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June 27, 2005

Via Electronic Delivery

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

Re: CAN-SPAM Act Rulemaking, Project No. 411008

To Whom It May Concern:

This letter is submitted on behalf of HSBC Bank Nevada, N.A. (“HSBC”) in response to the Notice of Proposed Rulemaking, and the request for public comment, (“Proposal”) issued by the Federal Trade Commission (“Commission”) with respect to several aspects of the Controlling the Assault of Non-Solicited Pornography and Marketing Act (“CAN-SPAM Act” or “Act”). HSBC is a top 10 issuer in the United States of Visa and MasterCard general-purpose credit cards and private label credit cards. We appreciate this opportunity to comment on the Proposal and support the Commission’s efforts to provide guidance via the Proposal.

Definition of “Sender”

The Act defines a “sender” as “a person who initiates [a commercial e-mail] message and whose product, service, or Internet Web site is advertised or promoted by the message.” The Commission’s regulations implementing the Act adopt, by reference, this same definition. We believe it is important for the Commission to address an issue that is raised by this definition in the context of e-mails that include advertisements or promotions for more than one person’s products or services. We do not believe that Congress intended the Act to prohibit, in effect, e-mails with multiple commercial messages due to the complexity of the compliance obligations, many of which are discussed by the Commission in the Proposal.

The Proposal would address this situation by retaining the definition of “sender” as it is in the Act. However, if more than one person’s products or services are advertised or promoted in a single e-mail, each such person who is within the Act’s definition would be a “sender,” except that if only one such person both is within the Act’s definition and meets one or more specified criteria, only that person would be deemed to be the sender. The criteria are: (i) the person controls the content of the message; (ii) the person determines the e-mail addresses to which such message is sent; or (iii) the person is identified in the “from” line as the sender of the message.

We believe the Commission's proposed definition is helpful, and recommend two clarifications. First, it is not clear what constitutes "control" with respect to the content of the e-mail. At the very minimum, the fact that multiple entities are allowing their intellectual property (*e.g.*, trademarks, logos, etc.) to be included in the message indicates some degree of control over part of the e-mail. Therefore, a strict reading of the Proposal renders the Commission's control prong meaningless, as each of the potential senders would have some control of the message, thereby making all of them "senders" under the Act.

However, in order to give meaning to the control prong of the proposed definition, we believe the Commission should clarify its application to situations involving more than simple usage of intellectual property. Indeed, if companies are willing to associate themselves with an e-mail, they will likely also have rights with respect to approval of ad copy, general types of content in the e-mail, items promoted within the e-mail, and other similar "control." Therefore, we urge the Commission to clarify that "control" relates to the ability to make ultimate decisions relating to the content or sending of the e-mail. If this clarification is not made, we believe this prong of the definition should be deleted, as it would render application of the Commission's intent virtually impossible.

We ask for similar clarification with respect to whether or not a company "determines" the e-mail addresses to which an e-mail is sent. For example, if an e-mail with multiple advertisements is sent, it is likely that each of the senders has at least consented to the types of e-mail addresses to which the e-mail will be sent (*e.g.*, persons with certain demographic characteristics). We do not believe that the Commission intends for such arrangements to qualify as "determining" the e-mail addresses to which the e-mail is sent. Rather, we believe the Commission intends to cover only those companies who determine the *specific* e-mail addresses to which the e-mail will be sent.

Definition of "Valid Physical Postal Address"

The CAN-SPAM Act requires a commercial e-mail to include "a valid physical postal address of the sender." In response to numerous comments to the Advance Notice of Proposed Rulemaking ("ANPR") the Commission proposes that a sender may comply with the relevant requirement in the Act by using any of the following: (i) the sender's current street address; (ii) a Post Office box the sender has registered with the United States Postal Service ("USPS"); or (iii) a private mailbox the sender has registered with a commercial mail receiving agency that is established pursuant to USPS regulations. In particular we support the clarification that the use of a Post Office box will satisfy the requirements of the Act. Each day we receive thousands of pieces of correspondence from our customers. By using Post Office boxes we are able to more efficiently manage the flow of mail by having designated correspondence routed to a specific Post Office box. By using Post Office boxes we are able to shorten the amount of time to sort mail and are able to get the mail into the hands of customer service representative so they can respond quicker.

However, we do not believe that it is necessary for the sender to register the Post Office box with the USPS so long as it is a Post Office box at which the sender receives mail. For example, it may be that several affiliated companies for a very specific purpose, such as an

opt out, receive mail at the same Post Office box, and yet not all of the companies have registered with the USPS. We do not believe the Commission intended to disqualify these circumstances with respect to listing a valid Post Office box in a commercial e-mail. As the Commission notes, any person desiring to evade detection can “falsify information to thwart the purposes of the Act.” Thus, assuming that the sender desires to evade detection, a registered Post Office box provides no greater protection than a non-registered Post Office box, or for that matter a street address.

We recommend that the Commission allow a sender to include any address to which mail is delivered as the “valid physical postal address.” In this context, the objective of the Act is achieved—the consumer has a mechanism to contact the sender other than by e-mail. So long as the sender provides this mechanism, we believe it should be deemed to be in compliance with the relevant requirement.

“Forward-to-a-Friend” E-mail

We believe that the simplest approach to address forward-to-a-friend e-mail is to exclude from the definition of a commercial e-mail any e-mail sent by one person to another, where such persons have a personal relationship. We do not believe Congress intended to regulate the transmission of e-mail among friends, nor is it appropriate to do so. A person may forward to a friend a commercial e-mail that promotes something of interest to one or both of them. The commercial entity whose product is being promoted should not be subject to the Act when it all it did was promote a product that generated “buzz” and, as a result, the person who received the promotion thought to share it with a friend. We are sensitive to the Commission’s desire to avoid creating a loophole that allows an illegitimate spammer the ability to send an e-mail to a “friend” only to have the “friend” (*i.e.*, another spammer) send the e-mail to millions of recipients and escape the requirements of the Act. Therefore, we support limiting legitimate friend-to-friend e-mail to circumstances where the original recipient of the commercial e-mail has a personal relationship with the person to whom the recipient forwards the e-mail.

We also believe that the Commission should clarify that friend-to-friend e-mails are not “induced” through means other than e-mail. For example, every time a consumer takes her car in for servicing at XYZ Auto the service manager encourages the customer to share her positive experience with friends. If the customer sends an e-mail to a friend discussing her positive experience and recommends XYZ Auto in an e-mail to a friend is this a commercial e-mail from XYZ Auto? Because the e-mail does not contain the required disclosures, such as an opt-out mechanism, is XYZ Auto liable under the Act? The answer to both questions should be no. XYZ Auto did not send the e-mail nor did it provide the type of inducement contemplated by the Act. More importantly we do not believe the friend had any expectation of the protections afforded to consumers under the Act or characterizes this type of e-mail as a commercial e-mail. This is simply a private communication between two individuals that should be free from regulation or oversight. Finally, we do not believe Congress intended XYZ Auto to be liable under these circumstances—nor do we believe the Commission intends for such a result.

Thus we urge the Commission to indicate that, in the context of friend-to-friend e-mails, an e-mail is not “induced” if there is no tangible consideration paid by the company to the consumer who forwards or creates the e-mail.

Transactional or Relationship Messages

The Commission proposes to define a transactional or relationship message, among other things, as content that consists exclusively to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender, or with respect to a loan (i) notification concerning a change in terms, (ii) notification of a change in account status or (iii) at regular periodic intervals account balance information or other type of account statement.

The Commission has asked whether an e-mail, which contains only a legally mandated notice should be considered a transactional or relationship message. We believe the answer should emphatically be in the affirmative. Such an e-mail facilitates the commercial transaction that the parties have entered into. Under these circumstances we believe the consumer would welcome receipt of the notice via e-mail. Of course in certain circumstances this notice may not be a substitute for a legally required disclosure, such as for example a change in terms required under the Truth in Lending Act to a consumer loan, where the consumer has not consented to receive disclosures electronically. However, we believe the recipient will be receptive to an e-mail notice in advance of any required written notice.

The Commission has also asked whether debt collection e-mails should be considered commercial. We do not believe a debt collection e-mail should be considered a commercial e-mail. A debt collection e-mail has all the indicia of a transactional or relationship e-mail. It facilitates the previously agreed upon commercial transaction, although not necessarily in a way the consumer would like. Further, it arguably notifies the consumer about a change in account status and provides other type of account statement information. The fact that collection e-mails might be viewed as annoying by a consumer should not be factored into the analysis. The consumer received a benefit and the creditor should be able to communicate with the debtor subject only to limitations imposed on it by debt collection laws.

Because the underlying debt collection e-mail should be characterized as a transactional or relationship e-mail, a third party debt collector should be considered a “sender.” In this context the third party debt collector is acting as agent for the creditor. We note that third party debt collectors are subject to licensing and laws governing the collection of debt, which among other things limit the type of contact they may have with debtors. These laws provide protection to the creditor for abusive practices by debt collectors. Recognizing that most debt collection laws were drafted at a time when e-mail was just a concept, we are not opposed to placing restrictions on the frequency of third party debt collection e-mails and providing the consumer with the right to opt out of receiving collection e-mails similar to the opt out in Section 805(c) of the Fair Debt Collection Practices Act, 15 USC Section 1692c(c), which, except under certain limited circumstances, allows a consumer to effectively opt out of receiving collections correspondence if written notice is provided to the debt collector.

Three-Business-Day Period for Processing Opt-Out Requests

The CAN-SPAM Act prohibits senders and persons acting on their behalf from initiating a commercial e-mail to a consumer if the consumer has opted out of receiving commercial e-mails from the sender at least ten business days prior to the date on which the commercial e-mail is sent. The Act gives the Commission the discretionary authority to modify the ten business day period for processing consumers' opt-out requests if the Commission determines that a different time period would be more reasonable. To that end the Commission has proposed shortening the current ten business day requirement to three business days.

When the Act passed we ceased sending commercial e-mails because of, among other things, the difficulty in complying with the opt-out processing requirement. We then determined that it would not be feasible for us to efficiently manage compliance with the ten business day processing requirement. As a result we have had to utilize the services of a third party vendor to manage the opt-out process. Although we are able to access the third party data easily, using that data in conjunction with the creation of an e-mail file takes time. While integrating the third party opt-out file with our e-mail file can usually be accomplished in a short period of time, we have found that it sometimes takes longer than expected to successfully ensure the information has been correctly transferred and incorporated into a final e-mail file, or to the system of another party that is sending the commercial e-mail on our behalf. Shortening the current ten business day period is not practical and will likely lead to unintentional mistakes caused solely by the rush to comply with a shortened processing period.

The Commission notes that some commentators expressed concerns that under the current ten business day time frame, senders would be permitted to bombard recipients for ten business days during the opt-out period. While this might be possible we suggest that it is highly unlikely to occur. Senders incur a cost in sending e-mails. If the sender utilizes the services of a third party, the charge is usually based on the number of e-mails sent. It does not make economic sense to send an e-mail to persons who have identified themselves as unreceptive. Legitimate businesses are sensitive to ensuring a positive customer experience. Further, in order to get the most out of its marketing dollars, a business would not engage in so called 'mail bombing' when marketing dollars can be used more effectively by sending commercial e-mails to receptive persons.

The Commission also notes that "the majority of industry members, including small businesses, recommend[ed] that [the ten-business-day period] be kept at ten business days or lengthened." The justifications for this, according to the Commission, were "complex business arrangements, the use of third-party marketers, and the maintenance of multiple e-mail databases." We agree that these are valid reasons for maintaining the ten business day processing period. It takes time to ensure the processing of opt-outs is done correctly, and a ten business day period is a short amount of time. We believe the more appropriate result is to retain or lengthen the ten business day time period.

Prohibition on Imposing Requirements on Recipients Who Wish to Opt Out

The Proposal would prohibit a sender from requiring the recipient to provide personally identifying information (beyond one's e-mail address). While we agree that the opt-out process should be relatively straight forward, there are circumstances where requesting additional information is warranted. For example we are aware of situations where a disgruntled spouse or relative has misappropriated the true persons e-mail address. One of the ways to ferret out the perpetrator is to ask for additional information that can be verified through a third party data base. While we do not envision this as a routine occurrence there may be circumstances where it would be helpful to ask for additional information to identify this type of fraud. Therefore, we recommend that the Commission create a limited exception to the prohibition on requesting identifying information other than the recipient's e-mail address and opt-out preferences for the purpose of identifying fraud

Duration of Opt Outs

The Proposal asks whether there should be a time limit on the duration of opt-out requests. We support the imposition of a limit and suggest a consumer's opt out under the Act should expire after three years. We note that the Commission has provided for such time limits in other areas, most notably under the national do-not-call list. However, we believe a time limit shorter than provided under the national do-not-call list is warranted. Unlike telephone numbers which generally remain fixed for as long as one lives in their current residence, e-mail address change more frequently. It is not unusual for a person to change internet service providers once a year either because they desire to take advantage of the latest deal or because they desire a different level of service. This type of competition does not exist in the telephone industry and telephone numbers do not change with such frequency. Therefore, it seems a shorter, rather than a longer duration is appropriate for commercial e-mail opt-outs. We would also add that without allowing for opt-outs to expire, managing opt-out lists could become quite challenging for senders that communicate with a large customer base. As more people get on the internet, and as more people become comfortable with transacting business on the internet, it is not inconceivable to imagine an opt-out list with tens of millions of addresses to be maintained and "scrubbed." Third, we do not believe that there is a significant burden to consumers to renew an opt-out under the Act every three years. Therefore, we request the Commission to consider adopting a three year time limit on the duration of an opt out.

HSBC appreciates the opportunity to comment on the Proposal. Please feel free to contact me at (831) 759-7098 if you have any questions concerning our comments.

Sincerely,

David C. Bouc
Associate General Counsel