

June 27, 2005

Federal Trade Commission  
CAN-SPAM Act  
Post Office Box 1030  
Merrifield, VA 22116-1030

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

Ladies and Gentlemen:

This comment letter is submitted on behalf of First National Bank of Omaha in response to the notice of proposed rulemaking (“Proposed Rule”) and request for public comment by the Federal Trade Commission (the “Commission”), published in the Federal Register on May 12, 2005 – Definitions, Implementation and Reporting Requirements Under the CAN-SPAM Act. First National Bank of Omaha appreciates the opportunity to comment on this important topic.

## **B. Questions on Proposed Specific Provisions**

### **1. Section 316.2—Definitions**

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

First National Bank agrees with the Commission’s proposed definition of “person.” The proposed definition is consistent with the manner in which we have interpreted the term and developed policies. We believe that to interpret it more narrowly would negate the intended protection of the Act.

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

First National Bank agrees with the Commission’s proposed definition of “sender.” The proposed definition is consistent with the manner in which we have interpreted the term, developed policies and engaged in joint email marketing arrangements. As an example of our joint email marketing arrangements -- Company A may offer online club memberships that provides various services or benefits. Company A also sends an electronic newsletter to its members, which contains various advertisements from multiple vendors, including First National Bank. First National Bank only provides advertising copy for its own products and services to include in Company A’s newsletter. Company A determines 1) the actual content of the newsletter, 2) identifies the email recipients and 3) is the “person” identified in the “from” line. Logically, it should be Company A that provides the physical address and opt-out notice. It would be far too confusing for the average recipient to understand why he must receive and respond to numerous opt-out notices from all the joint marketers in the newsletter.

Designating every joint-marketer in the newsletter as a “sender” and allowing a recipient to selectively opt-out of receiving the advertising information that is contained in the newsletter would be an administrative nightmare. The systems available today are not sophisticated enough to allow total customization at the email address level, especially when sending emails to potentially thousands of customers or members. Requiring each joint-marketer to be deemed a “sender” and therefore subject to the opt-out requirements would render this form of communication useless.

Furthermore, we concur with the ANPR commenters who discussed the risks involved with transferring multiple suppression lists to the various companies involved in a joint-marketing arrangement – specifically privacy and information safeguarding risks. The suppression lists could contain private non-public information that if intercepted by an unauthorized party could seriously damage the reputation of a financial institution and bring regulatory scrutiny. First National Bank vigorously protects the identities of its customers. In the spirit of the CAN-SPAM Act, we do not sell, share or otherwise distribute our customers’ Internet email addresses. We believe that requiring us to do so would be a violation of our policy and the Act itself.

In summary, First National Bank agrees with the Commission’s proposed definition of “sender.”

We would ask, however, that the Commission clarify that the term “content” does not include the advertising copy, or any other information, that a joint-marketer or vendor may supply for inclusion in the email. In our example above, Company A has control over the actual content of the newsletter items and makes the ultimate decision about whether or not to include our advertisement or information. However, other than determining whether an advertisement is appropriate for inclusion in a specific newsletter, Company A should have no responsibility for or control over the actual content of an advertisement.

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

First National Bank agrees with the Commission’s stance to not extend the application of the Act to those entities that do nothing more than provide a list of names or transmit a commercial email message on behalf of those whose products or services are advertised in the message.

First National Bank uses a third-party which sends commercial email messages on our behalf. We have contracted with this vendor to act as our agent. We provide all the content, we identify the email addresses to which the commercial email will be sent and we are the person identified in the “from” line. For all intents and purposes, First National Bank is the sender.

We believe that extending the Act to these types of third-party service providers would effectively put them out of business, which aside from the obvious loss of the business, would result in several additional drawbacks:

- 1) **Additional Expense to Businesses.** The third-party service providers would most likely become software providers since each business that sends large amounts of commercial information via email would have to purchase the software that was once available through the third-party. This would also mean that the business would have to house the software internally, ensure operating systems and computer systems are compatible, and ensure information technology staff is appropriately skilled. The business would also have to maintain its suppression list in-house instead of on the third-party’s computer system.

- 2) Loss of Expertise. The third-party providers are the experts in sending legitimate commercial material via the Internet, tracking and analyzing an advertising campaign's results, and managing the recipient and opt-out lists. Businesses rely on this expertise to ensure that a quality product is delivered to their customers.
- 3) Loss of a Gatekeeper. These third-party providers also act as an important gatekeeper for the industry. Their livelihoods depend on not being blacklisted as a "spammer" and ensuring that their clients are not cited for spam violations. In particular, our third-party provider reviews all our commercial messages for compliance with the Act prior to transmitting them. If the third-party provider is forced out of business, this additional layer of protection will disappear.

If nothing else, extension of the Act to service providers could result in a business having to use multiple third-party service providers, multiple mailing lists and multiple suppression lists to send the same information. This could result in frustration to the recipient since the possibility of sending duplicate emails is very real.

Another point we would like to bring out is that as part of our contract negotiations with any third-party service provider, we require, among other things that the service provider agree to not sell, share or otherwise distribute our customers' information. Additionally, the service provider must return all of our customers' information in its possession upon termination of the contractual relationship. Extension of the Act to a third-party service provider would mean three things:

- 1) The effectiveness of a vendor's email marketing campaign could be severely limited because the service provider would be required to run its own suppression list against all of its agent partners' lists prior to sending any commercial email;
- 2) By maintaining a suppression list that would contain the email addresses of its agent partners' customers', the service provider will not be able to comply with part of its contractual duties – returning all customer information upon termination of a contractual relationship; and
- 3) The vendors will lose the ability to safeguard their customers' non-public information once a customer's email address is included in the third-party's suppression list.

First National vigorously opposes any change to the rule.

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

First National Bank agrees with the Commission's proposed definition of the term "valid physical postal address." We find the choices to be sufficient and encompassing.

**2. Section 316.2(o)—"Transactional or Relationship Message"**

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

First National Bank does not believe that the Act applies to legally mandated notices. In the financial services industry, a customer may receive any number of notices via email, especially those customers that bank online. In these instances, a financial institution has no choice but to provide the notices and a customer has no choice but to receive the notices. We do not believe that legally mandated notices fit into any of the transactional or relationship message definitions

included in the Act. For instance, financial institutions are required by law to provide a potential customer with the USA PATRIOT Act notice prior to the customer opening an account. Since the “customer” may decide to withdraw an application at any time prior to opening an account or the financial institution may decline to open an account, we cannot say that the primary purpose of the USA PATRIOT Act notice is “...to facilitate, complete or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender.”<sup>1</sup>

First National Bank would like to suggest that the Commission clarify that any email that contains only a legally mandated notice be exempt from the requirements of the Act. However, if an email contains both a legally mandated notice and information that could be considered commercial, it should be subject to the primary purpose definitions.

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

First National Bank believes that debt collection emails should be considered transactional or relationship messages. They should not be considered “commercial.” To label debt collection emails as commercial in nature would provide the recipient with the ability to opt-out of receiving them, thereby avoiding legitimate collection efforts.

In addition, the term “sender” should be interpreted to extend to any third-party that is acting on behalf of one who would otherwise qualify as a sender. Especially in the financial services industry, third-party collectors are frequently used to collect unpaid debt. The collection agency must be able to act on the contracting financial institution’s behalf.

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

First National Bank agrees that the “transactional or relationship message” designation should travel to any third-party that is acting on behalf of the entity [“merchant”] with which the recipient transacted. As a nationally chartered financial institution, we offer a myriad of products and services, one of which includes facilitating online credit card payments. In this instance, a merchant contracts with us to process credit card payments on its behalf. As payments are processed, we send payment confirmation notices to the purchaser. This confirmation notice is clearly a relationship or transactional message and therefore should not be subject to the Act. Since the merchant has contracted with us and has designated us as their agent for the purpose of processing online credit card purchases, we must have the ability to fulfill our contractual obligations. We also believe that a person that makes online purchases reasonably expects to receive a confirmation notice of “good” payment via email.

We would like to note for the record that we do not use any of these email addresses for our own marketing purposes.

---

<sup>1</sup> 16 CFR Part 316, § 3, (17)(A)(i).

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

First National Bank agrees with the Commission’s interpretation. Financial institutions, such as ours, that sell their products and services across the United States and North America frequently effectuate or complete contract negotiations via email. It is a timely and cost effective means of doing business.

- e. Is it appropriate to classify messages offering employee discounts or other similar messages as transactional or relationship messages that “provide information directly related to an employment relationship”? Is a relevant factor the employer’s provision of the e-mail address to which such messages are sent to the employee? For example, should all messages sent from an employer to an employee at the employer-provided e-mail address be considered transactional or relationship under section 7702(17)(A)(iv)?; and**
- f. The Commission believes that an email message sent on behalf of a third-party, even with the permission of an employer, is not “transactional or relationship.” Is there any such scenario in which the e-mail message at issue could be considered “transactional or relationship”? If so, explain.**

First National Bank believes that any emails sent to employees by the employer or on behalf of the employer at an employer-provided email address are transaction or relationship messages that “provide information directly related to an employment relationship.” Most companies, including First National, have strict email-use policies. Generally, any emails that offer employee discounts or other similar messages are approved by the human resource department or other senior management.

An employer has the right and responsibility to communicate the benefits of employment with its employees, especially if the employer is providing the means of communication, whether that is through email, telephone or printed documents.

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

First National Bank believes that “providing information directly related to an employment relationship” should include providing information related to making an offer of employment. We typically only use email as a means of confirming a verbal offer of employment, especially when senior level positions are being filled. The emails are followed up with a written offer, but the email confirmation is a quick and acceptable method of ensuring all parties involved agree to the offer. We view this process in the same light as effectuating or negotiating a contract. [See comment for Section 2.d. above.]

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

First National Bank believes that the “primary purpose” rulemaking should be used as the guide for newsletters or other electronically delivered content. We have instituted the “primary purpose” of an email as our guideline when reviewing and transmitting information via email.

### 3. “Forward-To-A-Friend” E-mail Messages

- a. **Does the Commission’s discussion in this NPRM of the Act’s definitions of “initiate,” “procure,” and “sender” provide sufficient guidance to industry and consumers? Does the Commission’s explication of the term “induce” provide sufficient guidance to industry and consumers? Does the Commission’s discussion of “routine conveyance” provide sufficient guidance to industry and consumers? Does the Commission’s interpretation of any of these terms impose any undue burdens on industry or consumers?**

First National Bank agrees with the Act’s definitions and the Commission’s explications. We believe that sufficient guidance has been provided.

We are concerned that senders could unknowingly violate the law when recipients forward commercial emails. The forward-to-a-friend scenario leaves the sender open to unknown liabilities if a recipient deletes the required opt-out or address information or if a recipient forwards the commercial email to another email address that was on the sender’s suppression list. We agree that if the sender induces the recipient to forward the email, then the sender needs to have controls in place to ensure compliance with the Act. However, we are concerned that some well-intentioned senders will be fined for acts over which they have no control.

- b. **Does the Commission’s reading of “procure” to mean something that entails either payment of consideration or some explicit affirmative action or statement designed to elicit the initiation of a commercial e-mail message provide sufficient guidance to industry and consumers? Why or why not?**

First National Bank agrees with the Act’s definitions and the Commission’s explications. However, we are concerned that an innocuous statement such as “Please forward this email to your friends and family if you believe they could benefit from this information” could be misconstrued as an affirmative action or statement. In this specific example, no consideration would be provided to the recipient and unless the additional recipients respond directly to the email, the sender will never know the identities of the additional recipients.

- c. **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?**

An example of consideration that should be included with “routine conveyance” is the inclusion of a coupon in the email and a statement by the sender that the recipient is free to forward the coupon to as many friends and family members as they wish. However, the recipient may also use the coupon even if she does not forward the email. In other words, the sender has not attached any conditions-of-use to the “consideration” and unless the additional recipients respond directly to the email, the sender will never know the identities of the additional recipients.

- d. **Does the Commission’s position on “routine conveyance” provide industry with sufficient guidance concerning Web-based forwarding mechanisms? Does it impose any undue burdens on industry or consumers?**

First National Bank agrees with the Act’s definitions and the Commission’s explications. We believe that sufficient guidance has been provided. We do not believe that the Commission’s position will result in any undue burdens on the industry or consumers. We agree that if the sender intentionally induces the recipient to forward an email or Web-based information, then the sender needs to have controls in place to ensure compliance with the Act.

#### **4. Section 316.4—Prohibition Against Failure To Honor Opt-Out Requests Within Three Business Days of Receipt**

- a. Is three business days an appropriate deadline for effectuating an opt-out request? If not, what time frame would be more appropriate? Does the Commission’s proposal that multiple advertisers in a single commercial email message may arrange to have only one of those advertisers be the “sender” affect what time frame would be appropriate? If so, how?**

First National Bank strongly opposes changing the deadline for effectuating an opt-out request from 10 days to three days. Ten calendar days is a much more appropriate time frame for several reasons:

- 1) Three calendar days (or three business days for that matter) are not enough time to process recently received opt-outs against advertising campaigns that are in-design or that are ready for transmission. For example, under the three calendar-day rule, suppose a recipient opts out on a Friday. This would mean that the email list for a campaign that we want to transmit on Monday needs to be scrubbed for any opt-outs that were received since Friday. This would be extremely burdensome to the industry. Although opt-out requests can be added to a suppression list almost instantaneously, scrubbing against the list is not instantaneous.
- 2) Currently, we offer product information and newsletters based on behaviors. These advertising campaigns are targeted to specific audiences that are selected well in advance of the actual mailings. Once the audience is selected, we perform additional verification checks for accuracy and appropriateness. Allowing us only three days in which to process opt-out requests would not allow us to continue this stringent practice and targeted marketing. As a result, we would most likely send information to a much broader audience which could result in more unwanted emails and more opt-out requests.

We also feel that the three-day time frame would not allow multiple senders on the same email enough time to properly process opt-outs. The suppression lists would have to be shared across multiple systems not to mention the potential problems related to actually delivering the lists (e.g., Do we send it via the Internet? Should we burn it to a CD and overnight it?). A 10-day time frame is much more reasonable.

- b. Are some commenters’ concerns warranted that under the original ten business-day provision senders would be permitted to bombard a recipient with e-mail for ten business days following his or her opt-out request? Why or why not? Is this a commonly occurring practice? If so, what is the evidence supporting this? Providing as much detail as possible, explain whether recipients continue to receive commercial e-mail from a particular sender after submitting an opt-out to that sender. For example, are recipients who submit opt-out requests targeted for receipt of additional commercial e-mail? How likely are recipients to continue to receive additional commercial e-mail from a particular sender within ten business days after submission of an opt-out request? How likely after ten business days?**

First National Bank, as well as all other legitimate marketers, would never subject a recipient who chooses to opt-out to a “punishment” or “bombardment” campaign. We would consider that to be counterproductive since these are people we want to retain or acquire as customers.

- c. Some commenters indicated that there are several software products on the market that can effectuate opt-out requests almost immediately. Are such products widely or currently used by email senders? Are these products affordable for small entities? What are the costs and benefits of using such products?**

Our third-party processor has immediate opt-out capabilities; however, since we are a federally chartered financial institution, we house opt-outs internally for two reasons:

- 1) Privacy and Security. In the interest of maintaining our customers' privacy and safeguarding their information, we transfer as little customer information as possible to our third-party. As a result, our processor does not have a complete customer list; therefore our processor does not maintain a complete list of customer opt-out requests.
- 2) Distributed Systems. We have several distributed systems that must be updated with the opt-out information. As a result, immediate opt-out is not feasible.

- d. What specific technical procedures are required to suppress a person's email address from a sender's directory or distribution list? What are the specific time requirements and costs associated with those procedures? What, if any, manual procedures are required to suppress a person's e-mail address from a sender's directory or distribution list? What, if any, costs are associated with the manual suppression of e-mail addresses? How do such costs compare with costs associated with electronic processing? What, if any, circumstances would require manual processing of opt out requests? How prevalent is the use of manual procedures to suppress people's e-mail addresses from a sender's directory or list? What are the characteristics of senders that use manual procedures to process opt-out requests? What are the characteristics of senders that use electronic procedures to process opt-out requests? Do small entities process opt-out requests manually or electronically?**

First National Bank uses two distinct methods for processing opt-out requests:

- 1) Email Request. The most common method for requesting an opt-out is having the recipient reply to a commercial email we have sent. The customer replies with "unsubscribe" in the subject line. Our third-party processor receives this email and automatically adds the email address to their system. The third-party then forwards the email to our customer service department where the customer is unsubscribed in our systems. We have not changed to a batch process for opt outs, because we receive few opt outs.
  - 2) Phone or In-Person Requests. The recipient also has the option of asking us directly to place them on our suppression list. This opt-out is recorded on our internal systems and does not reside with our third-party processor. We generate all mailing lists internally; therefore opt-outs received in this manner are honored.
- e. In marketing agreements involving the use of third parties, what typically is the role of each third-party in processing an opt-out request? For example, who typically receives the opt-out request and how? If the opt-out request must be transferred to a third-party, how is that transfer accomplished, and how long does such a transfer typically take? Once an opt-out request is received by the third-party, what procedures are involved in effectuating the opt-out request, and how long do such procedures typically take?**

As a nationally chartered financial institution, we transfer as little customer information as possible to our third-party processor. Therefore, opt outs are housed in two places for us:

- 1) Opt-Outs Housed with the Third-Party. These opt-outs result from recipients sending "unsubscribe" emails to the third-party.

- 2) **Opt-Outs Housed Internally.** We generate our mailing lists internally. Therefore, we need to have access to our suppression list. In the interest of our customers' privacy and safeguarding of their information, we transfer as little customer information as possible to our third-party processor.

The process of generating a list, verifying the list is accurate, and loading the list to the third-party requires three to five business days. We always send a test email, asking for proof-reading and a final review from our Compliance Department. Preparing the email and sending a test for review requires three to five business days.

Altogether, an email can require up to 10 business days to transmit once the mailing list is generated. If the opt-out processing period is shortened to three days, we will be forced to cut verification that we consider vital to sending professional emails that are representative of the business and ethics on which we pride ourselves.

**f. Should there be time limits on the duration of opt-out requests? Why or why not? Does the CAN-SPAM Act give the Commission authority to limit the time opt-out requests remain in effect? If so, how?**

First National Bank believes that the opt-out requests should have an expiration date not to exceed five years, which would correspond to the time limits of the National Do Not Call Registry and a company's own internal do not call registry. An expiration date would also allow companies to purge their suppression lists, thereby reducing data storage costs.

We understand that some commenters might be concerned that an expiration date for an opt-out could mean the resumption of unwanted emails from the sender. We would disagree with this position. If a time limit were imposed, First National Bank would not resume sending commercial emails to an email address once the opt-out expired. As a marketer that prides itself on its integrity, we would use the expiration date only as a method of purging email addresses from our suppression list.

**g. Is an e-mail marketer's suppression list likely to have far fewer entries than the 84 million numbers on the National Do Not Call Registry? How many recipients receive an e-mail marketer's messages in a typical e-mail marketing campaign? How many of those recipients submit opt-out requests?**

First National Bank's suppression list will likely have fewer than the 84 million numbers that the National Do Not Call Registry ["Registry"] contains. However, because of the size of the Registry, the frequency with which it needs to be updated, and the limited number of marketing-type phone calls we place to non-customers, we do not house that information internally. We cannot justify the costs involved.

We have the same concerns regarding the email suppression list if no expiration date is allowed. Our email marketing is targeted to a specific audience that has indicated a desire to receive such emails. In addition, once a recipient indicates that he does not want to receive commercial emails from us, we will never add that email address back to our mailing lists, even once an opt-out expires.

## **5. Section 316.5—Receipt of Requests Not To Receive Future Commercial Email Messages From a Sender**

### **a. Should the Commission’s proposal regulating how recipients submit opt-out requests be changed in any way?**

First National Bank believes that the opt-out requests should have an expiration date not to exceed five years, which would coincide with the requirements of the various Do Not Call lists that companies currently maintain. An expiration date would allow companies to purge their suppression lists and reduce the amount of storage space used for the list. First National Bank would not resume sending commercial emails to an email address once the opt-out expires. As a marketer that prides itself on its integrity, we would use the expiration date only as a method of purging old email addresses from our suppression list.

First National Bank of Omaha appreciates the opportunity to comment on these important topics. If you have any questions concerning these comments, or if we may otherwise be of assistance in connection with this matter, please do not hesitate to contact Lynn Massey, Corporate Compliance at (402) 636-6694.

Sincerely,

Eric Durham  
Director, Corporate Compliance  
First National Bank of Omaha