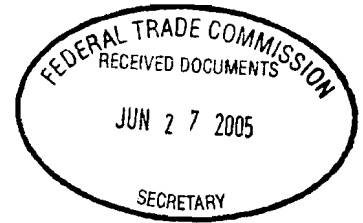


FEDERAL TRADE COMMISSION



CAN-SPAM Act Rulemaking

Project No. R411008

COMMENTS OF KEYSpan ENERGY DELIVERY NEW YORK AND  
KEYSPAN ENERGY DELIVERY LONG ISLAND

INTRODUCTION

On May 12, 2005, the Federal Trade Commission (“Commission”) published a Notice of Proposed Rulemaking (“NPRM”) proposing rules pursuant to several distinct provisions of the CAN-SPAM Act.<sup>1</sup> In the NPRM, the Commission proposes rule provisions on five broad topics: (1) Defining the term “person;” (2) limiting the definition of “sender” to address scenarios where a single email contains advertisements from multiple entities; (3) clarifying that Post Office boxes and private mailboxes established pursuant to United States Postal Service regulations are “valid physical postal addresses;” (4) shortening the time a sender has to honor a recipient’s opt-out request; and (5) clarifying that a recipient may not be required to pay a fee, provide information other than his or her email address and opt-out preferences, or take any steps other than sending a reply email message or visiting a single Internet Web page to submit a valid opt-out request.<sup>2</sup> The Commission based the proposed rule provisions on the Commission’s law enforcement experience and on comments received in response to the Advance Notice of

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<sup>1</sup> Project No. R411008, Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act, 70 Fed. Reg. 25,426 (Notice of Proposed Rulemaking May 12, 2005).

<sup>2</sup> *Id.* at 25,427.

Proposed Rulemaking (“ANPR”), published March 11, 2004, which sought comments on numerous issues raised by the Act.<sup>3</sup>

In addition to the Commission’s proposed rule provisions on the topics listed above, the Commission discusses other topics in the NPRM, in response to issues raised in comments responding to the ANPR.<sup>4</sup> Some of these other topics include the Act’s definition of “transactional or relationship message,” the Commission’s views on how the Act applies to certain email marketing practices, including “forward-to-a-friend” email marketing campaigns, and the expiration of opt-out requests (“other topics”).<sup>5</sup>

The NPRM invites comments to assist the Commission in determining whether the proposed regulations strike the appropriate balance between maximizing protections for email recipients and avoiding the imposition of unnecessary compliance burdens on legitimate industry.<sup>6</sup> The NPRM also invites comments on certain questions provided in the NPRM pertaining to these other topics, even though the Commission does not propose rule provisions addressing these other topics.<sup>7</sup>

The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York and KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island (collectively, “KeySpan”) are both,<sup>8</sup> public utility companies and support the Commission’s effort to strike a balance between maximizing protections for email recipients while avoiding the impositions of unnecessary compliance burdens on

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<sup>3</sup> Project No. R411008, Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act, 69 Fed. Reg. 11,776 (Advance Notice of Proposed Rulemaking March 11, 2004).

<sup>4</sup> Project No. R411008, Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act, 70 Fed. Reg. 25,426, 25,427 (Notice of Proposed Rulemaking May 12, 2005).

<sup>5</sup> *Id.* at 25,427, 25,444.

<sup>6</sup> *Id.* at 25,427.

<sup>7</sup> *Id.* at 25,4287.

<sup>8</sup> KeySpan Energy Delivery New York provides gas distribution services to customers in the New York City boroughs of Brooklyn, Staten Island and a portion of Queens. KeySpan Energy Delivery Long Island provides similar services to customers on Long Island and the Rockaway Peninsula in Queens.

legitimate industry. KeySpan generally supports and agrees with the Commission's proposed rules regarding the definition of the term "person" and the clarification of the definition of "valid physical postal addresses." KeySpan also generally supports and agrees with limiting the definition of "sender" to address scenarios where a single email message contains advertisements from multiple entities. However, KeySpan respectfully requests that the proposed criteria regarding "the person who controls the content of the message" and "the person who determines the email addresses to which such message is sent" be removed from the proposed definition of the term "sender." If the Commission disagrees with the request, then in the alternative KeySpan respectfully requests that the Commission provide guidance as to what constitutes "controls" with respect to the portion of the proposed sender definition that states "the person *controls* the content of the message" and what constitutes "determines" with respect to the portion of the proposed sender definition that states "the person *determines* the email addresses to which such message is sent."

KeySpan respectfully disagrees with shortening the period that a sender has to honor a recipient's opt-out request. KeySpan respectfully requests that the Commission maintain the Act's ten (10) business day period that a sender has to honor opt-out requests.

KeySpan generally supports the proposed prohibition on charging a fee or imposing other requirements on recipients who wish to opt-out, with the exception of the prohibition on requiring personally identifiable information to be provided by the recipient who wishes to opt-out. KeySpan respectfully requests that the Commission

permit senders to require recipients to include personally identifiable information in order to opt-out of commercial email from the sender.

KeySpan respectfully requests that the Commission consider the following as transactional or relationship messages: legally mandated notices, debt collection emails, employer email messages sent to employees at the employer-provided email accounts, email messages sent on behalf of a third party with the permission of the employer to the employer's employees at the employer-provided email accounts, emails sent to a recipient after an offer of employment is made, email messages meant to complete or confirm a negotiation, email messages delivering newsletters or other electronically delivered content to recipients who have entered into a transaction with a sender that entitles the recipient to receive such content, and business relationship messages which are individualized messages that are sent from one employee of a company to an individual recipient or small number of recipients. As discussed in KeySpan's comments below, these messages are transactional or relationship messages because they fit within an existing transactional or relationship category. The modification of the existing transactional or relationship categories to specifically include these messages would accommodate changes in email practices and accomplish the purpose of the Act.

With respect to forward-to-a-friend scenarios, KeySpan supports the Commission's views and definitions of the terms "sender," "initiate," "procure," and "routine conveyance." However, KeySpan respectfully disagrees with the Commission's application of the term "induce" and requests that the term not be applied in such a broad manner. If the Commission disagrees with the request, then in the alternative KeySpan requests that the Commission provide guidelines or criteria in determining whether a

sender is “inducing” or “intentionally inducing” a recipient to forward a message to a friend.

Finally KeySpan respectfully requests that the Commission not require senders to keep opt-out lists indefinitely. KeySpan respectfully requests that the Commission limit how long opt-out requests remain in effect and suggests a limit of five years which is similar the duration of a person’s registration on the National Do Not Call Registry.

KeySpan hereby submits its comments in response to the Commission’s NPRM.

## **DISCUSSION**

### **KeySpan Generally Supports The Proposed Definition Of The Term “Person,” “Valid Physical Postal Address” And “Sender.”**

KeySpan supports and agrees with the proposed definition of the term “person” which appears throughout the Act and is used in a number of rule provisions. KeySpan agrees with the Commission that clarifying the definition so as not to limit it to a natural person will advance the implementation of the Act and will not result in any unnecessary compliance burdens.

KeySpan also supports and agrees with the proposed definition of the term “valid physical postal address” which provides that a sender may comply with the Act’s requirements by including in a commercial email message either the sender’s current address, a Post Office box the sender has registered with the United States Postal Service or a private mailbox that the sender has registered with a commercial mail receiving agency that is established pursuant to the United States Postal Service regulations. The proposed definition for “valid physical postal address” is clear, satisfies the Act’s valid physical postal address disclosure requirement, and does not result in any unnecessary compliance burdens.

KeySpan also generally supports and agrees with limiting the definition of “sender” to address scenarios where a single email message contains advertisements from multiple entities. However, KeySpan respectfully requests that the proposed criterion regarding “the person who controls the content of the message” and the proposed criterion regarding “the person who determines the email addresses to which such message is sent” (“criteria”) be removed from the proposed definition of the term “sender.” The proposed criteria are not clear and result in unnecessary compliance burdens.

KeySpan requests that these two criteria should be removed and not be used to determine who the sender is of a joint marketing piece. KeySpan believes that entities engaged in joint marketing campaigns wish to retain the ability to provide their own marketing copy and contribute email addresses to which the joint marketing piece is sent. KeySpan does not believe that if each entity provides its own marketing copy in a joint marketing campaign, the result should be that each entity is a sender of the message because each sender would be “the person [that] controls the content of the message.” KeySpan also does not believe that if each entity provides email addresses to which the joint marketing email would be sent, the result should be that each entity is a sender of the message because each sender would be “the person [that] determines the email addresses to which such messages is sent.” KeySpan believes that entities should be permitted to address who is controlling the content of the message and who is determining the email addresses in contracts negotiated and agreed to by the entities without having to consider which entity is the sender in terms of the CAN-SPAM Act.

KeySpan respectfully proposes that the proposed criterion providing that the “person [who] is identified in the ‘from’ line” should remain in determining which entity is the sender especially since recipients seem to believe that the entity that appears in the “from” line is the sender of the message.

Thus, KeySpan respectfully requests that the proposed definition of the term sender be modified to provide that when more than one person’s products or services are advertised or promoted in a single email message, the person who is within the Act’s definition and who is identified in the “from” line will be deemed as the sender.

If the Commission disagrees with the request of removing the two criteria, than in the alternative, KeySpan respectfully requests that the Commission provide guidelines or criteria in determining what constitutes “controls” with respect to the portion of the proposed sender definition that states “the person *controls* the content of the message” and what constitutes “determines” with respect to the portion of the proposed sender definition that states “the person *determines* the email addresses to which such message is sent.”

**The Proposed Shortening Of The Ten Business Day Period That A Sender Has To Honor Opt-Out Requests Does Not Maximize Protections For Email Recipients And Imposes Unnecessary Compliance Burdens On Legitimate Industry.**

KeySpan respectfully disagrees with shortening the time period within which a sender must honor opt-out requests. KeySpan respectfully requests that the Commission maintain the current ten (10) business day period. For several reasons, KeySpan believes that shortening the time period from ten (10) business days to three (3) business days will lessen protections for email recipients while unnecessarily increasing compliance burdens on legitimate industry.

First, if the time period for processing opt-out requests is shortened to a three (3) business day period, senders will need to transfer opt-out files to their email vendors on a more frequent basis. This sending of multiple lists in a short time frame will increase the risk of the email vendor using the wrong opt-out list. Increasing the number and frequency of opt-out lists transferred from senders to their email vendors creates a greater risk that the recipient's opt-out requests will not be honored, resulting in less protection to email recipients.

The risk of the email vendor using the wrong opt-out list and the risk of the recipient's opt-out request not being honored is even greater for a sender who provides their recipients with a list or menu from which the recipient can choose what type of emails the recipient would like to opt-out of. The greater number of opt-out options provided to the recipients increase the time required to accurately process the opt-outs. Requiring an email vendor to process the opt-out requests in a shorter period of time, increases the opportunity for error and the cost of compliance.

Second, shortening the time period to honor opt-out requests to the three (3) business day period will increase the risk of an opt-out request not being honored when manual procedures are used to suppress a person's email address from a sender's email distribution list. Small volume senders may have elected to use manual procedures to comply with the current ten (10) business day period. A decrease in the time period as significant as that proposed by the Commission would require an investment in technology that small volume legitimate senders could not absorb. In addition, even entities that employ the most sophisticated technology to respond to opt-out requests may receive opt-out requests that require manual processing. Opt-out requests requiring































