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By Hand

September 13, 2004

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

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

To Whom It May Concern:

MasterCard International Incorporated (“MasterCard”)¹ submits this comment letter in response to the proposed rule (“Proposal”), issued by the Federal Trade Commission (“Commission”), defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message (“e-mail”) under the CAN-SPAM Act (“Act”). MasterCard appreciates the opportunity to provide its comments on the Proposal.

In General

The Act regulates, among other things, commercial e-mails. For example, the Act requires a commercial e-mail to include a functioning return e-mail address or similar Internet-based mechanism for recipients to use to opt out of receiving future commercial e-mails from the sender. Under the Act, a commercial e-mail is “any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet web site operated for a commercial purpose).” Congress directed the Commission to issue regulations “defining the relevant criteria to facilitate the determination of the primary purpose of” an e-mail. On March 11, 2004 the Commission published an Advance Notice of Proposed Rulemaking (“ANPR”) soliciting comments on a variety of issues raised by the Act, including how to determine an e-mail’s “primary purpose.” Based on comments it received as a result of the ANPR, including comments submitted by MasterCard, the Commission has issued the Proposal.

¹ MasterCard is a SEC-registered private share corporation that licenses financial institutions to use the MasterCard service marks in connection with a variety of payments systems.

We commend the Commission for issuing a thoughtful Proposal that attempts to address an admittedly difficult issue. One of the benefits of e-mail is that it allows *bona fide* entities to provide consumers with a variety of important and useful information in a relatively unobtrusive and efficient manner. However, the very benefits facilitated by the use of e-mail (e.g., the ability to convey different types of information in a single message) make it difficult to establish easily applied rules for determining an e-mail's "primary purpose." We sincerely appreciate the Commission's efforts to provide guidance on this issue.

MasterCard believes the Commission's task would be simplified if the Commission focused on the "purpose" of an e-mail, as the Act requires. The Proposal, however, appears to focus on the "effect" or "impression" of an e-mail on the recipient. We believe that the purpose of an e-mail is more appropriately determined by the intent of the sender. As discussed in our prior comments provided in response to the ANPR, the most reasonable approach involves what the Commission terms a "but for" test. The remainder of our comments are relevant only if the Commission retains the approach embodied in the Proposal, and determines that the "primary purpose" of an e-mail is actually the e-mail's effect on the recipient. In that instance, we recommend some limited modifications to the Proposal to improve its clarity and application to reasonable communications sent by *bona fide* entities.

Statutory Construction Focuses on "Purpose" of E-Mail

As noted above, Congress directed the Commission to facilitate the determination of an e-mail's "primary purpose." (Emphasis added.) Therefore, it appears that Congress intended the Commission to assist in determining the "purpose(s)" of an e-mail. In the Supplementary Information to the Proposal, the Commission states that its "single fundamental principle" for determining the primary purpose of an e-mail "must focus on what the message's recipient would reasonably interpret the primary purpose to be." We respectfully disagree with the Commission that the purpose of an e-mail should be evaluated from the perspective of the recipient. In fact, it seems intuitive that the purpose of any statement or message, whether oral, written, or otherwise, is best understood from the perspective of the person or entity making the statement or sending the message. Indeed, Merriam-Webster Online defines "purpose" as "something set up as an object or end to be obtained." It also provides that for the synonym of "purpose," one should refer to "intention."² An "end to be obtained" and an "intention" are both issues to be determined from the perspective of the entity sending the message—not from the perspective of the recipient. Furthermore, we do not believe it is possible, if the Commission is to stay true to the statutory language in the Act, to divine an e-mail's purpose based on the reaction of the e-mail's recipient. Although the recipient may be able to make educated guesses as to an e-mail's purpose, the purpose of the e-mail is not the recipient's "end to be obtained" or the recipient's "intention." It is solely the sender's. Therefore, we urge the Commission to amend the Proposal to reflect the congressional intent of the Act by basing a determination of an e-mail's "primary purpose" on the end to be obtained, or the intention, of the sender.

² See <http://www.m-w.com/cgi-bin/dictionary>.

If the Commission revises the Proposal to focus on the purpose (or end to be obtained or intent) of an e-mail, we believe the most appropriate mechanism to determine an e-mail's primary purpose is an application of a test to which the Commission refers as the "but for" test in the Supplementary Information to the Proposal. Under the "but for" test, the primary purpose of an e-mail would be evaluated based on a determination of whether the e-mail would have been sent "but for" certain content. For example, if an e-mail included a billing statement (or other information that would not be "commercial" under the Act) and a commercial advertisement, the e-mail's primary purpose would be determined by whether the e-mail would have been sent but for either the billing statement or the commercial advertisement. If the e-mail would not have been sent but for the non-commercial information (*i.e.*, the billing statement) then the e-mail's primary purpose was obviously not the commercial content, otherwise the commercial content would have been sent regardless. Therefore, the e-mail would not be "commercial" for purposes of the Act.

E-Mail Containing Commercial and Transactional/Relationship Content

The Proposal indicates that if an e-mail has both commercial content and transactional/relationship content, the primary purpose of the e-mail would be commercial if either: (i) the recipient reasonably interpreting the subject line of the message would likely conclude that the message advertises or promotes a product or service; or (ii) the message's transactional or relationship content does not appear at or near the beginning of the message. If the Commission is to retain this standard, we urge the Commission to make two modifications. First, we believe the Proposal should be amended to clarify that the recipient interpreting the subject line must likely conclude that the *primary purpose* of the e-mail is to advertise or promote a product or service. As drafted, the Proposal suggests that the determination would be based, in part, on whether the subject line has *any* commercial content, regardless of whether the reasonable consumer would assume the commercial content to be the e-mail's primary purpose. For example, a credit card issuer may include in the subject line "Your Monthly Billing Statement (And New Low Car Loan Rates!)." Based on the subject line, the consumer may reasonably conclude that the e-mail contains commercial content. However, that simply cannot be the end of the inquiry in light of the fact that the consumer, who expects to receive his or her monthly billing statement by e-mail, may not reasonably conclude that the primary purpose of the e-mail is commercial. Indeed, if the e-mail is a billing statement followed by a brief blurb on low car loan rates offered by the lender, it would be inappropriate to classify the e-mail as commercial simply because the subject line contained a more fulsome description of the contents of the e-mail when the same exact e-mail with the less descriptive subject line of "Your Monthly Billing Statement" would not be deemed to be commercial by the Commission.³

MasterCard also urges the Commission to revise the Proposal to indicate that the e-mail will be commercial if the reasonable consumer believes, based on the subject line, that the primary purpose of the e-mail is commercial *and* the transactional/relationship content

³ We assume that the Commission would not want the Proposal to encourage *bona fide* entities to include less descriptive summaries of the contents of an e-mail in the subject line, or to provide no information in the subject line, to avoid the inappropriate classification of an e-mail as commercial.

does not appear at or near the beginning of the message. We believe this approach will provide more clarity in applying the Proposal to mixed content e-mails. Furthermore, we do not believe that the impression left by the subject line, *or* the placement of the transactional/relationship materials, are sufficient by themselves to stand as a proxy in determining the purpose of an e-mail. In fact, we are particularly troubled by the fact that the Commission may inadvertently stifle the development of e-mail communications with consumers by requiring senders to adhere to an arbitrary and undefined standard that all transactional/relationship material must always be presented “at or near the beginning of the” e-mail or risk having the e-mail subject to a variety of provisions in the Act. We do not believe this was the congressional intent of the Act. A review of the subject line *and* the proximity of the transactional/relationship content to the beginning of the e-mail would be a better proxy with respect to the sender’s purpose in sending the e-mail, and would also mitigate the potential for stifling the format development of e-mail communications.

E-Mail Containing Commercial and Other Content

The Proposal includes an interpretation of how the Act would apply with respect to a mixed content e-mail containing commercial content and other content (but not transactional/relationship content). However, the interpretation is not the same as that provided with respect to mixed content e-mails containing commercial and transactional/relationship content. In these circumstances, the e-mail would be commercial if: (i) a recipient reasonably interpreting the subject line of the e-mail would likely conclude that the message advertises or promotes a product or service; or (ii) a recipient reasonably interpreting the body of the e-mail would likely conclude that the message is to advertise or promote a product or service.

MasterCard understands the need to provide differential treatment between the two types of mixed content e-mails to prevent spammers from exploiting potential loopholes. We believe, however, that the differential treatment creates unnecessary confusion and could create unintended consequences. For example, if a consumer e-mails a company to complain about a recent visit to the company’s store, the company may want to respond to the consumer. How would the Proposal apply to an e-mail with a subject line “Our Apologies” and a message apologizing to the consumer in a way that stresses at length the company’s objective to provide a variety of desirable quality products and services to the consumer, and the company’s assurance that the consumer’s experience was an unfortunate aberration? Would the e-mail be viewed by the consumer primarily as a plea to patronize the company again, and therefore potentially be “commercial” in nature? What if the e-mail included a coupon for a discount on a future purchase and a stronger sales pitch as to why the consumer should come back to the store? We do not believe that Congress intended to limit such e-mails, or to allow consumers to opt out inadvertently from receiving responses to their inquiries. Yet these are the types of questions that will arise as

a result of an approach that is based on an evaluation of the consumer's net impression of a mixed content e-mail not containing transactional/relationship content.⁴

If the Commission retains its approach in the Proposal with respect to these types of mixed content e-mails, we urge the Commission to make similar amendments to the Proposal as were suggested above for e-mails having both commercial content and transactional/relationship content. In particular, the consumer should reasonably determine that the *primary purpose* of the e-mail is commercial based on the subject line. Furthermore, the e-mail should be deemed to be commercial only if both of the criteria are met, as opposed to only one of the criteria being met.

Communications Deemed Not to Be Commercial

MasterCard believes that the Proposal will inappropriately require senders to evaluate a variety of e-mails that are transactional or relationship in nature to determine whether a nuance to the e-mail would cause it to be commercial for purposes of the Act. In effect, the Proposal would require senders of mixed content e-mails to make subjective guesses as to whether the transactional/relationship content of the e-mail was sufficiently close to the beginning of the message. Not only is the standard subjective and arbitrary but, as noted above, we believe such a standard will stifle the development of electronic communications with consumers by forcing certain content to the forefront of messages in all instances. One possible approach to mitigate this problem would be to classify certain types of communications as not being commercial in any instance. For example, a billing statement or other periodic account statement should never be deemed to be commercial. We do not believe that a reasonable consumer could consider a billing statement, regardless of the promotional nature of its added content, to have a primarily commercial content. A billing statement delivered by mail may include a variety of statement stuffers, statement messages, or other promotional items. However, we are confident that consumers do not mistake the primary purpose of the mailing as something other than to provide a billing statement. This holds true regardless of if the billing statement is in paper or electronic form.

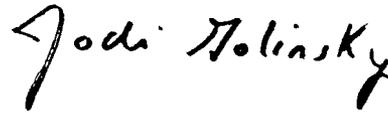
We are aware that the Commission is loathe to provide interpretations or regulations that would be subject to circumvention. We do not believe that classifying certain types of communications *per se* as not commercial will create opportunities for circumvention by those seeking to avoid the appropriate application of the Act. We believe that the Act provides the Commission and others with sufficient tools to enforce the Act against those who seek to mislead or falsify information in the e-mail to attempt to claim that the e-mail would be included in one of the identified categories of non-commercial e-mail, such as billing statements.

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⁴ We also note that the Commission could address these types of issues by including e-mails responding to consumer inquiries, or otherwise requested by the consumer, as e-mails that are transactional or relationship e-mails.

Once again, MasterCard appreciates the opportunity to comment on the Proposal. If you have any questions concerning the comments contained in this letter, or if MasterCard may otherwise be of assistance in connection with this issue, please do not hesitate to call me, at the number indicated above, or Michael F. McEneney at Sidley Austin Brown & Wood LLP, at (202) 736-8368, our counsel in connection with this matter.

Sincerely,

A handwritten signature in black ink that reads "Jodi Golinsky". The signature is written in a cursive, flowing style.

Jodi Golinsky
Vice President &
Senior Regulatory Counsel

cc: Michael F. McEneney, Esq.