

Microsoft

June 27, 2005

VIA HAND DELIVERY

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



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

Dear Secretary Clark:

Microsoft submits these comments in response to the Commission's Notice of Proposed Rulemaking (NPRM) dated May 12, 2005, to assist the Commission in developing regulations to implement provisions of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the "CAN-SPAM Act" or "Act"). Like other providers of Internet access and e-mail services, our top priorities are ensuring that our customers feel comfortable using e-mail to communicate and that e-mail remains a viable medium for business and personal communications. For these reasons, Microsoft supported passage of the CAN-SPAM Act, and we are committed to working with the Commission, law enforcement, and other industry members to address the spam problem.

Microsoft appreciates your consideration of our comments in response to the Advanced Notice of Proposed Rulemaking (ANPR) and welcomes the opportunity to provide these comments. We have focused these comments on four areas identified in the Commission's NPRM that we believe are critical to ensuring that the CAN-SPAM Act helps consumers control the types of commercial messages they receive, provides clarity for legitimate companies that seek to use e-mail responsibly, and captures illegal tactics employed by spammers to avoid detection.

- *First*, we urge the Commission to clarify certain aspects of the definition of "sender." Specifically, the Commission should clarify that an entity "controls" the "content" of a commercial message only when it has control over the overall message – and not merely control of any component part or parts of the message. Moreover, the Commission should make clear that, in the multiple advertiser scenario, there is a low threshold to satisfy the standard for what constitutes "advertising" or "promoting" an entity's product or service – which is a requirement to be deemed a "sender" under the Act – so that a list owner to

which the recipient would expect to be able to direct an opt-out request may, in fact, be considered the sender.

- *Second*, we urge the Commission to clarify the proposed prohibition on charging a fee or imposing other requirements on recipients who wish to opt out. Specifically, the Commission should affirm that while unreasonable barriers should be prohibited, in some cases it is permissible, or even desirable, that: a password or other credential be provided in order to opt-out; more than one web page be presented when the consequence of opting out may not be fully understood; and a benefit may be denied as a consequence of opting-out.
- *Third*, we urge the Commission *not* to reduce the time for honoring an opt-out request from the ten-business-day period established by Congress to three business days.
- *Fourth*, we urge the Commission to clarify that, in the context of forward-to-a-friend messages, merely offering “inducement” other than actual consideration – such as encouraging words on a website – does not take the seller outside the scope of the “routine conveyance” exception.

I. THE COMMISSION SHOULD CLARIFY ASPECTS OF THE DEFINITION OF THE TERM “SENDER” - § 316.2(m).

The CAN-SPAM Act imposes heightened obligations on “senders” of commercial e-mail messages: they must honor recipient opt-out requests; they must include a mechanism by which a recipient can opt out of future e-mails in every such message; and they may not initiate a commercial e-mail message to recipients who have previously opted out of receiving their messages. When a particular e-mail contains advertisements for multiple entities – which is now the norm for many commercial e-mail communications – these obligations would quickly become unwieldy if all advertisers were deemed separate senders of the message. As Microsoft noted in response to the Commission’s ANPR, a message for which there were multiple senders would require a separate pre-transmission opt-out list scrub by each sender, a distinct opt-out notice and mechanism for each sender, and potentially the transfer of recipient e-mail addresses and preferences among numerous and diverse parties. As we explained, this would add cost and complexity, undermine user choice and control, and create security vulnerabilities with respect to the transmission of most commercial e-mail.

The Commission recognized these problems in the NPRM, and noted that to avoid “placing undue compliance burdens on businesses and endangering the privacy of consumers’ personal information . . . the definition of ‘sender’ should be modified so that in situations when one or more person’s products or services are promoted in a single e-mail message, those sellers may structure the sending of the e-mail so that there will be only one sender of the message for purposes of the Act.” Specifically, the Commission proposes modifying the definition of “sender” as follows:

“(m) The definition of the term “sender” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(16), provided that, when more than one

person's products or services are advertised or promoted in a single electronic mail message, each such person who is within the Act's definition will be deemed to be a "sender," except that, if only one such person both is within the Act's definition and meets one or more of the criteria set forth below, only that person will be deemed to be the "sender" of that message:

- (1) The person controls the content of such message;
- (2) The person determines the electronic mail addresses to which such message is sent; or
- (3) The person is identified in the "from" line as the sender of the message."

This proposed definition offers a solution to many of the problems that could potentially arise under the definition used in the Act, and Microsoft greatly appreciates the Commission's effort to provide guidance and address the challenges posed by situations in which a single e-mail message could be seen as having multiple "senders" under the Act. That said, there are two issues with the language that should be addressed:

- First, the Commission should clarify that an entity "controls" the "content" of a commercial message only when it has control over the overall message – and not merely control of any component part or parts of the message.
- Second, the Commission should make clear that, in the multiple advertiser scenario, there is a low threshold to satisfy the standard for what constitutes "advertising" or "promoting" an entity's product or service – which is a necessary requirement to be deemed a "sender" under the Act – so that a list owner to which the recipient would expect to be able to direct an opt-out request may, in fact, be considered the sender.

Failure to clarify the proposed rule on either of these points could undermine the Commission's attempt to effectively address the multiple advertiser scenario.

A. "Control" of the "Content" Means Control over the Overall Message.

The first potential pitfall under the proposed rule is the requirement that where multiple entities have their products or services promoted in a message, only one of those entities may "control[] the content of such message" to be designated the sole sender. Obviously, where there is content advertising more than one person's products or services in a single message, each advertiser will have some control over some amount of the content in the e-mail (e.g., the look of its own trademarks, how those trademarks are used, and the description of its products). But this should not be sufficient to constitute "control" of the "content" under proposed section 316.2(m)(1); if it were, every advertiser would still be considered a sender, which would defeat the purpose of the proposed rule. Instead, the Commission should make clear that "control" of the "content" means control of the content of the overall message – for example, the integration of the various pieces of the message; the look and feel of the full layout; and the right of last refusal before transmission of the full message. Under this standard, only one entity may control the content of a commercial e-mail message – the entity that has the responsibility for assembling the component pieces into a full e-mail and the authority to decide when the message is final and ready to be transmitted.

This interpretation is consistent with the notion of a sender, because the entity that performs these tasks is generally the entity to which a recipient would reasonably expect that opt-out requests should be directed (assuming that entity and its role are apparent). In contrast, a broader interpretation of “control[] the content” to include responsibility for any of the content in a message would be inconsistent with the concept of a single “sender” and would plainly subvert the Commission’s intent in creating this flexible approach.

As Microsoft and others explained in response to the ANPR, and as the Commission appears to have recognized in the NPRM, “when consumers have subscribed to an online newsletter or similar service, they would expect to submit an opt-out request to that newsletter publisher, not to each advertiser in the newsletter.”¹ In this newsletter example, each advertiser would, by definition, have provided some content for use in the newsletter – for example, the advertiser’s logo, an advertising slogan, or text describing the advertiser’s product. It would be inconsistent to find that any of these advertisers that contribute this material “control the content” of the overall message under the Proposed Rule. Further, a recipient opting out of an e-mail newsletter that contained advertisements for various companies would reasonably intend to opt out of receiving the newsletter in the future, not to opt out of receiving messages from one of the underlying companies whose products are advertised in the newsletter. Indeed, this rationale also supports another factor in the Commission’s proposed definition of “sender” – which entity determines the list of recipient e-mail addresses – because it is the entity that controls the mailing list to which a consumer would reasonably expect an opt-out request would and should flow.

The proper and internally consistent interpretation – and the interpretation that the Commission should clarify that it proposed in its NPRM – is therefore that only the single entity that has overall control over the message’s content, is responsible for assembling the component pieces, and has final authority to decide whether the message is ready to be transmitted “controls the content” of that message under the Proposed Rule. The Commission should therefore clarify section 316.2(m)(1) accordingly.

B. The Threshold for What Constitutes “Advertising” a Product or Service in a Message with Multiple Advertisers Should Be Low.

The Commission should also clarify that, in the context of a message with multiple advertisers, the standard for what constitutes “advertising” a product or service to be deemed a sender should be interpreted broadly with respect to the list owner. This is critical to avoid the situation where a list owner meets most, or even all, of the proposed criteria of § 316.2(m) (i.e., controls the content of such message, determines the electronic mail addresses to which such message is sent, and is identified in the “from” line as the sender of the message) yet still would not be considered the “sender.” Such a result would clearly be contrary to the expectations of the recipient, and would permit list owners who wish to hide their role and/or rely on a technicality in the proposed rule to *never* give users the opportunity to get off of their lists. This would also enable list owners to behave

¹ 70 Fed. Reg. 25426, 25429-30 (May 12, 2005).

deceptively by determining the electronic mail addresses to which a message is sent but offering opt-out choices only for the other entities that advertised in the message but did not control the mailing list. This would likely mislead recipients of the mail as to why they received the mail, and the effect of exercising the opt-out choice(s) presented in the mail.

In order to prevent such a result, the Commission should make clear that when a commercial e-mail message is sent by a list owner, it would constitute a deceptive trade practice for the list owner to fail to identify itself and the role that it plays in sending the message. By doing so – and by adopting a sufficiently broad standard for what constitutes “advertising” in this context – the Commission can ensure that when the list owner identifies itself and the service it is providing, that list owner could be seen as advertising or promoting its own services and could therefore be considered the “sender” under the language of the Act. This will ensure that recipients will be able to notify the list owner that is the true “source” of the message that they no longer wish to receive commercial e-mails from that list owner.

II. THE COMMISSION SHOULD CLARIFY THE PROPOSED PROHIBITION ON CHARGING A FEE OR IMPOSING OTHER REQUIREMENTS ON RECIPIENTS WHO WISH TO OPT OUT - § 316.5.

Proposed section 316.5 would broadly prohibit senders from imposing any fee, requiring recipients to provide more personal information, or imposing other obligations in connection with an opt-out request. Microsoft unequivocally supports the intent of this provision – and generally supports its application. We do, however, believe that the Commission should clarify two aspects of this prohibition.

A. The Commission Should Not Prohibit the Use of Passwords and Other Authentication Mechanisms To Access Account Settings.

The Commission should clarify that the use of a password or other form of authentication is appropriate in connection with an opt-out request in some cases. In particular, we urge the Commission to avoid adopting a blanket rule that would prohibit senders from requiring the use of an authentication mechanism in connection with exercising opt-out requests under the Act.

We agree with the Commission that to the extent that the Act is intended to protect individual privacy, it would be a “subversion” of that intent to require a recipient to disclose personally identifying information to the sender that the sender does not already have in order to exercise an opt-out right.² Similarly, it makes good sense to establish a rule that would prohibit a sender from requiring a recipient to *create* an account or *establish* a username/password or other authentication credential in order to exercise an opt-out choice, because such a requirement would constitute an unreasonable obstacle.

However, in cases where there is an ongoing relationship with regular interactions between the sender and recipient, and such interactions are based on the use of an existing password

² 70 Fed. Reg. at 25445.

