters the names and e-mail addresses of friends and takes action to send those e-mails, then "another person has identified the recipients or provided the recipient addresses." These conditions are some of the fundamental characteristics of the kind of "Forward-to-a-Friend" mechanism used by ePrize's clients, and this interpretation is consistent with the plain language and purpose of the statute. This interpretation would allow mechanisms like ePrize's Tell-a-Friend feature, Hotmail's free e-mail service, and Evite's free online party invitation site to avoid unnecessary and unintended regulation under the Act.

---

[14] PR@Partners Referral Program (see http://www.pratpartners.com/newforyou/index.asp#Compliments).

[15] Avon's consultant program, for example, focuses on word-of-mouth marketing (see http://www.avoncompany.com/about/selling.html).

[16] 15 U.S.C. § 7702(15) (2005).

There are types of "Forward-to-a-Friend" emails that do not meet the definition of "routine conveyance," and should be regulated under the Act. Specifically, "Forward-to-a-Friend" mechanisms that request, retain, and compile the recipient e-mail addresses provided by participants, and that use those complied lists of names to send future, unsolicited e-mails to those addresses, would fall outside of the definition of "routine conveyance." By collecting, organizing, and coordinating the lists of names for subsequent unsolicited e-mails, the entity effectively is "identifying" the recipients. Further, the conscious action of initiating those subsequent e-mails, using the coordinated and compiled list, would eliminate the "automatic technical" nature of the action. Thus, this sort of activity, which can lead to true "spamming" problems, is excluded from the statutory definition of "routine conveyance."

Responses to Questions Posed by the Commission

In Section VII(B)(3)(d) of the Notice, the Commission poses the following question: "are there circumstances in which a seller could offer consideration to a person to forward a commercial e-mail that should be included within the 'routine conveyance' exception?" Our response, supported by the arguments above, is "yes." Actions that truly fall within the definition of "routine conveyance" are the automatic, technical transmissions of e-mail messages for which another person has identified the recipient address, and these actions fall under the "routine conveyance" exception regardless of whether consideration or inducement were provided. This interpretation is consistent with both the plain language of the statute and with Congress' intent, and it should be the interpretation that the Commission adopts in providing guidance to the industry.

In Section VII(B)(3)(e) of the Notice, the Commission poses the following question: "does the Commission's position on 'routine conveyance' . . . impose any undue burdens on industry or consumers?" Assuming *arguendo* that the Commission considers ePrize's "Forward-to-a-Friend" scenario to fall outside the routine conveyance exception, our answer is "yes, it would pose an undue burden." The vast majority of ePrize promotions involve some sort of instant win game. The "instant" nature of the promotion is vital to its success. If an entrant can earn an additional game play by referring a friend via a "Forward-to-a-Friend" mechanism, the promotion must be capable of real time "scrubbing" against the promotion sponsor's opt-out list to comply with CAN-SPAM. This presents a substantial technological hurdle. The most efficient, most secure, and most accurate solution would require building an XML-RPC integration into the promotion. In lay terms, ePrize's server would have to "call" the promotion sponsor's server (or servers, in situations involving multiple sponsors) to access and "scrub" against the appropriate opt-out list(s). This would ensure that registrants are not able to send the message to friends who may have opted out of communications with the promotion sponsor.

The XML-RPC integration solution would require substantial software engineering for the initial build and testing as well as engineering and maintenance work during the life of the promotion. This would range anywhere from 10 to 30 hours of software engineering time depending on the sophistication of the promotion sponsor's computer system. In addition to the raw engineering, significant time necessarily would have to be spent on administrative matters to implement the integration. On average, the financial cost would

amount to approximately 15% of the total purchase price of the promotion. However, the range could go from 1%-2% on the low end, to more than 100% on the high end.

These costs, however, only reflect ePrize's side of the equation. The promotion sponsor likewise would need to write the XML-RPC language on its end so that it can communicate with the ePrize server. With larger sponsors (*e.g.*, auto manufacturers) there would be substantial additional costs associated with obtaining security and legal approval. Extrapolated across all online interactive promotions, bringing "Forward-to-a-Friend" mechanisms into compliance with the Act would cost the industry anywhere from $1,000,000 to $6,000,000 per year. It is difficult to submit a more accurate figure because of the wide range of technological and administrative capabilities among promotion sponsors in the industry, which range from small businesses with fewer than 100 employees to the largest corporations in the world.

ePrize appreciates the opportunity to provide these comments and suggestions to the Commission and looks forward to continuing discussions of the important issues surrounding the implementation of the CAN-SPAM Act with the Commission.

Very truly yours,

ePrize, LLC

Robb Lippitt
COO/General Counsel