



**Deborah Zuccarini
President**

Experian Marketing
Solutions
955 American Lane
Schaumburg, IL 60173
(224) 698-8409

June 27, 2005

Mr. Donald S. Clark
Secretary
Federal Trade Commission
Room 159-H
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

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

Dear Mr. Secretary:

Experian Marketing Solutions (“Experian”) is pleased to have the opportunity to offer comments on the Commission’s implementation of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“the CAN-SPAM Act” or “the Act”) pursuant to the Commission’s Notice of Proposed Rulemaking (“NPRM”), issued on May 12, 2005.

Experian, along with its affiliates, is a global leader in providing information services solutions to consumers and its client organizations. We have 13,000 employees worldwide who support clients in more than 60 countries, and our annual sales exceed \$2.2 billion. We also do business with more than 40,000 clients every day, across a range of industries as diverse as financial services, telecommunications, health care, insurance, retail and catalog, automotive, manufacturing, leisure, utilities, property, e-commerce and government. Experian helps organizations find, develop and manage profitable customer relationships by providing them with information, decision-making solutions and processing services, including e-mail deployment services. In addition to providing marketing solutions, Experian and its predecessor companies have provided credit reporting services for more than 100 years; our consumer credit reporting business, in fact, provides hundreds of millions of credit reports to lenders annually, thereby contributing significantly to the streamlined credit system that exists in the United States today. We also work tirelessly to provide fraud and identity theft prevention services, scoring and analytic tools, and risk management consulting.

Sender Definitional Issues

Section B.1 of the NPRM invites comments on the Commission's proposed definition of sender. Experian appreciates the guidance the Commission has offered, but believes there are several issues which require further clarification.

First, the Commission should clarify that there can be only one sender in a commercial e-mail sent pursuant to a subscription. If the Commission fails to do so, a commercial message sent pursuant to a subscription, while following the other criteria the commission sets forth, could continue to be deemed to have multiple senders. We believe this could result in advertisers who do not hold the subscription relationship being defined as senders and therefore required to honor opt-out requests, which would most likely be directed to the entity with the subscription relationship rather than the advertisers.

In these subscription messages, we believe the entity that maintains the subscription relationship with the recipient of the e-mail should be designated as the sender. Such an interpretation would be appropriate because a subscription-based message, that brands itself accordingly as such, is an implicit advertisement or promotion of the subscription service itself. This would fall within the Act's definition of "sender" as a person who initiates the message and whose product or service is advertised or promoted in the message. We believe that this interpretation should be applied notwithstanding the three sender criteria which the Commission has proposed. To do otherwise would create scenarios in which the entity with the subscription relationship sends the e-mail, but might not be designated as the sole sender. In such a scenario, the entity with the subscription relationship provides the e-mail addresses, approves the content which is provided by another advertiser and is in the "from" address, yet the advertiser would still be considered the sender. If the Commission adopts the three sender criteria without further clarification, there would continue to be multiple senders with most e-mail advertisement scenarios.

As a complement to the proposed rule, Experian proposes that the role of a "list owner" be defined. This would be accomplished by adding a fourth category to the definition of sender which states that an entity that (1) has established a relationship with a recipient, (2) clearly holds itself out as the "owner" of that relationship in the message, and (3) is responsible for list maintenance, is deemed to be the sole sender of the message. Experian believes this view would be in line with common industry practices and would provide necessary guidance to the great majority of e-mail list rental scenarios or single-advertiser list sponsorships.

To create such a category, the Commission must merely interpret the Act as providing that a "list owner" which "holds itself out to the recipient throughout the message as that particular [list owner] rather than as the [advertiser itself], then the [list owner] shall be treated as the sender of such message for purposes of this Act." Experian strongly believes that the content of an e-mail message should not dictate which party is

responsible for the suppression; instead, it should be the entity that holds itself out as the list owner.

Finally, Experian urges the Commission to clarify the category of the three sender criteria relating to the “controls the content” of the message. Under the proposed definition, it is unclear whether this refers to the advertiser who creates the content or the list owner/manager who approves and deploys the content. Because advertisers often prohibit any modifications to their proposed content, this clarification is essential to a determination of who “controls” the content. We urge the Commission to define control of the content as the entity with ultimate authority over the entire contents of the message. This would mean, for example, that the determination of the content or placement of an advertisement by an advertiser did not result in control of content.

Ten Business Day Time Period for Processing Opt-out Requests

Experian very strongly opposes the Commission’s proposal to reduce the time period in which to process opt-out requests from 10 to three days. Even the current 10-day period poses significant technical and operational compliance challenges.

Experian has multiple “sender” business units which collect and manage suppression lists across our services and product offerings, including the use of a global suppression list. Experian – along with our clients – takes advantage of e-mail list rental opportunities which require the transfer and application of suppression addresses to and from list owners, and the application of these in turn to the business unit level and global suppression lists.

For example, one of our business units – MetaReward – works with hundreds of affiliates and sub-affiliates. MetaReward then collects the unsubscribe requests using a special e-mail address in affiliate messages. If a recipient chooses to use this e-mail address instead of using the list owners unsubscribe link, his or her request must be processed manually by MetaReward. Unsurprisingly, manual processing adds a significant amount of time to the suppression process. It is barely possible within our current and very efficient operations to collect and apply these unsubscribe requests to ongoing list rental opportunities within the present 10-day limit. Three days is simply unworkable and would significantly delay and hinder the success of our e-mail acquisition opportunities.

To provide further clarity with this affiliate marketing example, prior to sending out a campaign, all e-mail addresses located on the suppression list are compiled and readied for affiliates. Hundreds of affiliates are then required to upload their lists to be cleaned against this suppression list, which can include tens of millions of e-mail addresses and take up to a day to process. Following cleansing, affiliates must download the clean file, which – given its size – can take up to a day as well. After re-uploading their total, cleansed list to the e-mail service provider which will send out the e-mail, more than three days have often elapsed between the start of the process and the e-mail distribution. Finally, creative and operational testing takes place for at least a day prior

to the deployment of an e-mail advertisement, furthering the scope of the minimal timing available for managing suppressions.

In addition to the impossible situation that a three-day requirement would create for such an entity as MetaReward, we often see other situations that make the three-day period difficult at best, including large corporations with legacy databases that must plan for their marketing campaigns and use of suppression lists a week in advance, use of hard-copy media – such as CDs – to transmit the files via the postal service, and then the use by small businesses which only have access to low bandwidth connections. A three-day deadline could cause many advertisers, especially small or traditionally offline businesses, to abandon their e-mail acquisition efforts altogether in order to comply.

Experian also believes that compliance with a three-day deadline would require increased reference and distribution of suppression lists which would in turn increase the threat of security breaches. In addition, a three-day deadline would lend itself to fraudulent or mistaken subscription and unsubscription requests and erroneous CAN-SPAM Act violations.

Duration of Opt-out Requests

Experian again urges the Commission to place a reasonable cap on the duration of the “opt-out” once exercised. We believe it is counterintuitive to think that Congress intended for opt-outs to be in effect indefinitely, especially when the senders may change identities, and new products and services may evolve over time. We believe that, since the marketplace is a readily adaptive environment and the life of a particular product or service is short and finite, five years is a reasonable time period for a recipient’s opt-out to apply to the sender which originally registered an objection. Much like the five-year period applicable to telephone numbers on the National Do Not Call Registry under the Commission’s Telemarketing Sales Rule, Experian believes that both consumers and industry would be better served by a similar expiration of individual, electronic opt-outs.

As the Commission points out, there is no list of non-functional e-mail addresses to aid in scrubbing suppression lists. However, a time limit on opt-out requests would help eliminate some of these e-mail addresses from suppression lists. In addition, many common e-mail addresses are reassigned once they become inoperative. A five-year duration would also ensure that individuals who obtain reassigned e-mail addresses would not be opted out of receiving commercial e-mail without receiving their affirmative consent. The burden on persons whose functional e-mail addresses re-enter sender lists would then be minimal.

If a five-year opt-out is considered, we would also urge the Commission not to require the affirmative consent of the person who previously opted out prior to sending him or her commercial e-mail. The Act requires affirmative consent in certain instances, but it does not mention it in the context of a re-used address.

Opt-out requirements

Although Experian supports the Commission's prohibition on fees, we urge the Commission to remove the prohibition on "other requirements." Certain requirements are necessary for authentication and confirmation purposes.

First, dual purpose messages – which include transactional or relationship content as well as commercial content – may require users to enter a login and password to manage their preferences and potentially cease to receive the transactional or relationship-related messages as well.¹ A mere change in the subject line may determine whether these dual purpose messages are deemed commercial or not, particularly given that the primary purpose is to be determined by the recipient and not the sender. As a result, the Commission's prohibition would force transactional and relationship e-mailers to separate these messages from commercial messages, therefore adding to the amount of e-mail being sent. At the least, Experian recommends an exemption for messages in the dual purpose category of transactional or relationship with commercial content that is considered commercial under the primary purpose rule. Experian believes this class of dual purpose messages is discrete and readily distinguishable from other messages.

Examples of a dual purpose message include a bank that sends a customer his or her monthly statement, together with a product offer, or a subscription confirmation message with a product offer. Both of these examples are dual purpose messages because they contain transactional or relationship content as well as commercial content. Depending upon the subject line, however, they may be treated as a commercial message. If they are, then under the Commission's proposed rules, recipients could only opt out by replying or going to a single web page. Such a requirement would prevent authentication and lead to mistaken or fraudulent opt outs.

Experian also recommends that the Commission consider carving out exemptions in which authentication requirements are used for websites with stored preferences, including filed credit cards, which may be storing preferences for more than one user.

Second, the Commission's prohibition would prohibit even an "Are you sure email@address.com should be unsubscribed?" request prior to submission of an unsubscribe request. Such confirmation requests are frequently used to reduce the two most common errors associated with opt-out requests: typographical and "alias" errors in which an e-mail user has multiple addresses forwarding to another address and the user attempts to unsubscribe from an alternative address not listed in an e-mailer's database. In many cases, this confirmation process alerts the user or e-mailer of an error in the e-mail address from that entry. Under the proposed rule, this practice of confirming an e-mail address would be prohibited. For example, confirmation methods often include: (1)

¹ There are many cases of commercial subscription services that require a login and password to authenticate a user prior to unsubscription. Examples include notable brands such as the Wall Street Journal Online.

a second web page or pop up following a web form unsubscribe entry or (2) a triggered e-mail message from an auto-reply or web form entry confirming the unsubscribe.

Finally, there are circumstances in which a marketer would like the opportunity to display an advertisement or other incentive in order to remind the recipient of the value of the list subscription prior to their unsubscription. This could come in the form of a pop-up, pop-under or other creative way which would be considered an “extra step” and subsequently be prohibited. Experian does not believe that these advertisements should be prohibited.

Again, Experian very much appreciates the opportunity to offer comments to the Commission on implementation of the CAN-SPAM Act. The Company will gladly provide any further information should the Commission require clarification or additional explanation of any of the issues discussed herein.

Sincerely,
/s/ Deborah Zuccarini
Deborah Zuccarini
President
Experian Marketing Services