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Federal Trade Commission  
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Washington, DC 20580

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

Mattel, Inc. is the worldwide leader in the design, manufacture and marketing of toys and family products. For more than 50 years, Mattel, Inc.'s premier toy brands have delivered innovative toys that inspire and spark children's imaginations around the world. The company's best-known brands include Barbie®, Hot Wheels®, Fisher-Price®, Tyco® R/C, and American Girl.® With headquarters in El Segundo, California, Mattel has approximately 5,500 employees in the U.S., offices and facilities in 42 countries and sells its product in more than 150 nations throughout the world.

Mattel appreciates the opportunity to submit these comments to the Federal Trade Commission ("FTC" or "Commission") on the Notice of Proposed Rulemaking ("NPRM") concerning Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act ("CAN SPAM" or "the Act"), which was published in the *Federal Register* on May 12, 2005.<sup>1</sup> Mattel's approach to sending e-mails to consumers is simple. It is a permission-oriented company. Mattel does not send unsolicited e-mail messages, and is strongly committed to respecting consumer privacy and choices about receiving commercial e-mail messages. As one of the world's major toy companies, Mattel operates websites directed to children under age 13. We also offer sites primarily geared to collectors, as well as sites (and areas of sites) where consumers can buy our products online. Naturally our companies have procedures in place to comply with the Children's Online Privacy Protection Act ("COPPA") and the privacy guidelines of the Children's Advertising Review Unit ("CARU"). Virtually all of our websites, both those primarily of interest to children as well as our adult and collector sites, offer a variety of popular refer-a-friend features, including e-cards.

Mattel believes that its dissemination of e-cards and other refer-a-friend messages constitutes a routine conveyance in accordance with the plain meaning of the statute. We are concerned, however, that the interpretation of refer-a-friend offerings outlined in the NPRM is ambiguous in

<sup>1</sup> 70 *Fed. Reg.* 25426-25455 (May 12, 2005) ("CAN SPAM NPRM").

this regard. If in fact such messages are covered, it would create inconsistencies with COPPA, and we would therefore ask that the comment period be extended for further input on this point. We also are concerned that the proposal to shorten the period for honoring opt-out requests from ten business days to three business days will create implementation difficulties. Finally, we respectfully request clarification regarding the definition of "transactional or relationship messages" as applied to "club" memberships. Mattel is pleased to have the opportunity to submit comments in this important proceeding.

### **"Forward-to-a-Friend" Scenarios**

Among the most popular offerings on many of our websites are our character-based e-cards and other refer-a-friend features. Our refer-a-friend features allow website visitors, including children, to forward e-cards or other e-mail messages to their friends by providing their own and a friend's e-mail address. This allows a child to receive, for example, a birthday greeting from Barbie® or another character. In all of our websites, we collect the name of the sender and the recipient only for purposes of sending the message as requested; our sites do not retain either the sender's or the recipient's address except to fulfill the request. This is a classic example of a routine conveyance. E-cards and similar refer-a-friend features have long been recognized by the Commission to be permissible in kid-directed sites, and to fall under the "one-time only" exception to COPPA's general rule regarding verifiable parental consent.<sup>2</sup> COPPA requires that the site not retain the e-mail addresses involved, a rule that indeed reflected longstanding practice by responsible companies offering websites appealing to children. Importantly, the Commission has clarified that sites could not retain e-mail addresses of consumers known or believed to be children for other purposes, including for purposes of maintaining an opt-out list, without obtaining verifiable parental consent, under COPPA.

Mattel has transmitted many, many e-cards and refer-a-friend e-mail messages each year. These messages are not viewed to constitute unsolicited marketing messages or spam by our consumers. Mattel does not offer any payment or "consideration" of any kind to individuals to forward e-mail messages to friends (*i.e.*, money, coupons, discounts, awards, additional entries in a sweepstakes, etc.), and firmly believes that these messages fall under the routine conveyance exception to the Act. We are concerned, however, that the discussion surrounding the term "inducement" in the NPRM introduces ambiguity in terms of subjecting Mattel's refer-a-friend offerings to CAN SPAM requirements. In this regard, we are troubled by discussions regarding the term "inducement" in the notice. If the intent is to indeed assess refer-a-friend campaigns by their use of any mild "urging" language, the result will potentially limit creative text around refer-a-friend offerings or subject a larger universe of refer-a-friend and like offerings to the CAN SPAM requirements, including, potentially, e-cards. This, in turn, creates conflict with COPPA.

In the NPRM, the staff evaluated the definitions set forth in the Act, specifically the definitions of "initiate," "procure," and "sender." The term "initiate," as defined in the Act, means "to originate or transmit such message or to procure the origination or transmission of such message,

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<sup>2</sup> See *Frequently Asked Questions About the Children's Online Privacy Rule*, Question 44, at <http://www.ftc.gov/privacy/coppafaqs.htm>.

*but shall not include actions that constitute routine conveyance of such message.* For purposes of this paragraph, more than one person may be considered to have initiated a message.”<sup>3</sup> The term “procure” means “intentionally to pay or provide other consideration to, or induce, another person to initiate such a message on one’s behalf,”<sup>4</sup> and the term “sender” means “a person who initiates [a commercial e-mail] message and whose product, service, or Internet web site is advertised or promoted by the message.”<sup>5</sup>

Looking at these definitions, the NPRM reasons that a person who *intentionally* pays, provides *consideration* to, or *induces* another to send on his or her behalf a *commercial e-mail message that advertises or promotes his or her product* may be considered to have “*procured*” the origination of that message under the Act, and therefore should be deemed an “*initiator*” or “*sender*.” Indeed, the NPRM acknowledges, in a brief footnote, that its interpretation assumes that the activity in question is not a “routine conveyance.”<sup>6</sup> The NPRM goes on to state that the words “consideration” and “induce” are not defined in the Act, and separately discusses these terms. We disagree with the discussion of the role of “consideration” in the NPRM. We do not believe that offering a trivial benefit, such as extra chances to win in a sweepstakes, should vitiate the routine conveyance exception. We note, for example, that extra chances to win in a sweepstakes is not viewed to constitute “consideration” under state sweepstakes laws. We reserve the right to supplement these comments on this point. For purposes of this response, however, we focus on the discussion of the term “induce” in the NPRM, which introduces added ambiguity into refer-a-friend messages.

The NPRM says that to “intentionally induce” the initiation of a commercial e-mail message, according to the notice, the sender must “affirmatively act or *make an explicit statement that is designed to urge another to forward the message.*”<sup>7</sup> The NPRM suggests that merely making available the means for forwarding a commercial e-mail message, for example, by including a link that merely states “E-mail to a friend”- would not constitute “inducing” the sending of an e-mail. It opines that such language is more appropriately considered a “routine conveyance,” which does not constitute “initiation” of an e-mail message.<sup>8</sup> The NPRM, however, introduces confusion by suggesting, in a footnote, that language such as: “Tell-A-Friend – Help spread the word by forwarding this message to friends!”<sup>9</sup> might be treated differently.

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<sup>3</sup> 15 U.S.C. §7702(9) (emphasis added).

<sup>4</sup> 15 U.S.C. §7702(12).

<sup>5</sup> 15 U.S.C. §7702(16). As noted in the Act, however, “if an entity operates through separate lines of business or divisions and holds itself out to the recipient throughout the message as that particular line of business or division rather than as the entity of which such line of business or division is a part, then the line of business or the division shall be treated as the sender of such message for purposes of this Act.”

<sup>6</sup> CAN SPAM NPRM at note 173.

<sup>7</sup> *Id.* at 25441(emphasis added).

<sup>8</sup> *Id.* at 25441-25442, note 180. According to the Commission, such a statement does not amount to “inducement” because it only exerts a *de minimis* influence or persuasion. *Id.* at note 180.

<sup>9</sup> *Id.* at note 178.

E-card areas commonly feature language such as “Check out our cool e-cards and send one to your friends!” The American Girl e-card area, for example, says: “Welcome to E-Card Central! Check back often for the newest cards!” We believe that e-cards are a classic example of offering a mechanism on a website for forwarding messages to a friend that constitutes a classic example of a routine conveyance. Regardless of the language surrounding the offering, someone other than the site operator identifies the recipient and provides their address; this is the essence of the routine conveyance exception. Consequently, if, the staff does plan to treat e-cards and other refer-a-friend messages differently depending on the language used, we believe it plainly contravenes the statute. We are hard-pressed to distinguish how “Tell-A-Friend – Help spread the word by forwarding this message to friends!” is materially different from a link like “E-mail to a friend!” or how one can be interpreted as any more influential or persuasive than the other. Such an approach will unduly enmesh the Commission in the content and language of invitations to send e-cards and refer-a-friend messages, and that is not the FTC’s role. Mattel does not believe that this was the intent of Congress when it drafted the CAN-SPAM Act, and seeks clarification on this point.

Such an approach would also yield inconsistent results with COPPA. COPPA limits the information that companies can collect from children, such as e-mail addresses. The Mattel websites do not use their own lists to send refer-a-friend messages. The friend provides the address of the recipient, and the Mattel website functions much as any Internet Service Provider (ISP) does in transmitting or conveying the message. In any event, COPPA prohibits any of our websites (or areas of websites) primarily intended for children from maintaining opt-out lists with children’s e-mail addresses unless parents have provided the requisite verifiable parental consent. Websites directed to children could not cross-check a suppression list for kids’ e-cards because they do not retain one, and instead promptly delete the sender and the friend’s e-mail addresses. Our sites would have no means of protection if downstream “friends” receive altered e-mails, *e.g.*, with opt-out information deleted. It certainly could not have been the intent of Congress in drafting the CAN SPAM Act to create such an inconsistency.

The statute itself clarifies the breadth of the “routine conveyance” exception. A “routine conveyance” is defined in the Act as “the transmission, routing, relaying, handling, or storing, through an automatic technical process, of an electronic mail message for which another person has identified the recipients or provided the recipient addresses.”<sup>10</sup> By defining the term “routine conveyance” as broadly as it has and including within the scope any e-mail message for which a person other than the marketer identifies the recipient or provides the recipient’s e-mail address, the only sensible interpretation is that Congress intended for a “routine conveyance” to broadly include all refer-a-friend offerings like e-cards.

We believe that the routine conveyance exemption means a situation where the website or online services functions merely as a transmitter for a sender and recipient, where another person has identified the recipients or provided the recipient addresses, the situation that would apply to e-cards. Because of the potential ambiguities in the NPRM’s discussion on this point, Mattel urges the FTC to confirm that sending e-cards are covered by the “routine conveyance” exception. Any refer-a-friend message where 1) the sender submits the e-mail address of the recipient (in

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<sup>10</sup> 15 U.S.C. §7702(15).

other words, there is no question of any commercial relationship between the actual sender and the website), 2) the commercial nature, if applicable, of the message is apparent from the subject line (e.g., "A birthday greeting from Barbie®!"), and 3) the sender and recipient information is not retained or used for marketing purposes (unless either affirmatively signs up to receive marketing messages), should be considered to fall in the "routine conveyance" category and exempt from CAN SPAM. If friends are abusing their knowledge of their friends e-mail address, the friend has a simple remedy: block or delete any e-mails from the friend.

### **Timeframe For Honoring Opt-out Requests**

Mattel values the trust our consumers have in our brands. We make every effort to honor opt-out requests as promptly as possible. However, the proposal to shorten the period for effectuating an opt-out request from ten business days to three business days could not be fully implemented by Mattel. The notice reasons that changing the time for processing opt-out requests to three business days should not pose a significant problem, as this should be done electronically. As a company, we are in fact striving to move to real-time database updates across our brands and platforms; however, we are not there yet. Consumer-oriented companies like Mattel offer consumers a variety of opt-out mechanisms. For example, Mattel offers consumers both a web-based unsubscribe mechanism and the opportunity to unsubscribe by calling a toll-free number. While opt-out requests sent to Mattel electronically can indeed be honored within three business days, our system through the company is set up to transmit opt-out requests made via telephone on a weekly basis. Thus, Mattel believes that it would be premature to move to a three-day period at present. Given the difficulty that Mattel - a large, global organization - would have in assuring that it could indeed honor all unsubscribe requests in three days, we have no doubt that the requirement would impose an even greater burden on small and mid-sized operations. The result would be to eliminate telephone contact as a means of unsubscribing, a result that we do not think is optimal for consumers.

### **Transactional/ Relationship Messages**

Although numerous parties urged the FTC to change the scope of the transactional/ relationship exemption, the FTC did not propose any modifications to the definition of a "transactional or relationship message." One scenario that does not appear to have been presented is one related to online club memberships. Some of our brands, including American Girl, offer club memberships that entitle the recipient to receive newsletters, product updates, and special promotional offers related to products. Sometimes participation is free; sometimes it is available for a fee. For example, the American Girl Club is an online club open to girls 8 years and older. For COPPA compliance purposes, American Girl utilizes a credit card authorization method of parental consent, and charges an annual fee of \$20. Member benefits include e-mail updates containing anything from account information to sneak previews of select American Girl products to special discounts on products. We believe that the FTC should clarify that all electronically delivered content sent to members of the American Girl Club or other similar clubs offered by our websites constitute "transactional or relationship messages."

In response to comments recommending that subscriptions to newsletters, membership clubs, and the like be deemed "transactional or relationship messages," the NPRM states that "CAN-

SPAM's regulation of a message delivered pursuant to a subscription depends on whether or not the message contains exclusively commercial content."<sup>11</sup> It also notes that the sender need not receive consideration from the recipient for the message to be classified as "transactional or relationship." Mattel believes that the American Girl Club in particular is unique because it has a consideration component and e-mail messages have a finite duration (one year), unless the recipient renews her membership. Furthermore, the transaction or relationship itself, namely, the club, clearly encompasses receipt of both informational updates and commercial or promotional announcements on a regular basis. Prospective members are also generally informed that some of the e-mail messages they will receive relate to Mattel products (*i.e.*, may be "commercial" in nature). If a member no longer desires to receive future e-mail messages a club, she always has the option of terminating her membership.

Mattel does not believe that largely exempting club communications from CAN SPAM requirements will threaten consumer privacy, as only a narrow scope of messages fall within this category of communications. Moreover, such communications are of the type that the recipient expects to receive, and in fact wants to receive, especially if consideration is paid to join the club. The communications are *per se* valuable to the recipients, and should therefore be covered by the transactional/ relationship exemption.

#### **Definition of "Sender"**

The staff has rightfully acknowledged the need to clarify the "sender" of a commercial e-mail in situations when more than one person's products or services are advertised or promoted in a single message. The term "sender" is currently defined in the Act as "a person who initiates [a commercial electronic mail] message and whose product, service, or Internet Web site is advertised or promoted by the message." The NPRM proposes that, when more than one person's products or services are advertised or promoted in a single electronic mail message, each person who comes within the Act's definition will be deemed a "sender," provided that if only one of the "senders" meets one or more of the following criteria, *only that person* will be deemed to be the "sender" of the e-mail message: (1) The person controls the content of the e-mail message; (2) the person determines the e-mail addresses to which the message is sent; or (3) the person is identified in the "from" line as the sender of the message.

Mattel believes that application of this proposed approach to commercial offers including multiple ads from multiple advertisers should simplify advertisers' compliance obligations by clarifying that only one advertiser is the "sender," while avoiding the need to provide the other parties' opt-out lists. It will avoid the need for each advertiser to maintain its own suppression list and cross-check its list with other "senders." The proposed definition clarifies who will be responsible for complying with the Act, and the proposed criteria offer adequate guidance for establishing the "sender" when multiple advertisers are involved.

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<sup>11</sup> CAN SPAM NPRM at 25437.

Mattel appreciates the opportunity to submit comments in this important proceeding. If we can provide further information or explanation, please let me know.

Respectfully submitted,

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