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FEDERAL TRADE COMMISSION

SPAM TASK FORCE CALL

REGARDING REPORTS TO CONGRESS

OF THE EFFECTIVENESS AND ENFORCEMENT

OF THE CAN-SPAM ACT

Thursday, July 14, 2005

2:00 p.m

1 P R O C E E D I N G S

2 - - - - -

3 MS. HARRINGTON-McBRIDE: What I would
4 like to do to begin this call of the SPAM Task
5 Force to discuss the FTC's upcoming report on
6 the effectiveness and enforcement of Can-SPAM,
7 is to actually take roll. We had asked that
8 everyone RSVP for the call. If you're on and
9 you haven't RSVP'd, that's not a problem, as
10 long as you identify yourself after I'm done
11 taking roll, we just want to make sure for the
12 record to know who is on the call.

13 So, I will begin alphabetically by
14 organization. Ashley Fisher from Arkansas? Is
15 Ashley on?

16 (No response.)

17 MS. HARRINGTON-McBRIDE: Ian Sweedler?

18 MR. SWEEDLER: I'm here.

19 MS. HARRINGTON-McBRIDE: Hi. John
20 Neumon? John Neumon from Connecticut?

21 (No response.)

22 MS. HARRINGTON-McBRIDE: Okay.

1 Mercedes Alonzo also from Connecticut?

2 (No response.)

3 MS. HARRINGTON-McBRIDE: Julie

4 Saulnier, from the FCC?

5 MR. SUALNIER: Here.

6 MS. HARRINGTON-McBRIDE: Thank you.

7 MS. SAULNIER: Here. I also have Lloyd

8 Collier.

9 MS. HARRINGTON-McBRIDE: Great, thank
10 you. Glen Watkins from Florida?

11 (No response.)

12 MS. HARRINGTON-McBRIDE: Debbie Matties
13 from the FTC?

14 MR. DAVIS: Debbie will be joining us
15 in a few minutes.

16 MS. HARRINGTON-McBRIDE: Great. Steve
17 Cohen?

18 MR. COHEN: I'm here.

19 MS. HARRINGTON-McBRIDE: Katie
20 Harrington McBride, I am here. Allyson
21 Himelfarb?

22 MS. HIMELFARB: Yes.

1 MS. HARRINGTON-McBRIDE: Larry Hodapp?
2 MR. HODAPP: Yes.
3 MS. HARRINGTON-McBRIDE: Jay Miller?
4 MR. MILLER: Here.
5 MS. HARRINGTON-McBRIDE: Susan
6 McDonald?
7 MS. McDONALD: I'm here.
8 MS. HARRINGTON-McBRIDE: Ann Weintraub?
9 MS. WEINTRAUB: I'm here.
10 MS. HARRINGTON-McBRIDE: Maxine
11 Stansell?
12 MS. STANSELL: Here, I just joined.
13 MS. HARRINGTON-McBRIDE: Thank you.
14 Barbara Bolton?
15 MS. BOLTON: Here.
16 MS. HARRINGTON-McBRIDE: Kristen
17 Malmberg?
18 MS. MALMBERG: Here.
19 MS. HARRINGTON-McBRIDE: Those were all
20 FTC folks. Jane Hochberg from Idaho?
21 MS. HOCHBERG: Here.
22 MS. HARRINGTON-McBRIDE: Great. Adam

1 Sokol from Illinois?

2 MS. HAGAN: Katie, this is Debbie Hagan
3 from Illinois, sorry I didn't email you.

4 MS. HARRINGTON-McBRIDE: Hi, Debbie,
5 thanks for letting us know you're on. Is
6 Jennifer Meyer there?

7 MS. MEYER: Yes, I'm here.

8 MS. HARRINGTON-McBRIDE: Great, thank
9 you. Marguerite Sweeney from Indiana?

10 (No response.)

11 MS. HARRINGTON-McBRIDE: Still waiting
12 on that. Bill Brauch from Iowa?

13 (No response.)

14 MS. HARRINGTON-McBRIDE: Scott Schafer
15 from Massachusetts?

16 MR. SCHAFER: Here.

17 MS. HARRINGTON-McBRIDE: Bryan Devlin,
18 Michigan?

19 MR. DEVLIN: Here.

20 MS. HARRINGTON-McBRIDE: Hedda Litwin
21 from NAAG?

22 MS. LITWIN: Here.

1 MS. HARRINGTON-McBRIDE: Tom Taff from
2 NAAG?

3 MR. TAFF: Here.

4 MS. HARRINGTON-McBRIDE: Harriet Worley
5 from North Carolina Department of Justice?

6 MS. WORLEY: I'm on.

7 MS. HARRINGTON-McBRIDE: Leslie Levy
8 from Nebraska?

9 (No response.)

10 MS. HARRINGTON-McBRIDE: Connie
11 Stratton from New Hampshire?

12 MS. STRATTON: Here.

13 MS. HARRINGTON-McBRIDE: Jim Petroff
14 from Ohio?

15 MR. PETROFF: Ohio is here.

16 MS. HARRINGTON-McBRIDE: Thank you.
17 Julie Bays from Oklahoma?

18 MS. BAYS: Here.

19 MS. HARRINGTON-McBRIDE: Kathy Silcox
20 from Pennsylvania?

21 MS. SILCOX: This is Michael Gertis
22 sitting in for Kathy Silcox.

1 MS. HARRINGTON-McBRIDE: Great, thank
2 you, Michael. Leigh Ann Roberts from Tennessee?

3 (No response.)

4 MS. HARRINGTON-McBRIDE: Esther Chavez
5 from Texas?

6 (No response.)

7 MS. HARRINGTON-McBRIDE: Brad Schuelke
8 from Texas?

9 MR. SCHUELKE: I'm here.

10 MS. HARRINGTON-McBRIDE: Thank you.
11 Gene Fishel from Virginia?

12 (No response.)

13 MS. HARRINGTON-McBRIDE: Paula Selis
14 from Washington?

15 MS. SELIS: I'm here.

16 MS. HARRINGTON-McBRIDE: Thanks.
17 Carolyn Teter from Wyoming?

18 MS. TETER: I'm here.

19 MS. HARRINGTON-McBRIDE: Peter Free
20 from Wyoming?

21 MR. FREE: Also here.

22 MS. HARRINGTON-McBRIDE: Great.

1 Bridgette Wiggins, Mississippi?

2 (No response.)

3 MS. HARRINGTON-McBRIDE: Sherry Ingles
4 from Wisconsin?

5 MS. INGLES: Here.

6 MS. HARRINGTON-McBRIDE: Chris Hedges
7 from West Virginia?

8 (No response.)

9 MS. HARRINGTON-McBRIDE: And Nelle
10 Rohlich from Wisconsin?

11 MS. ROHLICH: Here.

12 MS. HARRINGTON-McBRIDE: Is there
13 anyone whose name that I have not called who is
14 on this call?

15 MR. SINGH: Tony Singh from U.S. DOJ.

16 MS. HARRINGTON-McBRIDE: Thank you,
17 Tony. Tony Singh. Anyone else?

18 CONNECTICUT CONSUMER PROTECTION:
19 Connecticut Consumer Protection.

20 MS. HARRINGTON-McBRIDE: Okay,
21 Connecticut, is John there?

22 CONNECTICUT CONSUMER PROTECTION: John

1 Neumon is with the AG, this is consumer
2 protection.

3 MS. HARRINGTON-McBRIDE: Oh, consumer
4 protection, okay, thank you.

5 HAWAII CONSUMER PROTECTION: Hawaii
6 Office of Consumer Protection.

7 MS. HARRINGTON-McBRIDE: I'm sorry, I
8 missed that, I'm not sure if the court reporter
9 got it.

10 HAWAII CONSUMER PROTECTION: Hawaii
11 Office of Consumer Protection.

12 MS. HARRINGTON-McBRIDE: Hawaii,
13 terrific, thank you.

14 MR. JANSEN: Mark Jansen, Montana
15 Department of Justice, Consumer Protection.

16 MS. HARRINGTON-McBRIDE: Thank you.

17 MS. FISHER: Ashley Fisher, Arkansas.

18 MS. HARRINGTON-McBRIDE: Great, hi,
19 Ashley.

20 MR. SHAUL: Andrew Shaul, Oregon
21 Department of Justice.

22 MS. SWANSON: Jodie Swanson, South

1 Dakota's Attorney General's Office, Consumer
2 Protection.

3 MR. NEUMON: Katie, this is John
4 Neumon, Connecticut Attorney General's Office,
5 along with Gary Hawes and Mercedes Alonzo.

6 MS. HARRINGTON-McBRIDE: Great. Thank
7 you, John. Anybody else?

8 MS. WIGGINS: I'm sorry, I just joined,
9 this is Bridgette Wiggins with the Mississippi
10 Attorney General's Office, Consumer Protection
11 Division.

12 MS. HARRINGTON-McBRIDE: Hi, Bridgette,
13 thanks for letting us know you're on.

14 MS. WIGGINS: Sorry I'm late.

15 MS. HARRINGTON-McBRIDE: Okay, no
16 problem. We're still doing all the
17 preliminaries, so you haven't missed anything.

18 MS. WIGGINS: Oh, great, thank you.

19 MS. HARRINGTON-McBRIDE: Let's see,
20 let's go ahead and begin now. I would like to
21 do a brief explanation of the purpose for the
22 call and the protocols for it. As you know,

1 those of you on the line who are members of the
2 SPAM Task Force, we have calls every month or
3 two or three and they're very informal events.
4 This one is a slightly more formal affair,
5 because we're doing this in service to the
6 report to Congress that the FTC is mandated to
7 produce by this coming December 16th. And so
8 we're going to be transcribing the call. It's
9 also being recorded and I wanted to be sure that
10 everyone was aware of that.

11 As you all know, in December of 2003,
12 Congress enacted and the president signed the
13 Can-SPAM Act which directs the FTC to report on
14 the effectiveness and enforcement of the
15 Can-SPAM Act and the cite for that is 15 USC
16 7709. The FTC has been gathering data for this
17 report since the passage of the act, and this
18 interview with the members of the SPAM Task
19 Force, which is jointly chaired by the FTC and
20 the Attorney General of Washington State, will
21 be transcribed for the record, and will be part
22 of the record for the report.

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1 This interview is just one of several
2 ways the FTC is seeking information that would
3 be relevant for the report on the effectiveness
4 and enforcement of the act. Because today's
5 call is being transcribed for the record by a
6 court reporter, who is listening to the call,
7 it's very, very important that when you wish to
8 speak, you begin by stating your name and your
9 affiliation each time you speak. For example,
10 this is Katie Harrington-McBride with the FTC.
11 If you don't remember, don't worry, because a
12 whole team of us will stop the call and ask you,
13 so the call will simply proceed more efficiently
14 if you can make a note of this now and try to
15 remember to do it.

16 Finally, and just to be absolutely
17 clear, your views expressed here today will be
18 transcribed for the record and may be appended
19 to the report to Congress or otherwise made
20 public. So I want to be sure everyone is clear
21 on that. Are there any questions before we
22 begin?

1 (No response.)

2 MS. HARRINGTON-McBRIDE: Okay. Today's
3 interview questions will come from four main
4 topics, and this follows the structure of the
5 provision of the Can-SPAM Act that asks the FTC
6 to produce this report. Congress asks three
7 specific questions, and one overall question on
8 the effectiveness and enforcement of the act,
9 and we're going to follow that structure in
10 today's discussion.

11 The first issue is the question of
12 marketplace developments or technological
13 changes since the passage of the act, that is
14 December 2003, that may affect the practicality
15 or effectiveness of the act. This could
16 include, but is not limited to, changes in
17 filtering, methods of authentication, the new or
18 increasing use of nontraditional devices for
19 receiving email, such as hand-held devices or
20 cell phones. The second question that we'll be
21 addressing is the extent to which the
22 international transmission of email might affect

1 the effectiveness of the act and any suggestions
2 or changes. Our third topic will be ways in
3 which consumers, especially children, can be
4 protected from obscene or pornographic material.
5 We'll discuss the FTC's sexually explicit
6 labeling or brown paper wrapper rule, among
7 other approaches.

8 And finally, we'll talk about the
9 effectiveness of the various provisions of the
10 act, which we'll discuss one by one.

11 MR. DAVIS: Katie, this is Mike Davis.

12 MS. HARRINGTON-McBRIDE: On each of
13 these four main areas, I will ask a series of
14 questions and I will ask if you have any
15 information responsive to the question. If you
16 do, you can signal your interest. We don't have
17 a technological means for you to do that, you
18 don't have to push any buttons, but if you do
19 have something to say, identify yourself and
20 your organization and tell us what you have to
21 say. If there are multiple people who wish to
22 speak, we will try to do this as orderly as we

1 can, but obviously since we can't see one
2 another, we have to rely on our best ability to
3 hear who is starting first and we'll cue up
4 after that.

5 We'll go ahead and begin now with the
6 first issue, whether there are any marketplace
7 developments or technological changes since the
8 passage of the act in December 2003 that may
9 affect the practicality or effectiveness of the
10 act. Specifically, I think what I would like to
11 begin with is, to find out whether anyone on the
12 call believes that there are new or increasingly
13 used methods for receiving email by consumers,
14 such as the use of cell phones or hand-held
15 devices, Blackberries and the like, to receive
16 email, and if so, if the usage of these devices
17 affects in any way the practicality or the
18 effectiveness of the Can-SPAM Act.

19 (No response.)

20 MS. HARRINGTON-McBRIDE: I can see you
21 guys are going to make it as easy for Sally as
22 possible. Let me see if I can approach this

1 maybe in a slightly different way. We at the
2 FTC have been doing lots of research since the
3 passage of the act, as you all know, your
4 offices and ours have been active even before
5 the passage of the act in trying to analyze SPAM
6 trends, email trends, generally, and figure out,
7 you know, where things are heading. And, so,
8 we've been looking at lots of articles in the
9 popular press and things like that to try to
10 discern whether there are new and increasing
11 methods by which people are able to access email
12 and whether there are any trends.

13 And, so, this does not have to be from
14 research, for example, that your office has
15 done. If you're aware anecdotally or from
16 popular press articles or law journal or
17 technical journal articles or anything, you
18 should feel free to respond and simply note, you
19 know, what your source is for the data. It's
20 not my expectation, obviously, that you all have
21 been out there studying these things using the
22 resources of your office.

1 MR. DAVIS: Katie, this is Mike Davis
2 in Washington at the FTC and I would just like
3 to add that we have been joined by two
4 colleagues, Sana Coleman, a lawyer, and Debbie
5 Matties, also a lawyer.

6 MS. HARRINGTON-McBRIDE: Great, thank
7 you.

8 MR. DAVIS: Thanks.

9 MS. HARRINGTON-McBRIDE: Okay. Why
10 don't we move on to the next question that I
11 have, then. Again, we're still talking about
12 marketplace developments or technological
13 changes. Have there been any changes in email
14 filtering in the last two years, or year and a
15 half, technically, I guess, that affect the
16 practicality or effectiveness of the Can-SPAM
17 Act?

18 (No response.)

19 MS. HARRINGTON-McBRIDE: Okay, what
20 about any changes regarding authentication
21 systems that may affect the practicality or
22 effectiveness of the act?

1 (No response.)

2 MS. HARRINGTON-McBRIDE: And I should
3 tell everyone to unmute your phone, you press
4 star 6, right? You're not struggling out there
5 trying to get me but have been unable to? All
6 right.

7 My last question on this topic is
8 whether there are any other marketplace
9 developments or technological changes that may
10 affect the practicality or effectiveness of the
11 act. And this could be, you know, really
12 anything. I think we've conceived a certain
13 topic, these filtering and authentication
14 issues, and certainly the receipt by consumers
15 of email in different ways than they used to,
16 we're certainly viewing email on smaller and
17 smaller screens, but if you can conceive of any
18 technological change or any marketplace
19 development that could impact the practicality
20 or effectiveness of the act, that's the kind of
21 information we're looking for. We're trying to
22 be as broad here in our data gathering as we can

1 be.

2 MS. SAULNIER: Katie? This is Julie
3 Saulnier from the FCC.

4 MS. HARRINGTON-McBRIDE: Hi, Julie.

5 MS. SAULNIER: Our engineers are not on
6 this call, unfortunately only lawyers are on it,
7 and we can't answer the technical questions.
8 These are questions, if you would like me to
9 later, I could try to set up a call with some of
10 our engineers who could, I don't know exactly
11 what their expertise is, but I know that the
12 lawyers currently on this call, we don't have
13 it.

14 MS. HARRINGTON-McBRIDE: Okay.

15 MS. SAULNIER: So, if you would like
16 for me to set that up later, we could talk about
17 that.

18 MS. HARRINGTON-McBRIDE: That will be
19 great, I will make a note to contact you, and
20 whether we do sort of an informal call that can
21 be transcribed, we can decide later. And that
22 would go for anyone else on the call, if at some

1 point you don't think that you have access to
2 data right now, but you think you may be able to
3 get data, we are interested on an ongoing basis,
4 really any time within the next five or six
5 weeks, in receiving information that's relevant
6 to the questions that we'll discuss today. So,
7 if you're not able to give an answer to me
8 today, but you you've come into that information
9 in the next few weeks that you would like to
10 give us, please feel free to transmit that to me
11 by email at cmcbride@ftc.gov, and we'll
12 certainly use that information whenever it is
13 received.

14 Okay, the next topic that Congress
15 specifically requests that we address in the
16 report is how to address commercial email that
17 originates in or is transmitted through or to
18 facilities or computers in other nations.
19 Congress wants the report to include analysis
20 and recommendations on this, including
21 initiatives or policy positions that the U.S.
22 could pursue.

1 As all of you are aware, who may have
2 participated in a recent call, we had some folks
3 from our international division describing the
4 efforts that the FTC has made in the
5 international community to understand better the
6 email transmission patterns and to combat SPAM
7 collaboratively with other nations. So, this is
8 something about which we have a fair amount of
9 data, but I wanted to be sure to ask on the call
10 as well in case anyone has any particular
11 expertise or suggestions. The first specific
12 question is this: To what extent does
13 commercial email received in the U.S. originate
14 in or transmit through other countries? Does
15 anyone have any ideas about that or any
16 suggested data sources that we check?

17 MS. ROBERTS: This is Leigh Ann in
18 Tennessee, I don't know if it's appropriate for
19 me to comment on this, but this has been one of
20 our trouble areas, and this is a big concern for
21 Tennessee, every time we trace a piece of SPAM
22 back, it goes somewhere in China or Russia. And

1 but it's my understanding from our forensic
2 computer staff that that can be almost like a
3 PMB address, and it can actually be a company in
4 California; however, they've gotten a Internet
5 address that traces back to a foreign country to
6 kind of get around or to discourage enforcement
7 efforts.

8 MS. HARRINGTON-McBRIDE: Interesting.
9 Do you have any further sort of anecdotal
10 information, Leigh Ann, about ways in which you
11 think the legislation could aid you in the
12 future?

13 MS. ROBERTS: Well, I mean, you know,
14 if you look at it kind of like the PMB
15 regulation, where if they have to disclose at
16 that overseas address, if they have an actual
17 presence in California, a registered agent, or
18 some sort of indicator that it is a Mailboxes,
19 Etc. type outfit, in the foreign country.
20 Because I really think it's just a way to get
21 around enforcement.

22 MS. HARRINGTON-McBRIDE: Um-hmm.

1 MS. ROBERTS: So, I mean, as far as
2 statistical information, we really don't have
3 anything put together on that, but consistently,
4 this is what we're finding.

5 MS. HARRINGTON-McBRIDE: Okay. That's
6 very helpful, thank you, Leigh Ann.

7 MS. ROBERTS: You're welcome.

8 MS. SAULNIER: Katie, this is Julie
9 Saulnier at the FTC again.

10 MS. HARRINGTON-McBRIDE: Hi, Julie.

11 MS. SAULNIER: You may already be aware
12 of this, but are you aware of the work that the
13 Organization For Economic Cooperation and
14 Development has done on combatting --
15 international efforts to combat SPAM, have you
16 seen these reports that they put out?

17 MS. HARRINGTON-McBRIDE: I have, and
18 actually I think we have someone from our
19 international division, Susan McDonald on the
20 line.

21 MS. McDONALD: I am on the call and I
22 am familiar with that work and there are other

1 people in our division who participate in that
2 work, so we do have access to all of that.

3 MS. SAULNIER: Okay, I just wanted to
4 be sure.

5 MS. HARRINGTON-McBRIDE: Thanks. Now
6 that's exactly what we're trying to ferret out
7 in the call, so really don't assume that
8 something is so basic that we would necessarily
9 know it, feel free to let us know, because we're
10 doing this in an effort to cover every base.

11 MS. STANSELL: Katie, this is Maxine
12 Stansell in Seattle. You probably realize this,
13 but if you look at the SPAM database, you will
14 notice that lots of the IP addresses that are
15 the originating IP addresses are overseas. I
16 can't quantify that, I just know from the
17 matters that I have worked on, and from going
18 through the SPAM that, you know, it's a lot.

19 MS. HARRINGTON-McBRIDE: Um-hmm. Yes,
20 and there are some studies out that we're aware
21 of that try to suggest what the origin of SPAM
22 is. The exact organization's name escapes my

1 memory, but it may be that somebody else on the
2 Can-SPAM team knows this, but there are groups
3 that regularly report on what percentage of SPAM
4 originates in the U.S. or outside the U.S., and
5 it sort of lists the top, you know, the top
6 countries from which SPAM comes. And those are
7 sources of data of which we're aware, but we're
8 always trying to check to be sure that if there
9 are other sources that anyone has found useful,
10 that we access those. So, I should say off the
11 bat that we know about those.

12 MR. SINGH: Katie, this is Anthony
13 Felix Singh, U.S. DOJ.

14 MS. HARRINGTON-McBRIDE: Hi there.

15 MR. SINGH: As I mentioned before, I
16 think we should be careful not to confuse the
17 machine origin of SPAM and the individual who is
18 the button pusher or who is responsible for
19 sending the SPAM. It seems anecdotally that if
20 the SPAM is in English and is directed to U.S.
21 consumers, there is a higher likelihood that
22 that individual is in the United States as

1 opposed to SPAM that is, say, in Chinese that
2 comes to U.S. consumers. At the end of the day,
3 they're trying to sell a product, and that
4 product normally will be delivered by mail or
5 perhaps online, but I just want to point out,
6 and I think it was suggested earlier on the call
7 that simply identifying the machine origin of
8 SPAM doesn't tell you where the individual
9 that's responsible for it is.

10 MS. HARRINGTON-McBRIDE: That is a very
11 good point. Does anyone have any data about the
12 amount of the email originating in or
13 transmitted through other countries and whether
14 this amount is changing over time, specifically
15 whether it has gone up or down since December of
16 2003?

17 (No response.)

18 MS. ALONZO: Hi, this is Mercedes
19 Alonzo of Connecticut.

20 MS. HARRINGTON-McBRIDE: Hi, Mercedes.

21 MS. ALONZO: Hi. I don't have
22 statistics, but I do get a lot of SPAM that has

1 increased, but it's of the Nigerian type. The
2 Nigerian type emails.

3 MS. HARRINGTON-McBRIDE: Yes.

4 MS. ALONZO: So, those are not emails
5 that are targeted to sell consumers products or
6 anything like that. So, I don't know if people
7 have much experience with those out there, but I
8 deal with consumer complaints dealing with
9 Nigerian type emails and a lot of the advanced
10 C-type fraud, the cashier checks. There's a lot
11 of those out there. The sweepstakes contests,
12 that type of thing.

13 MS. HARRINGTON-McBRIDE: And do you
14 think that -- I know obviously the Nigerian
15 emails presumably originate overseas. Do you
16 think that the others have an international
17 component as well?

18 MS. ALONZO: A lot of them. I don't
19 know how many. I mean, that's difficult to
20 tell. Because a lot of them, they just want
21 your money, and you'll never get anything.

22 MS. HARRINGTON-McBRIDE: Right. Okay.

1 We had talked a little bit, again, in the call a
2 few months back when we talked with the folks in
3 our international division who work closely with
4 various international organizations to monitor
5 email trends, and as we just said in the call,
6 there are these contacts out there that the FTC
7 has. Are there any thoughts about these
8 initiatives or others that could be undertaken
9 that might help to establish more effective
10 enforcement, in particular, collaborative
11 efforts between law enforcers in different
12 countries that could aid in the effort to bring
13 spammers to justice?

14 UNIDENTIFIED FEMALE SPEAKER: Can you
15 say the question again, I'm sorry?

16 MS. HARRINGTON-McBRIDE: Sure, the FTC
17 has worked with a number of international
18 organizations, but I wonder are there any
19 thoughts of any additional initiatives that are
20 trying to improve international cooperation, I
21 would guess particularly when it comes to
22 enforcement. If, for example, most of the folks

1 on the call today are from the various states, I
2 think we have more than half the states
3 represented, and if, for example, in your work,
4 when you're running into emails that appear to
5 or actually originated in another country, if
6 what you're finding is you wish you had better
7 contacts to try to track those things down,
8 those are the kind of initiatives that I was
9 wondering whether anyone had any thoughts about
10 in that area, improvement in communication.

11 MS. ALONZO: This is Mercedes Alonzo,
12 Connecticut again.

13 MS. HARRINGTON-McBRIDE: Um-hmm. Are
14 you still there, Mercedes? I think we may have
15 lost Mercedes. Are you there?

16 MS. ALONZO: Hello?

17 MS. HARRINGTON-McBRIDE: There you are,
18 hello.

19 MS. ALONZO: We have Phone Busters in
20 Canada, and I was wondering if they have similar
21 services in other countries and if you could put
22 us in touch with those countries' services. And

1 then we could forward consumer complaints to
2 those authorities in those specific countries.

3 MS. ROBERTS: That's a great idea.

4 MS. HARRINGTON-McBRIDE: Well, I have
5 to say as a member of the Division of Marketing
6 Practices and not the International Division,
7 they're not contacts that I have personally, but
8 that's something that we can raise within the
9 FTC to see, you know, what contacts might be
10 possible.

11 MS. ALONZO: Okay, thank you.

12 MS. HARRINGTON-McBRIDE: Thank you.

13 MS. ROBERTS: And the only suggestion
14 that I would have, and this is Leigh Ann again,
15 is something along the lines that if there's
16 anywhere that those initiatives in those foreign
17 countries, as far as creating a separate
18 designation for these types of businesses that
19 are basically just alternative address, have
20 some sort of designation or disclosure
21 requirement on their -- and I don't know the
22 exact term for it, but the page that you can go

1 back to to see who the address belongs to and
2 that sort of thing, and maybe an appointment of
3 an agent of some sort. I don't know if there's
4 an initiative, if that's appropriate for an
5 initiative, but if there were groups in other
6 countries that were looking for recommendations
7 on what they can do to help us out, that might
8 be something they can do.

9 MS. HARRINGTON-McBRIDE: And Leigh Ann,
10 are you referring to the domain name
11 registration information?

12 MS. ROBERTS: Yes.

13 MS. HARRINGTON-McBRIDE: Okay, great.
14 I think that's an ongoing concern for law
15 enforcement that that information is not always
16 accurate and available, and it makes it very
17 difficult to track.

18 MR. HODAPP: Katie, this is Larry
19 Hodapp.

20 MS. HARRINGTON-McBRIDE: Yes.

21 MR. HODAPP: There seems to be perhaps
22 a bit of confusion, not confusion, but something

1 that might be beneficial to clarify is my
2 understanding is that the things that are
3 expressly violations of Can-SPAM, in particular
4 the header violations, if we're talking about
5 identifying the people responsible for those,
6 the people who are actually sending out the
7 SPAM, that one thing that hasn't been mentioned,
8 as perhaps this is a technological innovation
9 that's a difficulty, but the increasing use of
10 SPAM zombies or Botnets to distribute SPAM,
11 which make it very difficult, as noted in
12 previous FTC reports, to identify the actual
13 spammer.

14 When we get to the alternative of
15 domain names, which I think people may be
16 referring to the names of the sites in the SPAM,
17 the target URLs, as far as I know, the act does
18 not make that a violation. Can-SPAM does not
19 make any sort of falsification of the domain
20 names that appear as the target URL in the SPAM
21 a violation. And that's one thing that given
22 the prevalent use of Botnets or false headers,

1 the -- a growing practice of falsity or attempts
2 to conceal what the target URL is or where it's
3 located is something as now as I understand it
4 is outside the scope of Can-SPAM. Isn't that
5 correct?

6 MS. HARRINGTON-McBRIDE: That is right.

7 MR. HODAPP: And that might be
8 considered that when people are having problems
9 there, that might be an issue with the scope of
10 the -- the nonapplication of Can-SPAM to that.

11 MS. HARRINGTON-McBRIDE: Okay, that's a
12 helpful suggestion.

13 MR. SCHUELKE: This is Brad Schuelke,
14 the Texas Attorney General's Office.

15 MS. HARRINGTON-McBRIDE: Hi, Brad.

16 MR. SCHUELKE: And the only point I
17 would make is I know the FTC has worked really
18 hard and done well to get some relationships
19 with foreign countries to help them, you know,
20 locate people and enforce, and the states
21 obviously can't on their own probably develop
22 those same relationships. So, some sort of

1 official procedure or easy mechanism for the
2 states to utilize those relationships or have a
3 point person or something so that when we
4 encounter the same countries, we can either go
5 through the FTC or utilize the same sort of
6 relationship they've already built would be
7 certainly helpful to the states I think in
8 enforcement.

9 MS. HARRINGTON-McBRIDE: I think that's
10 a great idea, we'll certainly look at that. Are
11 there any other thoughts about the international
12 transmission of email and the act's ability to
13 address it?

14 MR. NEUMON: This is John Neumon in
15 Connecticut.

16 MS. HARRINGTON-McBRIDE: Hi, John.

17 MR. NEUMON: One of the situations that
18 I have come across is often countries where many
19 of these things are emanating don't have law
20 enforcement agencies who have even the most
21 minimal of technological capability. For
22 example, Joe Sullivan who is counsel for Ebay

1 shared with me when they had an issue with a
2 fraudulent transmission from Romania, they
3 contacted the Romanian police and the police
4 didn't even have computers. One of the aspects,
5 perhaps, of fostering contacts then is to be
6 able to create an environment or a situation
7 where some of the countries may be able to
8 obtain computers at such a low cost, perhaps,
9 fostering commercial entities to provide
10 computers for them at low cost and open markets
11 for American corporations as well.

12 MS. HARRINGTON-McBRIDE: Very
13 interesting, thank you. Any other thoughts
14 about international transmission of email?

15 (No response.)

16 MS. HARRINGTON-McBRIDE: Okay. The
17 third specific area that Congress asks that we
18 look at in our report is protecting consumers,
19 including children, from receipt and viewing of
20 commercial email that is obscene or
21 pornographic, and as you know, the FTC was
22 required under the SPAM Act in April of 2004 to

1 create a rule addressing a label that would be
2 applied to any email that contained sexually
3 explicit content and to further protect
4 consumers by ensuring that any sexually explicit
5 imagery was not viewable in the initial screen.
6 Our sexually explicit labeling rule is certainly
7 I think one of the areas that will be addressed
8 in the report to Congress, so I guess my first
9 question would be how effective in your view has
10 the sexually explicit labeling rule been in
11 protecting consumers, including children, of
12 receiving or viewing obscene or pornographic
13 email?

14 (No response.)

15 MS. HARRINGTON-McBRIDE: It doesn't
16 sound like there's a lot of experience with that
17 rule, I guess, or at least not a lot of opinions
18 that have been formed. I guess my next question
19 then is, because the question from Congress is
20 posed in such a way that I think it really goes
21 beyond simply the sexually explicit labeling
22 rule, but incorporates other private sector

1 solutions as well. What private sector tools,
2 perhaps those made available by ISPs or email
3 service providers already exists to shield
4 consumers from obscene or pornographic email?
5 Are you aware of any of these methods for
6 filtering or blocking?

7 (No response.)

8 MS. HARRINGTON-McBRIDE: My next
9 question, then, is are there any other options
10 for blocking obscene or pornographic email?

11 (No response.)

12 MS. HARRINGTON-McBRIDE: Can you all
13 still hear me?

14 MS. ALONZO: Yes.

15 MS. HARRINGTON-McBRIDE: There was a
16 clicking on the line, I couldn't tell if I was
17 just getting through. So, any other options,
18 for example software that could be installed by
19 consumers on their own machines, filtering that
20 may have emerged since December of 2003, all of
21 those would be things that we would be
22 interested in knowing about.

1 (No response.)

2 MS. HARRINGTON-McBRIDE: Well, that
3 topic I would suggest if anyone comes up with
4 any ideas about the effectiveness of the current
5 explicit labeling rule or any methods that are
6 available to protect consumers from receiving
7 obscene or pornographic email or from viewing
8 it, if you come up with anything, please feel
9 free to supplement by sending an email to me.

10 All right, now we're on to the fourth
11 and final topic, this is the longest laundry
12 list that we have, though, of subset questions,
13 because this is the place where we'll talk about
14 the effectiveness of the various provisions of
15 the act. There are several of them, so I would
16 like to take them one by one, and we can discuss
17 whether these provisions achieve their purpose,
18 how effective they've been, and whether there
19 are any concerns about enforcement of any of
20 them.

21 I would also like to say the blanket
22 matter here that we are compiling a list of

1 actions brought under Can-SPAM. That includes
2 actions by the FTC, the state, the Department of
3 Justice, and the various other enforcers who
4 have authority under the act, and that's a
5 fairly long list itself. We're doing that, and
6 we have fairly good access, we think, to all the
7 information about cases that have been filed and
8 have been made public, but we may be going out
9 with a request to you to let us know if you have
10 filed anything.

11 And, so, we will be also sending back a
12 final list to make sure we haven't missed
13 anything and we're up to date just before we go
14 public with the report. If you feel like
15 prophylactically sending your list, we won't
16 bother you with an email, if you want to go
17 ahead and let us know by email what case your
18 state or organization has already brought under
19 the Can-SPAM Act.

20 The first area that the Can-SPAM Act
21 covers will basically be going through this in
22 section-by-section order. The first section is

1 the criminal provisions of the criminal
2 penalties. I think we have some folks from the
3 Department of Justice on the call, we're
4 separately doing interviews with a number of
5 enforcers, and so whether or not this is the
6 proper place for discussion of that, I don't
7 know, but if the states have any input on the
8 criminal provisions or the criminal penalties
9 under the act, this would be a great time to
10 talk that through.

11 (No response.)

12 MS. HARRINGTON-McBRIDE: Okay, the next
13 provision that I would like to talk about is the
14 act's prohibition on false header information.
15 That provision applies to both commercial and
16 transactional or relationship messages. The
17 purpose, obviously, to ensure that consumers and
18 law enforcers have data about who is sending
19 email, presumably to provide accountability. We
20 talked about some of the challenges with the use
21 of zombies and Botnets to subverting this
22 provision, but as the provision is drafted, any

1 thoughts about its effectiveness?

2 (No response.)

3 MS. HARRINGTON-McBRIDE: Any thoughts
4 about the enforcement of this, any of you who
5 may have brought cases that allege a violation
6 of this provision?

7 MR. SCHAFER: Yes, this is Scott
8 Schafer from Massachusetts, and we were able to
9 bring an action based on false header
10 information, and frankly found that the judge
11 was quite receptive to that, because it's so
12 clear in terms of the nature of the message
13 versus the header, and so we did find in terms
14 of being able to convince the judge of the
15 violation, it was fairly clear and able to do
16 that.

17 MS. HARRINGTON-McBRIDE: Great, thanks,
18 Scott. Any other experience using this in
19 enforcement matters?

20 MR. HODAPP: Yeah, this is Larry
21 Hodapp. We included false headers in a case we
22 brought against GlobalNet Solutions, but it's

1 extremely difficult to identify the perps
2 through the headers alone, which is one reason
3 why the absence of a violation based upon the
4 attempts to falsify target URLs or hide them
5 creates difficulties. It appears that the use
6 of false headers is extremely prevalent
7 because -- partly because people have to use
8 false headers in order to avoid increasingly
9 sophisticated filtering methods.

10 MS. HARRINGTON-McBRIDE: Um-hmm.
11 Great, thank you, Larry.

12 MR. SWEEDLER: This is Ian Sweedler,
13 California. In a case that we brought jointly
14 with the FTC, we also included false or
15 misleading headers as an element of that, and
16 again, that -- as in Massachusetts, that's
17 something that we found the judge was receptive
18 to in terms of granting a TRO.

19 MS. HARRINGTON-McBRIDE: Great, thank
20 you, Ian. Anyone else with any ideas about the
21 false header provision, either how effective it
22 has been, or what your ideas about the

1 enforcement of it are?

2 MR. SWEEDLER: I'm sorry, Ian Sweedler
3 again, I'm sorry, in terms of the various
4 provisions of Can-SPAM, one thing that's useful
5 about that one is that it's a violation that can
6 be proven, you know, from the email itself,
7 without having to track someone down and prove
8 that wasn't their real name. So, that can be a
9 very useful aspect of it.

10 And then I also wanted to point out
11 that it's useful, I don't know if this is off
12 topic with this subject here, but we were able
13 to pursue that violation, also, as a matter of
14 state law, because that aspect isn't preempted.
15 So, that was also helpful to us.

16 MS. HARRINGTON-McBRIDE: Okay, so you
17 pled that jointly?

18 MR. SWEEDLER: Yes.

19 MS. HARRINGTON-McBRIDE: With the
20 Federal.

21 MR. SCHAFER: This is Scott Schafer
22 again from Massachusetts. I would have to agree

1 with Ian on that. That is what was so easy for
2 the judge to see is you can print out the email,
3 you show the header information, and then you
4 show the email, and it's very clear to the judge
5 that if you click on the link that's typically
6 in these emails and show them what site it takes
7 you to, that pretty much wraps it up for the
8 judge in terms of false or misleading.

9 In our case, they used the header that
10 was the name of a town here in Massachusetts,
11 and when you clicked onto the link, it was for
12 teenage pornography. So, it was pretty clear.

13 MS. HARRINGTON-McBRIDE: Okay. The
14 next provision is the prohibition on deceptive
15 subject lines. Any thoughts about the
16 effectiveness of that provision or the ways in
17 which you've used it in enforcement?

18 MR. SWEEDLER: This is Ian Sweedler in
19 California again. Once again we have used that
20 violation in our joint case with the Federal
21 Trade Commission. Again, it was something that
22 was easy to explain in the complaint and was

1 easy to explain to the judge and that the judge
2 relied on in terms of granting a temporary
3 restraining order. And once again, that's also
4 an area where we're able to use the same law
5 that we have, which has a better remedy because
6 Congress didn't preempt state law prohibition of
7 deceptive subject language.

8 MR. HODAPP: Larry Hodapp again. We
9 were also able to use that violation effectively
10 in our case. The defendants were using false
11 subject lines to make individuals think that the
12 message was directed to them or important to
13 open or including statements such as "Osama
14 strikes again." Which it did, we think,
15 strengthen our case.

16 MR. SCHAFER: This is Massachusetts
17 again, same experience saying that that was
18 effective for us.

19 MS. HARRINGTON-McBRIDE: Thank you.

20 MR. SCHUELKE: This is Brad Schuelke in
21 Texas, also in our case that was the primary
22 allegations that we made with respect to the

1 violations of the Can-SPAM.

2 MS. BOLTON: Hi, this is Barbara
3 Bolton, the FTC Atlanta office. We also used
4 that provision very effectively in a case that
5 we recently won in the Southern District of
6 Florida. I just wanted to make that contact.

7 MS. HARRINGTON-McBRIDE: Great, thanks,
8 Barbara. Any other thoughts about the
9 effectiveness or enforcement of the deceptive
10 subject line prohibition in the act?

11 (No response.)

12 MS. HARRINGTON-McBRIDE: Okay. The
13 next provision taken seriatim here is the
14 requirement in the act that emails, commercial
15 emails, include a functioning return address or
16 other opt-out mechanism that must work for 30
17 days with a safe harbor for temporary
18 unavailability. Any ideas about the
19 effectiveness of this provision, how it's been
20 enforced in your offices or any other thoughts
21 about this approach?

22 MR. SWEEDLER: This is Ian Sweedler in

1 California. A couple of things about this one.
2 First of all, you obviously can't prove this
3 violation from the sayings in the email. I
4 think you can prove it. Normally you need some
5 evidence from whichever Internet service
6 provider operates in the alleged functioning
7 return address. Also, because most spammers in
8 the course of sending out one campaign of SPAM
9 will use many, many different return addresses,
10 and only a small subset of those may be
11 available to us for use as evidence.

12 In the case of a higher amount of
13 investigative effort to prove a violation, to
14 prove a small number of violations. You know,
15 any particular spamming campaign, only a small
16 number of them may use a certain return email
17 address, and then you have to do a certain
18 amount of investigation with the Internet
19 service provider to prove that that one wasn't
20 real and wasn't functioning.

21 So, you would have to repeat that for
22 each email address, with many different email

1 service providers, that was used in a single
2 campaign. So, it's somewhat more cumbersome,
3 but it can still be proven without evidence, for
4 example, from the perpetrator.

5 MS. HARRINGTON-McBRIDE: Okay.

6 MR. SCHAFER: And this is Scott Schafer
7 in Massachusetts again. The one thing that you
8 can tell from the email itself if it does not
9 have it, but it has to be a complete lack of
10 appearance on the email is the opt-out
11 provision. I think we were able to do that in
12 one of our cases; however, as with a
13 nonfunctioning email address, the opt-out
14 provision, we needed to do some more
15 investigation to prove it doesn't opt you out or
16 you have to go through that process more and
17 that's a little more difficult to prove.

18 MS. HARRINGTON-McBRIDE: Anything else
19 on that provision, the functioning return
20 address or other opt-out mechanism?

21 MR. SWEEDLER: Ian Sweedler again. One
22 thing that we've noticed, also, is that

1 sometimes in an effort to create an out-going
2 SPAM email that appears to comply with the law,
3 spammers will just incorporate the opt-out
4 provision and opt-out web address, for example,
5 from someone else's SPAM, or even from, you
6 know, a non-SPAM from an email marketing. That
7 way they're not burdened with any responses.
8 They don't have to worry about their own email
9 address or website being targeted for shut-down,
10 and that also means that you can see some sort
11 of opt-out mechanism that refers to a particular
12 website when the person sending the SPAM may
13 have had no relationship or responsibility for
14 that website.

15 MS. HARRINGTON-McBRIDE: So, basically
16 there appears to be an opt-out mechanism, but it
17 doesn't relate to the sender of the email?

18 MR. SWEEDLER: Right. And unlike, for
19 example, the commercial site that they may be
20 promoting, since they have no interest in
21 getting a response to that [opt-out] website,
22 there's no reason to assume that it's their

1 website.

2 MS. HARRINGTON-McBRIDE: Right. Is
3 that something that other folks have
4 encountered? This inclusion of an unrelated
5 opt-out address?

6 (No response.)

7 MS. HARRINGTON-McBRIDE: Okay. The
8 next and a related provision of the act is a
9 prohibition on transmission of commercial email
10 after a recipient has opted out. The act allows
11 for a ten-day period. There's currently an FTC
12 notice of proposed rule-making that would shrink
13 that time frame and the final rule on that will
14 be out in the next several months.

15 Any thoughts about the effectiveness of
16 that provision, how it has been enforced, if
17 it's being adhered to by those who send emails
18 generally or any subset group?

19 MR. SWEEDLER: Ian Sweedler in
20 California. Unsurprisingly, it's generally not
21 adhered to. It's hard -- I think that
22 relatively few consumers attempt to opt out

1 because of, you know, relatively few read all
2 the way through SPAM messages and there's a
3 widespread belief that it's not effective or
4 wise to do that. Consumers who do attempt to
5 opt out that we're familiar with find that it's
6 not effective. On the other hand, because
7 spammers don't use any consistent identity in
8 identifying themselves, it's not always
9 immediately apparent that the similar email that
10 you receive two weeks later is from the same
11 entity that you attempted to opt out from. It
12 may be implicit in the fact that the wording is
13 the same, but there's nothing identifying the
14 sender that claims to be the same.

15 MR. SCHAFER: This is Scott Schafer in
16 Massachusetts. Another issue that we have had
17 is where dictionary attacks are done. That's
18 essentially putting the name, you know, a bunch
19 of different names that are somewhat similar but
20 changed by a letter. If someone is to opt out,
21 that then signals to the spammer that that is a
22 live address that can be used down the road to

1 send SPAM to maybe not from the same address or
2 something, it's something that can be used again
3 and now they have confirmation that it is live.
4 So, I think people, consumers, are hesitant not
5 to respond for that reason.

6 MS. HARRINGTON-McBRIDE: Is anyone
7 aware of any research on that topic, that is the
8 extent to which those who send email actually
9 observe the opt-out preference -- rather not
10 abide by the opt-out preference, but use the
11 fact that someone has opted out as an indicia
12 that it's a live address and therefore adding
13 that address to other mailing lists? Is that a
14 prevalent practice? I know it's one that gets
15 talked about a fair amount.

16 (No response.)

17 MS. HARRINGTON-McBRIDE: Well, if
18 anyone has any data sources that you can provide
19 us, we would like to know.

20 MR. SCHULTZ: Andrew Schultz, Oregon.
21 I thought it was the FTC, but I remember some
22 time ago being on some call that was discussing

1 this exact topic, and someone has set up a
2 number of dummy Hotmail accounts and whatnot,
3 and if I remember correctly, their research
4 showed that they did not reply to those sorts
5 of -- replying to shows sorts of inquiries did
6 not decrease the amounts of SPAM that those
7 dummy accounts were receiving.

8 MS. HARRINGTON-McBRIDE: You are
9 exactly right, that is an FTC finding, and every
10 time I go to a public venue and state it, I am
11 sneered at, and folks look at me like I don't
12 know what I'm talking about, but in fact that is
13 the sort of common research is what has been
14 stated, which is if you opt out, that may yield
15 a suggestion for the spammer that this is a live
16 address and that may be added to a list.
17 There's -- we're just not able to find anything
18 that confirms that, and in fact our data shows
19 the opposite, which is that you are no more
20 likely -- there are so many ways for spammers to
21 compile information about addresses that are
22 much more efficient than the one by one use of,

1 you know, whether someone has opted out or not.
2 Including web bugs and other technologies that
3 would indicate from the mere opening of the
4 email that there's a live body at the other end.
5 That's just not consistent with our findings.
6 But that is something that we're continuing to
7 try to gather data about.

8 So, if there's any external source of
9 information on that or if you've done any
10 internal studies and you are able to share that
11 with us, that would be great.

12 MR. SCHUELKE: This is Brad Schuelke at
13 the Texas Attorney General's Office again, and I
14 think our biggest concern now rather than
15 necessarily increasing the amount of SPAM that
16 you get is the possibility that merely clicking
17 on the link to unsubscribe, you could be going
18 to a website with Malware or gaining a Trojan
19 horse or whatnot from that process, and that in
20 itself is too much of a risk to actually do the
21 opt-out procedure.

22 MS. HARRINGTON-McBRIDE: That also is

1 something that's been reported on that we're
2 trying to follow up on in our research, so if
3 it's something that any of you are aware of any
4 hard data on that area, that indeed opting out
5 could lead to affirmative harm beyond the
6 sending of additional SPAM, that is the
7 installation of Malware on your machine or other
8 devices that would give others access to your
9 computer, that's something we're very keenly
10 interested in.

11 It's interesting to me that during just
12 the 58 minutes or so we've been on this call,
13 I've already received a Nigerian SPAM. What are
14 the odds of that, I suppose? Right? Not that
15 bad, since I probably get at least one every
16 couple of days, but it gives you a sense of
17 they're still out there.

18 The next provision we'll talk about is
19 its requirement that commercial email include an
20 identifier; that is, some sort of identification
21 that it's an advertisement or a solicitation.
22 Has anyone brought any enforcement actions using

1 that provision or do you have any other thoughts
2 about the effectiveness of that identifier?

3 MR. HODAPP: We have brought a case
4 that charged the violation of that part, and it
5 was quite provable, because the defendants
6 represented to the site was free. This is Larry
7 Hodapp, I'm sorry.

8 MS. HARRINGTON-McBRIDE: Thanks, Larry.
9 Any experience in the states with that
10 provision? Or any thoughts about its
11 usefulness?

12 MR. SWEEDLER: Ian Sweedler in
13 California. I believe we mentioned that we did
14 include that as a cause of action in our joint
15 case with the Federal Trade Commission. When I
16 refer to that case, I am referring to our case
17 against Opt-in Global, and again, it was an easy
18 one to prove for the purposes of a temporary
19 restraining order.

20 MS. HARRINGTON-McBRIDE: Thank you.
21 The next provision is the requirement that
22 commercial email provide a clear and conspicuous

1 notice of the right of the recipient to opt out.
2 Are there any thoughts about the effectiveness
3 of that provision or any thoughts about
4 enforcing it?

5 MR. HODAPP: Once again, Larry Hodapp.
6 Yes, we charged that, also, and that was quite
7 provable because it was very evident from the
8 face of the email.

9 MS. HARRINGTON-McBRIDE: And was that
10 because there was a complete access of any
11 notice of the right to opt-out?

12 MR. HODAPP: Yes. Although I have seen
13 instances in which there would have been a
14 failure but a presence of the opt-out, including
15 opt-outs that are only in the hyper text and are
16 not visible and things like that, but we had
17 complete failures in so many that we didn't need
18 to highlight the others.

19 MS. HARRINGTON-McBRIDE: Okay.

20 MR. SWEEDLER: Ian Sweedler in
21 California. I did want to make one contrast to
22 something earlier I think we were talking about.

1 My recollection is that for this particular
2 violation, we were not able to use our state
3 Spam law, because of preemption, and that
4 limited the kinds of remedies that we were able
5 to seek, and it also limited the -- well, I'll
6 just say, it would have been better for us, and
7 I think better for consumers, if we had been
8 able to rely on state law possibilities that we
9 have for a violation.

10 MS. HARRINGTON-McBRIDE: Okay, thank
11 you, Ian. Anyone else on that provision, the
12 clear or conspicuous notice of opt-out?

13 (No response.)

14 MS. HARRINGTON-McBRIDE: The next
15 provision is the requirement that commercial
16 email provide a valid physical postal address of
17 the sender. I think this is one in particular
18 where we would be remiss in not asking for the
19 input of our law enforcement colleagues, has
20 this provision been effective, is it being
21 adhered to by those who are sending email, and
22 have you been able to use it in enforcement?

1 MR. HODAPP: Larry Hodapp again, and in
2 our GlobalNet Solutions case, we charged a
3 violation of this. There was widespread, I
4 think, perhaps total failure to comply with any
5 address. There was no address in the emails.

6 MS. HARRINGTON-McBRIDE: Okay.

7 MR. SWEEDLER: Ian Sweedler in
8 California. Two experiences with this. One is
9 a total failure to provide an address. Another
10 address that's not an accurate address, either
11 because it's something that appears to be a
12 mailing address that just doesn't exist. For
13 example, our defendants used what appeared to
14 be, I think it was a post office box in Canada,
15 that it doesn't exist as a valid post office box
16 address. We had that as well. And then there
17 were instances where they were simply using
18 someone else's P.O. box address. And I'll just
19 mention that postal authorities in both the U.S.
20 and Canada were very helpful in getting the
21 evidence to show that the addresses which
22 appeared on the face of the email were not

1 actually valid postal addresses.

2 MS. CHAVEZ: Katie, this is Esther
3 Chavez from Texas, we joined late, I apologize.
4 Our experience on this is we've seen the
5 spammers who are, one, using somebody else's
6 address, and then the other experience we have
7 had is spammers who use an address that is, in
8 fact, a valid physical address, it does exist,
9 it is a piece of real estate that they have some
10 control over, but they don't, you know, have any
11 real base of operation there.

12 When we've taken statements of
13 spammers, they say to us, well, we're not that
14 popular with the public, and so we are concerned
15 that if we use our real physical address where
16 we can be found, you know, that we might be
17 threatened and we don't want to put our staffs
18 at risk.

19 MS. HARRINGTON-McBRIDE: Any other
20 experiences with that valid physical postal
21 address provision?

22 (No response.)

1 MS. HARRINGTON-McBRIDE: Next, and not
2 directly, maybe chronologically as we plow
3 through the act, but I thought this would be a
4 good time to talk a little bit about penalties,
5 because we're going to be talking about
6 aggravated violations in a moment. What is your
7 view of the penalties available under the act,
8 whether or not they're effective, as a
9 deterrent, and what your experience has been in
10 enforcement with obtaining these penalties.

11 MR. SWEEDLER: Ian Sweedler again in
12 California. First of all, in our Opt-in Global
13 case, we're still at an early enough stage that
14 we have not yet actually -- we don't have a
15 judgment, so we don't have penalties in hand
16 yet. The possibility of recovering penalties
17 was a sufficient basis for the court for an
18 asset freeze as part of the TRO, which I think
19 will ultimately prove to be very helpful in what
20 is often the biggest problem with penalties in a
21 case like this, and that's collection.

22 In an earlier Spam case that predated

1 Can-SPAM that I brought under state law, I got a
2 \$2 million award, I was able to collect very,
3 very little of it, because of assets just
4 disappeared.

5 So, the possibility of an asset freeze
6 at the outset of the case was very helpful. The
7 other thing that I find odd about the wording of
8 Can-SPAM as it relates to recovery by state
9 attorneys general is the financial part of this,
10 I believe it's worded as damages rather than
11 penalties for state attorneys general, and I
12 find that unhelpful, because they are distinct
13 concepts. It's unclear from the way that's
14 worded exactly who that money is supposed to go
15 to. SPAM, of course, is not at the consumer
16 level, especially, is not usually something that
17 just -- receipt of SPAM doesn't cause
18 substantial economic damages to the individual
19 consumer. Personally, I think it would be
20 better if the monetary recovery available to
21 state attorneys general was identified as
22 penalties rather than as damages.

1 MS. HARRINGTON-McBRIDE: Okay, thank
2 you.

3 MR. HODAPP: This is Larry Hodapp.
4 Concerning the GlobalNet Solutions case where we
5 also obtained temporary restraining orders and
6 preliminary injunctions, as part of that case,
7 based upon the Commission's injunctive power,
8 and that can be used as well for restitution or
9 disgorgement, and we were successful in freezing
10 substantial assets in that case.

11 MS. HARRINGTON-McBRIDE: Okay.

12 MS. CHAVEZ: This is Esther from Texas
13 and I would just like to sort of underscore the
14 comment that Ian from California made, because
15 that particular section, the enforcement by
16 state section, really is confusing in terms of
17 the -- like the penalty damage provision. It
18 uses the parens patriae language and then it
19 talks about obtaining damages on behalf of the
20 residents of the state. So, clarity would be
21 good, and characterizing it as penalties would
22 just -- what it is, I think, would help, and it

1 really would also, I think, be useful, even
2 though we argue in our deceptive trade practice
3 cases relying on not just FTC law for asset
4 freeze to justify that before the court. I
5 think that if there was explicit asset freeze
6 and disgorgement language, I think that would be
7 very helpful as well.

8 MS. HARRINGTON-McBRIDE: Okay.

9 MS. CHAVEZ: Because usually, I mean,
10 some of these briefs that we have within the
11 context of the case law to educate, you know, a
12 particular judge about the state's ability to
13 obtain data as appropriate relief.

14 MR. SWEEDLER: Ian Sweedler again.

15 Just to build on that, because
16 sometimes the case law about asset freezes
17 relates to restitutionary situations, which is a
18 somewhat different model, because you're talking
19 about getting back the money people paid in,
20 that case law doesn't always apply perfectly to
21 a SPAM situation. So, for all of those reasons,
22 penalty language would be better than damages

1 language, and it would be terrific to have some
2 express language about asset freezes, although I
3 haven't -- it was not a problem for us that
4 there wasn't explicit language like that, and it
5 may be that trying to put it in could have
6 unintended consequences.

7 MS. HARRINGTON-McBRIDE: Any other
8 thoughts about penalties?

9 (No response.)

10 MS. HARRINGTON-McBRIDE: The act also
11 contains a provision denoted as aggravated
12 violations, certain activities, these are not
13 independent violations of the Can-SPAM Act, but
14 if these practices are engaged in and there is a
15 primary violation of the act, they can lead to
16 -- up to trouble damages. This is not a
17 provision, actually, that the FTC enforces, but
18 the states and the Internet access services who
19 have the authority to enforce under the act can
20 use it. Has anyone attempted to use the
21 aggravated violations or does anyone have any
22 thoughts about the effectiveness of those that

1 are included?

2 (No response.)

3 MS. HARRINGTON-McBRIDE: The act as
4 we've discussed required the FTC to promulgate a
5 rule which we did last April on sexually
6 explicit emails requiring a label and the sort
7 of brown paper wrapper effect, if you will, that
8 prohibits an email sender from including
9 sexually explicit imagery in the additionally
10 viewable screen. That rule making was completed
11 last April. Any thoughts about the
12 effectiveness of the provisions of the act or
13 the rule pursuant to it or about the enforcement
14 of that provision?

15 MR. HODAPP: Larry Hodapp again.

16 We enforced the violations, a case of
17 violations in GlobalNet Solutions case. There
18 was noncompliance with the labeling requirement.
19 There was the presence of sexually explicit
20 images and text in the email, in the initially
21 viewable area. It's we got a temporary
22 restraining order and preliminary injunctions

1 and so that has been successful in the
2 enforcement of that so far.

3 MS. HARRINGTON-McBRIDE: Great. Thank
4 you, Larry.

5 MR. SWEEDLER: Ian Sweedler in
6 California. We had prior to Can-SPAM had
7 preempted by Can-SPAM the California law that
8 has sort of a similar concept behind it. My
9 experience with the California law -- and it's
10 been this way since then -- is that I don't
11 recall ever seeing a single email that had
12 complied with the law. And I'm curious if
13 anyone else has ever seen an instance of
14 compliance.

15 MR. HODAPP: Larry Hodapp again. We
16 have seen some compliance. We have seen some,
17 even total in compliance. We have also seen
18 some use of the label where there is no reason
19 to have the label, where there is no sexually
20 explicit material. It may be that for some
21 people it's an inducement, rather than a
22 warning.

1 MS. HARRINGTON-McBRIDE: Okay. The
2 next provision of the act is the prohibition on
3 the promotion of a person's trade or business in
4 a commercial email, the transmission of which
5 violates the false or misleading header
6 provision. This is for FTC enforcement only is
7 my reading of the act from way back when is
8 right. Is that a provision about which anyone
9 has any thoughts, its effectiveness or
10 enforcement?

11 MS. CHAVEZ: This is Esther Chavez from
12 Texas, and I have a question. Have there been
13 any decisions that address this particular
14 provision? Because it seems that I heard that
15 there was a decision out there, but I have not
16 been able to track it down.

17 MS. HARRINGTON-McBRIDE: This is Katie,
18 there's none that I am aware of, Esther. Anyone
19 else?

20 (No response.)

21 MS. CHAVEZ: Guess not.

22 MS. HARRINGTON-McBRIDE: Here's one

1 that may bring out the other 38 of you. The
2 provision preempting state law, except that is
3 not specific to email. Any thoughts about that
4 provision?

5 MR. SWEEDLER: Can you repeat that,
6 Katie.

7 MS. HARRINGTON-McBRIDE: Sure, the next
8 provision I wanted to talk about is the
9 provision that preempts state laws, except those
10 not specific to email. The one that Ian
11 referred to in noting in several instances that
12 California law had been preempted.

13 MR. SWEEDLER: This is Ian Sweedler in
14 California.

15 As many people know, there was a much
16 broader approach that California had taken
17 legislatively that never got to take effect,
18 because of Can-SPAM. And obviously we would
19 have liked to have been able to see that take
20 effect. However, even under the Can-SPAM
21 approach, it's not clear to me why state laws
22 that are completely consistent with Can-SPAM,

1 why there would be any reasons to preempt those.

2 For example, we are permitted to have
3 state laws that regulate deceptive email and
4 deceptive headers, but we're not permitted to
5 have state law that is in other ways consistent
6 with Can-SPAM. It might seem as though there
7 would be no reason for that, since it would just
8 be duplicative of Can-SPAM, but having the
9 option of enforcing under state law can be very
10 helpful to us.

11 It's very helpful to us in terms of
12 what forum we use, and it could also be very
13 helpful in terms of available remedies, our
14 available remedies that are more reasonably
15 obtainable through prosecution, or that are more
16 like the kinds of remedies that we're accustomed
17 to getting.

18 Penalties, for example, as opposed to
19 damages, so that it's easier to incorporate spam
20 enforcement into our other consumer protection
21 actions. And then there's another element to
22 that, which is the question about who does the

1 enforcing, and state laws often have a broader
2 range of, first of all, government officials who
3 can bring enforcement action, but also often
4 have the possibility for private rights of
5 action.

6 So, I'm certain that where you're
7 talking about conduct that is already illegal
8 under Can-SPAM, it's hard to see a policy that
9 Congress would allow it to be used under state
10 law.

11 MS. HARRINGTON-McBRIDE: Thank you,
12 Ian. Any other thoughts about the preemption
13 provision?

14 (No response.)

15 MS. HARRINGTON-McBRIDE: Okay. The
16 final provision that I would like to discuss
17 specifically, and then I'll open the floor for
18 anything that I might have missed in just a
19 moment, is the wireless rule-making provision
20 where the FCC was instructed to conduct a
21 rule-making having to do with wireless SPAM. We
22 are lucky to have on the call with us today

1 someone from the FCC, Julie Saulnier, and so if
2 anyone had any thoughts on that, or Julie if you
3 have something to say, now would be the time to
4 do that.

5 MS. CHAVEZ: What is the status of that
6 rule-making?

7 MS. HARRINGTON-McBRIDE: I'm sorry,
8 what is that?

9 MS. CHAVEZ: I'm sorry, this is Esther
10 Chavez from Texas. What is the status of that
11 rule-making?

12 MS. HARRINGTON-McBRIDE: Julie, are you
13 still on the call?

14 MS. SAULNIER: Excuse me, yes, I had my
15 mute button on, excuse me. Those were
16 promulgated, they were issued at the end of
17 2004. We had to get permission from OMB to
18 collect wireless domain names from wireless
19 carriers. So, it took an extra couple of months
20 to actually put together a list of domain names
21 to which mobile service commercial messages
22 could not be sent under our rules, and that list

1 was posted on our website February 7th, 2005,
2 and senders of mobile service commercial
3 messages had 30 days from that date to comply.

4 So, the rules have been in effect
5 essentially since March.

6 MS. HARRINGTON-McBRIDE: Okay, any
7 thoughts in addition to the specific areas that
8 we have discussed about the effectiveness and
9 enforcement of the various provisions of the
10 Can-SPAM Act?

11 (No response.)

12 MS. HARRINGTON-McBRIDE: Okay. I would
13 like to make a last call for a request for any
14 data sources, whether they be individuals,
15 studies, articles that you've run across, any
16 information that you think that we should review
17 in completing our report to Congress on the
18 effectiveness and enforcement of the Can-SPAM
19 Act. We very much appreciate the collaboration
20 of our law enforcement partners that we have
21 through the SPAM Task Force and we trust that if
22 you all have any information, even if it's

1 something that you are not able to provide us
2 today, that you have the ability to send that to
3 us in the next five to six weeks. We are doing
4 a very comprehensive search through the
5 literature, talking with experts, this is the
6 first of eight interviews that we will hold,
7 group interviews with various interested
8 parties, and so we are certainly out there data
9 gathering as we have been for the last year and
10 a half, but we want to leave no stone unturned,
11 so if you know of something, even if you think
12 it might be duplicative, we would very much
13 appreciate if you would send an email, again you
14 can email me, cmcbride@ftc.gov, and if you have
15 any further thoughts on anything that we have
16 talked about today, you can email those as well.

17 Once the transcript of today's call is
18 available, it will be circulated to
19 participants, you will have an opportunity to
20 review and correct. Because there are so many
21 participants, it would help us if you can
22 redline those transcripts and send them to us,

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1 we work with Word and WordPerfect, but we will
2 send you an electronic version of this, and you
3 can redline any changes. That would be helpful
4 for us as we finalize the document.

5 Allyson Himelfarb, who coordinated this
6 call, thank you very much, Allyson, will be the
7 contact person and she will be in touch as soon
8 as the transcripts are ready. And I just want
9 to thank everyone for participating in today's
10 call. Your input has been helpful, and will
11 assist us in completing the report to Congress
12 on the effectiveness and enforcement of
13 Can-SPAM. So, thanks everyone, I think that
14 concludes our call.

15 (Whereupon, at 3:26 p.m., the
16 deposition was concluded.)

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