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June 27, 2005

Mr. Donald S. Clark
Secretary
Federal Trade Commission
Room H-159 (Annex C)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

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

Dear Secretary Clark:

Motion Picture Association of America ("MPAA") is pleased to submit these comments ("Comments") regarding the Federal Trade Commission's ("FTC" or "Commission") proposed rules relating to the implementation of the CAN-SPAM Act.¹

MPAA member companies² and their affiliates provide permission-based electronic mail to consumers containing a wide array of promotions for member products. MPAA members have a long record of supporting the principles underlying the CAN-SPAM Act, which requires all companies to provide consumers with the option not to receive unwanted commercial email and imposes penalties on

¹ These comments are in response to the Commission's request for public comment published in Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act; Proposed Rule, 70 Fed. Reg. 25,426 (proposed May 12, 2005) (to be codified at 16 C.F.R. pt. 316), available at <http://www.ftc.gov/opa/2005/05/canspamfrn.htm> [hereinafter *NPRM*].

² MPAA members include: Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corporation; Warner Bros. Entertainment, Inc.; Universal City Studios LLLP; and The Walt Disney Company.

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illegitimate marketers' deception and "spamming" of consumers. Since the implementation of the CAN-SPAM Act, MPAA members have undertaken their obligations under CAN-SPAM to ensure that consumers are not receiving unwanted, bothersome email.

MPAA appreciates this opportunity to comment on the proposed rule modifications—specifically those that implicate its members' use of email communications. In particular, MPAA and its member companies believe there are four key areas that must be addressed in this rulemaking: (1) clarification of the definition of sender; (2) maintenance of the current ten-day opt-out period; (3) clarification of the scope of the Forward to a Friend and Tell a Friend exceptions to ensure that consideration is a necessary element of the Act's protections; and (4) clarification that the transactional or relationship exception applies to free, subscription-based newsletters.

In addition to the items detailed in this Comment, MPAA finds much to commend in the Commission's proposed rule. Specifically, MPAA also supports: (1) the proposition that confirmation messages sent by travel agents or similar entities in which they confirm a transaction that they themselves booked are transactional/relationship messages (but MPAA also maintains that travel and other independent agencies should be considered senders); (2) including ongoing negotiation messages in the Act's transactional/relationship exemption (as well as allowing an exemption for legally-required notices); (3) the idea that "business relationship messages" sent by an individual to one or a small number of recipients in the course of promoting a business-to-business transaction are transactional/relationship messages (but MPAA maintains that a specific exemption is unnecessary in that these messages are already outside of the definition of "commercial electronic mail message"); and (4) an exemption for all emails sent to employees by employers or third parties with the employer's consent to an employer-provided email address. MPAA also supports the inclusion of a safe harbor provision for good faith reliance on the representations and/or expected performance of third parties. Finally, MPAA requests that the FTC clarify that requiring a subscriber to provide authentication information for security purposes when a company processes an opt-out or otherwise providing a recipient with a two-step opt-out process is not prohibited.

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I. The FTC Should Clarify the Definition of Sender

As the Commission has recognized, when more than one person's products or services are advertised or promoted in a single email message, there is the possibility of having multiple senders, opt-outs, and unsubscribe lists.³ However, in accordance with congressional intent, the definition of sender should ensure that "sender" is appropriately defined, consistent with the purposes of the Act.⁴ MPAA understands the intent of the FTC's three-prong test for multiparty emails, but believes this approach as currently conceived does not promote clarity. In fact, the proposed test may result in unwarranted treatment of some entities as senders under the Act, lead to consumer confusion and impose unnecessary compliance burdens on passive content providers that have neither created nor procured the subject message.⁵ In particular, the "controlling the content" prong of the test is unnecessarily broad and will increase the burden on senders without any appreciable benefit to consumers. The proposed test also fails to protect against unintended violations of CAN-SPAM where the entity that actually transmits the email fails to comply, thereby creating liability for mere passive parties. Finally, the rule should at least enable more than one party to be a sender without triggering the sender obligations for all parties associated with a given email. MPAA believes the modifications proposed below are consistent with the intent of the Act and meet consumer expectations.

A. *Controlling the Content of an Advertisement Is an Essential Aspect of Multiparty Advertising and Should Not Make a Company a Sender*

The MPAA recommends that the FTC clarify the first prong of the proposed sender test—that a person who controls the content of the message is a

³ See *NPRM*, 70 Fed. Reg. at 25,428.

⁴ See S. Rep. No. 108-102, at 16 (2003), as reprinted in 2004 U.S.C.C.A.N. 2348, 2360-2361.

⁵ The FTC proposes to identify a single sender of a multiparty email *only* when a single sender meets that statutory definition and (1) controls the content of the message; (2) determines the email addresses to which such message is sent; or (3) is identified in the "from" line as the sender of the message. When more than one party meets one of these three criteria then all parties that meet the statutory definition of sender will need to meet the opt-out requirements. See *NPRM*, 70 Fed. Reg. at 25,428.

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sender—to ensure that sender obligations are not created when a party merely contributes the properly-formatted advertisement and/or graphics to be inserted into a multiparty email and/or retains approval rights over the look and feel of its own content. Companies that are not identified as the email sender, that do not select the individuals to whom an email is sent, and that are not in control of the final content of the email, should be able to provide some portion of the content for an email without triggering sender responsibilities under the CAN-SPAM Act.

Companies must protect their intellectual property—such as the use of a trademark or logo—as well as maintain contractual and publicity rights. For this reason, companies routinely provide exact language and formatting for advertisements in a publication regardless of whether they appear in an email or in a magazine. The publisher—whether online or offline—inserts the company’s prearranged content into the text of the publication in accordance with its contractual obligations with the company. In this instance, a company controls *its own* message—but does not control the other content of the email or its overall look and feel and thus should not be implicated by the statutory mandate. Additionally, companies routinely have contractual obligations that give them approval rights over content in order to protect a company’s brand and reputation. These approval rights also ensure that an advertisement conforms to contractual obligations with talent or other parties.

The rules for a company’s online responsibility should be consistent with the rules for offline advertising. Companies should be able to protect their brands and review advertisements in the ordinary course of business regardless of the medium they use to publicize their products and that review should not trigger “sender” status under CAN-SPAM. The FTC should clarify that preserving the integrity of a company’s intellectual property and meeting its contractual obligations with talent or other third parties by reviewing or even approving an advertisement (including location of an advertisement within an email or the placement of an actor’s image in relation to other products in the email) does not confer “sender” status on that party. MPAA asks that the Commission conclude in the final rule that the party that determines the final form and content of the email (other than rights of approval)—*i.e.* aggregating advertisements from different

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sources or adding a final significant element of the content—should be considered to control the content and thus be the sender for purpose of the three-prong test.⁶

B. The Proposed Sender Test Should Be Clarified to Protect Against Unintended Violations of CAN-SPAM

The FTC should make it clear in the final rule that a party cannot be deemed a sender solely because of mistakes or negligence on the part of another entity that has agreed to accept the responsibility under CAN-SPAM as the sender of the email.⁷ Unless the rule is clarified in this fashion, advertisers will face a substantial risk of unintended obligations and liabilities under CAN-SPAM. Such a result does nothing to add to the consumer protections embodied in the CAN-SPAM Act. The final rule should explicitly state that an advertiser should not be liable for mistakes or CAN-SPAM content violations on the part of the entity that has agreed to accept responsibility as the sender of the email.

C. Only Those Parties that Meet One of the Prongs of the Sender Test Should Be Senders

Where more than one entity meets any one of the three elements of the FTC's proposed sender test, MPAA believes that only those entities that satisfy one

⁶ For example, a MPAA member and a national ticket distributor might jointly promote an upcoming live musical or other event produced by the MPAA member by urging the recipients of promotional emails to purchase tickets from the ticket distributor. The ticket distributor would be listed in the "from" line of the email and the email would be transmitted by the ticket distributor to its own customer email list. The MPAA member and the ticket distributor might either (a) agree that the email would contain promotional material concerning only the MPAA member's event or (b) agree that the ticket distributor could add promotional material concerning unrelated events produced by other entities but for which the ticket distributor would also sell tickets. In either case, the ticket distributor properly would be treated as the sender under the FTC's test for "control" of the "content" of a promotional email because the ticket distributor aggregated content from multiple sources and/or added the final significant element by providing a "call to action" to purchase tickets to the event(s) from it. Otherwise, both the MPAA member and the ticket distributor would be considered the sender (along with the producers of any other events included in the email), unnecessarily complicating the process when the ticket distributor is the final compiler of the email.

⁷ For example, if an advertiser takes all of the necessary steps to ensure an email is treated as having a single sender, but the transmitter of the email alters the email so that the advertiser is identified in the "from" line, the advertiser should not be penalized for failing to provide an opt-out. *See, infra*, V.E.

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or more of the three elements should be treated as senders. Thus, if two parties meet the terms of the sender test, then those two parties should be identified as the senders, rather than forcing all advertisers to provide a suppression list and opt-out link just because more than one party meets one of the prongs of the test. For example, if in an email that includes four advertisers, one such advertiser is listed in the "from" line and another supplies the email list (thus both meet the sender test), the other two advertisers in the email who have not met any part of the proposed multiparty sender test should not be considered the sender simply because they have contributed to the email. A "one-or-all" approach to the sender definition significantly expands the opt-out requirements without creating additional consumer benefits or safeguards. Moreover, identifying a party that meets none of the criteria in the three-prong test as a sender will likely create more consumer confusion and will impose unnecessary regulatory burdens on advertisers. The Commission should clarify that sender responsibilities should be confined to those advertisers that satisfy one or more of the three prongs of the Commission's multi-advertiser test.

***D. MPAA's Proposed Clarifications Are Consistent with the
CAN-SPAM Act and Meet Consumer Expectations***

MPAA's proposed clarifications to the three-prong sender test meet the goals of the Act by ensuring that consumers have an effective way to opt out of future emails and by preserving a clear test for identifying the sender of a given email. These suggestions are also consistent with consumers' expectations. Consumers often have a relationship with the person that sent the email and generally consider that person the sender. Consumers also expect to receive professional, well-formatted advertisements with products clearly and accurately presented. This expectation is met by allowing companies to police the content of their advertisements without facing unwarranted liabilities. Finally, consumers expect that individual advertisers retain substantial creative control over the manner in which their products and services are presented in advertisements.⁸

⁸ In this way, online advertisements are no different from offline advertisements.

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II. The Ten-Day Opt-out Period Should Not Be Reduced

The FTC's proposal to reduce the time period allowed to effectuate an opt-out from ten days to three days is contrary to congressional intent, harmful to businesses, and provides no additional protection to consumers from receiving unsolicited commercial email. This ten-day standard was supported by a majority of commenters.⁹ Indeed, as the Commission itself noted, approximately half of the *consumers* who commented supported maintaining the ten-day requirement.¹⁰ Accordingly, the record compiled in this proceeding does not support the FTC's proposed dramatic reduction—by more than two-thirds—of the opt-out implementation time period.

The FTC should continue to follow the congressional intent evidenced by the plain language in the statute and the legislative history.¹¹ By allowing for a ten-day opt-out period under the plain language of the statute and specifically discussing a ten-day opt-out period in the relevant Senate Committee Report, Congress identified the appropriate level of consumer protection without creating unnecessary burdens on businesses. Since the passage of the Act, MPAA members have spent 18 months and devoted countless resources to comply with the ten-day rule. The proposed reduction would place additional burdens on companies that, like MPAA members, have acted in good faith to support and comply with the Act and implementing regulations. A marked increase in these companies' obligations is unwarranted particularly because consumers are satisfied with the current approach. The FTC appears to be relying on a few statements by companies who provide these opt-out services to businesses, rather than relying on unbiased statements by a wide range of industry and consumer commenters who concur that a ten-day opt-out period is the right balance.

Ten days is a reasonable amount of time to accomplish the opt-out process, given the different ways to opt out, and the potential for complications

⁹ See *NPRM*, 70 Fed. Reg. at 25,442. Only thirty-eight percent of the commenters favored shortening the period in any way (1,449 responders). *Id.*, n.189.

¹⁰ Presumably, the consumers that chose to comment on the March 11, 2004 Advanced Notice of Proposed Rulemaking are among the more active and consumer-focused individuals. See *supra* note 9.

¹¹ See 15 U.S.C. § 7704(a)(4)(A)(ii); S. Rep. No. 108-102, at 18 (2003), *as reprinted in* 2004 U.S.C.C.A.N. 2348, 2357.

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therein. Generally, there are two ways to opt out implicated by the scope of the Act's protections—via a Web profile page or via email. The amount of time necessary to complete these opt-outs depends on the processes for effectuating them. For example, if information needs to be shared between two databases or computer systems because of partnerships between companies—or even subsidiaries of one company—additional time may be necessary to accomplish that process.

Furthermore, even if the opt-out could be accomplished in a three-day period, such a time frame may not allow a company to address any unforeseen problems. If the sender experiences any delays due to system issues, the opt-out would not be completed in the time allowed. In fact, a three-day time period is so short that virtually any technical problem would lead to a violation of the rule.¹²

Additionally, stricter rules will hinder development and innovation in new media. Congress and the Commission have consistently applauded corporate efforts to more effectively communicate with consumers. These efforts will be stifled if, as new media opportunities are developed, the technology to opt out within three days is not readily available for these new technologies.

A shorter opt-out period also presents challenges for small businesses who advertise on MPAA members' sister radio and television stations, as well as for other local or regional advertisers. For example, local radio and television stations often send their listeners and viewers promotional emails for small business advertisers such as local automobile dealerships, restaurants and small retailers. These advertisers often use manual processes to add email unsubscribe requests to the advertisers' CAN-SPAM suppression lists. The advertiser must then supply its updated suppression list to any radio or television station, or other email service provider, whose list the advertiser seeks to use in order that the station or other service provider may process the advertiser's suppression list against the station, or

¹² Admittedly, a company is not generally liable under the Act for some unforeseeable technical issues if the problem is corrected in a "reasonable" time period. *See* 15 U.S.C. § 7704 (a)(3)(C); S. Rep. 108-102, at 17 (2003), *as reprinted in* 2004 U.S.C.C.A.N. 2348, 2362. However, a three-day rule would create unrealistic expectations among consumers. For example, if a company faces technical difficulties under the proposed rule, consumers, cognizant of the three-day requirement, may believe that they are victims of improper email communications when in fact the company has made reasonable efforts to meet consumers' demands.

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other service provider's, intended email distribution list. Given the limited resources that smaller businesses possess to handle email unsubscribe requests, three days are not sufficient for such small advertisers to take notice of an opt-out request, add that request to their suppression lists and then distribute the updated suppression lists to entities, such as local radio and television stations, with which they cooperate on email marketing.

If the three-day opt-out period is incorporated into the FTC's final rule, small advertisers will likely have no choice but to reduce or stop advertising via email. This in turn would harm small and local advertisers as well as the local radio and television stations that rely on such advertisers.

Significantly shortening the opt-out period also fails to achieve the goals of CAN-SPAM. One purpose of the Act is to protect consumers from deliberate spamming. To the extent that the three-day time period does not allow time to complete processing, senders will be inappropriately stigmatized in spite of their efforts to enforce requested opt-outs. This undesirable outcome is not accompanied by any additional benefit to consumers and thus provides no support for a reduction in the opt-out period.

III. "Forward to a Friend" and "Tell a Friend" Messages Should Remain Outside of CAN-SPAM Unless There Is "Consideration"

The FTC should clarify that "Forward to a Friend" and "Tell a Friend"¹³ functionalities are subject to the "consideration" interpretation that the FTC proffered as guidance in the proposed rule.¹⁴ MPAA agrees with the FTC that the Act applies where the company providing a "Friend to Friend" option offers an inducement in the form of money, coupons, discounts, awards, or additional entries into sweepstakes for forwarding or sending an email.¹⁵ However, Friend to Friend

¹³ For the purposes of these comments, "Forward to a Friend" involves consumers forwarding emails that may contain commercial content through their own browsers and personal computers to their family, friends, or colleagues. "Tell a Friend" allows consumers to use a Web-based form to send an email through the Web site operator's service to a friend with text and/or hyperlinks of interest. The term "Friend to Friend" is used to describe the two functions collectively.

¹⁴ See *NPRM*, 70 Fed. Reg. at 25,441.

¹⁵ See *id.* at 25,442.

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messages without consideration are not commercial emails and fall outside of the scope of the statute.

The Commission acknowledges that enabling persons to send an email to a friend is a “routine conveyance” not encompassed in the scope of the Act.¹⁶ However, footnote 178 conflicts with such an interpretation by applying the Act where a company includes Friend to Friend language but provides no consideration or other substantial inducement to prompt the forwarding.¹⁷ This inconsistency should be clarified to ensure that routine conveyances made via Friend to Friend functionalities are not improperly governed by the Act.

To remain consistent with this approach, the use of the word “induce” in CAN-SPAM should be appropriately defined using the recognized legal definition, which does not encompass the aforementioned Friend to Friend scenario. Black’s Law Dictionary defines “inducement” as the “the act or process of *enticing* or *persuading* another person to take a certain course of action.”¹⁸ When a business offers a mechanism to allow consumers to Tell a Friend and includes language similar to footnote 178, it hopes that the message will be forwarded but it has done nothing to actively persuade a person to do so. To use marketing language as the basis to distinguish Friend to Friend mechanisms as either commercial emails or routine conveyances is not a useful distinction.

If Friend to Friend mechanisms accompanied by even a suggestion that consumers use them must comply with CAN-SPAM, companies will be unable to meet the standards.¹⁹ Therefore, these services will be significantly curtailed or eliminated, harming rather than protecting consumers. Notably, Forward to a Friend messages *benefit* consumers in that they allow for people to be informed

¹⁶ See *id.* at 25,441.

¹⁷ “For example, an email message likely satisfies the Act’s definition of ‘procure’ when it includes text such as ‘Tell-A-Friend—Help spread the word by forwarding this message to friends! To share this message with a friend or colleague, click the ‘Forward Email’ button.’” *Id.*, n.178.

¹⁸ Black’s Law Dictionary 779 (7th ed. 1999) (emphasis added).

¹⁹ It is virtually impossible to meet the CAN-SPAM requirement that a company not send email to someone who has already opted out from its lists for Forward to a Friend, because the company will never know the email address of the recipient. Even in the Tell a Friend context, the company will not know the email addresses of the receiving “friend” until the sending “friend” initiates the transmission of the email. The company would need to put all such emails in a queue and then compare the recipient’s email address with its opt-out list, a complicated and laborious process.

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about products and services in which their own “friends” know that they are likely to be interested. Well-meaning communication between friends should not be hindered by inappropriately classifying these emails as commercial.

Consequently, the FTC should clarify that Friend to Friend messages that are not accompanied by consideration or a substantial inducement (such as additional entries in a sweepstakes) do not constitute a commercial email for purposes of the Act. This guidance will properly limit the scope of the Act and provide clear direction to businesses desiring to comply with governing law.

IV. Newsletters, Even Absent Consideration, Should Qualify for the Transactional or Relationship Exception

Congress has recognized that transactional or relationship messages are “*per se* valuable” messages.²⁰ Furthermore, the Commission provided an easy-to-use standard when emails contain both commercial and transactional or relationship content.²¹ MPAA supports the notion posited by the Commission in this NPRM that “when a subscription calls for delivery of a message that is not exclusively commercial, then the message is ‘transactional or relationship’ under section 7702(17)(A)(v) as long as ‘the recipient is entitled to receive [the message] under the terms of a transaction that the recipient has previously agreed to enter into with the sender.’”²²

This distinction is particularly important for MPAA companies and their newsletters to which consumers subscribe to receive information of interest to them. The newsletters, which are almost always free, may contain both commercial and transactional or relationship content. MPAA agrees with the Commission that such newsletters should be considered “transactions” under section 7702(17)(A)(v), even in the absence of consideration.

²⁰ See *NPRM*, 70 Fed. Reg. at 25,433.

²¹ See *Definitions and Implementation Under the CAN-SPAM Act*, 70 Fed. Reg. 3110 (Jan. 19, 2005) (to be codified at 16 C.F.R. pt. 316).

²² 70 *NPRM*, 70 Fed. Reg. at 25,437.

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V. Additional Clarification of FTC Guidance and Proposed Rulemaking

In addition to the issues addressed in detail above, MPAA offers the following brief comments and notes its general support for the Commission's proposals identified below.

A. Confirmation Messages Should Be Treated as Transactional or Relationship Messages

MPAA agrees with the Commission's proposal to allow confirmation messages sent by travel agents and similar entities, such as ticket distributors, to be deemed transactional or relationship messages where they confirm a transaction that the travel agency or other similar entity has booked.²³ MPAA disagrees, however, with an assumption that appears to underlie the Commission's request for comment on this issue—an assumption that the travel agency or similar entity is not a “sender” with respect to the transaction. This assumption is not factually correct. For example, travel agents provide important services to their consumer clients, including research and advice regarding the availability, quality, and price of various travel alternatives that fall within the client's interests and budget, as well as booking the travel alternative selected by the client. These services are “commercial . . . services” within the meaning of the Act's definitions of “commercial electronic mail message” and “sender,”²⁴ and thus a travel agent properly may be deemed a “sender” of an email that promotes travel services to be booked by the travel agent.

Deeming travel agents to be “senders” with respect to email messages that promote their travel advisory and booking services is essential to preserve a well-established and legitimate business practice. In the course of providing their services, travel agencies compile client lists that they use to market additional vacation and business travel opportunities. Many travel agencies are small or medium-sized businesses that have the technical capability to manage email unsubscribe requests and suppression lists with respect to their own client database, but do not have the technical capability to interface with the suppression

²³ See *supra* note 6.

²⁴ 15 U.S.C. § 7702 (2), (16).

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lists of the numerous airlines, hotels, cruise lines, and automobile rental companies whose products and services the agencies promote to their clients. Thus, an industry practice has emerged under which travel agencies assume responsibility under the Act as “senders” of commercial emails that promote their travel advisory and booking services, as well as the travel products that are the object of those services. This practice is consistent with the expectations of travel agency clients who perceive themselves to have a relationship with the travel agency and who therefore expect to be offered an opportunity to unsubscribe from the travel agency's emails. If this opportunity were not offered, travel agencies would be able to bombard individuals on their client lists with commercial emails regarding a multitude of travel service providers' products despite the email recipients' repeated unsubscribe requests. Because the existing practice is both consistent with the Act and in the best interests of consumers and legitimate businesses, the Commission should not issue any rule or guidance that would deem or imply that such practice is improper.

B. On-going Negotiations Should Be Treated as “Commercial Transactions”

MPAA agrees with the Commission's analysis that negotiations properly may be regarded as “commercial transactions” for purposes of the Act provided that the negotiations have been voluntarily entered into by the recipient of an email message sent in the course of the negotiations. This analysis is particularly important given the state of currently available email technology. Business email systems that handle one-to-one email communications (such as enterprise implementations of Microsoft Outlook) do not offer standard configuration to interface with businesses' separate consumer-facing email systems that send advertising and promotional emails. Moreover, no add-on software is generally available on the market to provide that interface. Thus, building such interfaces requires either extensive customization of businesses' email systems by in-house technology departments or outside consultants, or the use of highly inefficient and costly manual processes.²⁵

Treating negotiation emails as “transactional or relationship” also is consistent with the purposes of the Act. Negotiation emails are not like unsolicited

²⁵ See V.C., *infra*.

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advertising and promotional communications that the recipient has no means of stopping without the benefit of the Act's unsubscribe and suppression requirements. Rather, the moment that a recipient of a negotiation email terminates the negotiation, the "commercial transaction" that forms the basis for the transactional or relationship exception disappears and further emails directed to re-initiating a possible commercial transaction must be treated as "commercial electronic mail messages." The recipient of a negotiation email thus has fully adequate means to prevent receiving unwanted email without resorting to the Act's unsubscribe and suppression requirements for commercial electronic mail messages. For this reason, the Commission should clarify that emails sent in the course of negotiations voluntarily entered into by the recipient of the email message are properly treated as "transactional or relationship messages" under section 7702(17)(A)(i) of the Act.

C. "Business Relationship Messages" that Promote Business-to-Business Transactions Are Transactional or Relationship Messages

Generally, MPAA supports an express exception that would modify the definition of transactional or relationship messages to include all "business relationship messages" sent by an individual to one or a small number of recipients in the course of promoting a business-to-business transaction. However, MPAA maintains that no such exception is required given appropriate interpretation of the term "commercial advertising or promotion" in the Act's definition of "commercial electronic mail message." As discussed in section V., at 18-19, of the Comments submitted by MPAA on April 20, 2004, in response to the Commission's Advance Notice of Proposed Rulemaking published in the Federal Register, 16 C.F.R. 316, on March 11, 2004 ("2004 MPAA Comments"), the term "commercial advertising or promotion" consistently has been construed in the context of its use in section 43 of the Lanham Act,²⁶ to require "*some level of public dissemination of information,*"²⁷ and to exclude "isolated communications" that are not part of a pattern of "widespread dissemination within the relevant industry."²⁸ Thus, clear precedent exists for determining that it was not Congress' intent to capture within the Act's "commercial electronic mail message" definition emails sent in the business-to-

²⁶ 15 U.S.C. § 1125(a)(1)(B).

²⁷ See *Sports Unlimited, Inc. v. Lankford Enters., Inc.*, 275 F.3d 996, 1005 (10th Cir. 2002) (emphasis in original).

²⁸ See *Garland Co., Inc. v. Ecology Roof Sys., Corp.*, 895 F. Supp. 274, 276 (D. Kan. 1995).

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business context from one individual to another (or to a small group of other individuals).²⁹ Finally, for the reasons stated above in section V.B. with respect to negotiation emails, technology has not developed that reasonably supports subjecting such emails to the unsubscribe and suppression requirements of the Act pertaining to “commercial electronic mail messages.” For all these reasons, the Commission should either modify the definition of “transactional or relationship message” to include these messages, or should issue guidance that these emails are excluded from the Act’s definition of “commercial electronic mail message.”³⁰

D. Messages Sent to Employees to Employer-Provided Email Addresses Should Be Exempt

MPAA believes that all email messages sent by an employer, or a third party expressly authorized by the employer, to an employee’s employer-provided workplace email address should be deemed to fall within the Act’s “transactional or relationship message” exception.³¹ Employers, including members of MPAA, frequently communicate with their employees at work through corporate email systems regarding a variety of topics, including special offers of company products at company stores or other retail locations. As an employee benefit, employers may also arrange for third parties to offer commercial products or services on a preferred basis to employees and to communicate such offers through emails sent to the

²⁹ See *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 314 F.3d 48, 57 (2d Cir. 2002) (twenty-seven oral statements did not constitute “commercial advertising or promotion”).

³⁰ The Commission also has requested comment on whether a legally-mandated notice should be considered a “transactional or relationship” message or otherwise be deemed exempt from the suppression and unsubscribe requirements applicable under the Act to “commercial electronic mail messages.” MPAA is of the opinion that such notices should not be deemed to constitute “commercial advertising or promotion” under the definition of “commercial electronic mail message,” provided that the commercial content of such messages does not exceed the amount reasonably believed by the entity transmitting the message (or otherwise initiating the message) to be required to meet the legal requirement prompting the message. See 2004 MPAA Comments, § III., at 11-12. Thus, for example, emails sent to fulfill state law requirements that motion picture distributors invite exhibitors to trade screenings of upcoming motion pictures, *see, e.g.*, OHIO REV. CODE ANN. §§ 1333.05 – 1333.07; 73 PA. CONS. STAT. §§ 203-1 – 203-11, should not be treated as “commercial electronic mail messages” unless the commercial content of the emails exceeds that reasonably believed by the distributor to be necessary to meet the state law requirements. This construction of the Act is necessary to permit email to continue to serve as a cost-effective and convenient method for sending and receiving legally-mandated notices.

³¹ 15 U.S.C. § 7702 (17)(A)(iv).

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employees at work. Such third-party offers include discounts on personal automobile or home insurance, automobile repair, health club memberships, personal travel services, and a myriad of other products. In every instance, the employer has made a business judgment that the potential disruption of workplace efficiency that might be caused by sending such emails is outweighed by a tangible benefit to the employee recipients. Virtually no danger exists that an employer would harm its own interests by interfering with its employees' efficiency through bombarding its employees with workplace spam. Thus, the Commission should issue guidance that all email messages sent by an employer, or a third party expressly authorized by the employer, to an employee's employer-provided workplace email address fall within the employment-related element of the Act's "transactional or relationship message" definition.³²

E. The Commission Should Adopt a "Safe Harbor" for Good Faith Reliance upon the Representations and/or Expected Performance of Others

MPAA believes that the Commission should be guided by the Act's legislative history to adopt a "safe harbor" from statutory liability where an "initiator" (including a "sender") has relied in good faith on the representations of, and/or promised performance by, an affiliate or third party. In this regard, compliance with the Act often requires a "sender" to rely upon the expected performance of a service provider to ensure that commercial email sent by the service provider on behalf of the "sender" complies with the email format requirements of the Act, and that the service provider properly applies the "sender's" suppression list to, and forwards unsubscribe requests received from, the

³² 15 U.S.C. § 7702(17)(A)(iv). The Commission also has requested comment on whether emails sent by prospective employers to individuals who have received bona fide, solicited offers of employment should be deemed to fall within the Act's "transactional or relationship message" definition, 15 U.S.C. § 7702(17)(A)(iv). As noted in the 2004 MPAA Comments, employers often need to send prospective employees information on employer-provided rental housing, employee health or life insurance benefit options, or other administrative benefit information prior to the time of hire. 2004 MPAA Comments, § III. at 12. Treating such emails as "commercial electronic mail messages" subject to the Act's suppression and unsubscribe requirements would interfere with legitimate human resource administration processes and is not consistent with Congress' intent with respect to the scope of the Act. The Commission therefore should issue guidance recognizing that such email messages fall within the Act's "transactional or relationship message" definition. See 15 U.S.C. § 7702 (17)(A)(iv).

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email campaign. In similar fashion, when “initiating” an email campaign on behalf of a “sender,” service providers rely upon the accuracy of suppression lists provided by “senders” and upon “senders” representations that they will honor unsubscribe requests that result from email campaigns. Recognizing the necessity of such reliance, Congress stated its intent that entities that “initiate” commercial email campaigns simply “be responsible for making a good faith inquiry” where they rely upon the representations of others involved in the email campaign.³³ By contrast, entities cannot avoid statutory liability by “willfully remain[ing] unaware” or “consciously avoiding knowing” that another party has not performed, or will not perform, its statutory duties.³⁴ The Commission should adopt a “safe harbor” to implement Congress’ intent that entities that “initiate” commercial email campaigns (including “senders”) be permitted to rely in good faith upon the representations and expected performance of others, and not be subjected to statutory liability where such reasonable reliance is disappointed.

F. The Commission Should Clarify that a Request for Authentication Information to Process an Opt-Out Is Not Prohibited

In the NPRM, the Commission requested comments on proposed rule § 316.5, under which a sender would be prohibited from charging a fee or imposing other requirements on recipients who wish to opt out.³⁵ In this regard, MPAA asks the FTC to clarify that a request for a password or other authentication information is consistent with this prohibition. Companies use passwords and other authentication information to ensure consumers’ privacy and identity and a request for such information is consistent with the purposes of CAN-SPAM. Furthermore, MPAA requests clarification that an opt-out process that includes hyperlinks leading a recipient through one or two additional Web pages is consistent with the proposed rule as long as the process does not frustrate or unduly burden the user’s desire to opt out. The Commission’s clarification of these points under the proposed rule would allow MPAA members to continue to protect consumers by authenticating opt-out requests without imposing additional requirements on recipients who wish to opt out.

³³ See S. Rep. No. 108-102, at 18 (2003), as reprinted in 2004 U.S.C.C.A.N. 2348, 2362.

³⁴ See *id.*

³⁵ NPRM, 70 Fed. Reg. at 25,453.

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MPAA appreciates this opportunity to comment on the NPRM and thanks the Commission for its continued commitment to ensuring that the CAN-SPAM Act is properly enforced.

Sincerely,

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