

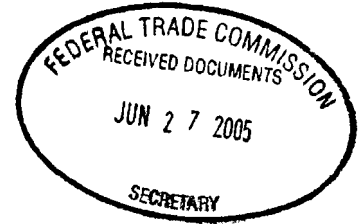


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June 27, 2005

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



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

Dear Mr. Secretary,

I am pleased to submit these comments ("Comments") on behalf of ePrize, LLC ("ePrize") in response to the Federal Trade Commission's ("FTC" or "Commission") Notice of Proposed Rulemaking, published in the Federal Register, 16 C.F.R. 316, on May 12, 2005, regarding regulations to be enacted under the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act" or "the Act").

ePrize is a full-service promotion agency that provides the strategy, creative design, and technological implementation that allows its clients to carry out creative and successful online promotions. ePrize has created promotions for brands such as General Motors, Crest, Pampers, Black & Decker, Home Depot, Target, Coca-Cola, PETSMART, Hanes, Barnes & Noble, the states of Arizona and New Jersey, the United States Postal Service, and the United States Army, to name only a few. The most experienced interactive promotion agency in the world, ePrize has developed and managed more than 1,400 campaigns for major brands since 1999.

Because of ePrize's focus on quality electronic communication with consumers, the company remains strongly committed to reducing the burden of unwanted commercial e-mail on consumers and supports the goals of the CAN-SPAM Act. The problems caused by illegitimate "spammers" are daunting to both the regulatory community and the community of legitimate online marketers, and ePrize applauds the Commission for its continuing efforts to address these difficult issues and to develop regulations that will ensure effective implementation of the Act. To that end, ePrize provides the following Comments in an effort to provide insight into the practical effect of the Commission's proposed interpretation of the Act with respect to "Forward-to-a-Friend" e-mails.

Forward-to-a-Friend marketing provides an effective and welcome alternative to traditional mass e-mailing methods of communication with consumers. Legitimate marketers, like ePrize's clients, develop their online promotions in such a way as to ensure that the only consumers who receive e-mails about the promotion are those who are likely to be interested in the promotion. Therefore, a popular component of these promotions is the "Forward-to-a-Friend" feature, which allows participants in the promotion to send a message to friends they think are likely to be interested and refer them to the promotion Web site.

THE INTERACTIVE PROMOTION AGENCY

Detroit ■ New York ■ Los Angeles ■ Chicago ■ London



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In ePrize-designed promotions, "Forward-to-a-Friend" e-mails do not contain any commercial advertisements, nor do they contain content about its clients' products or services. These e-mails simply inform the friend about a skill- or chance-based contest and provide a link to the contest Web site.¹ The person sending the e-mail could send the same e-mail to her friend via her own e-mail service provided by her internet service provider or through any number of "free" e-mail services. Alternatively, she could use the "Forward-to-a-Friend" mechanism. Either way, she is able to communicate rapidly. And, either way, the marketer sponsoring the contest is satisfied because the person sending the email is spreading news about the promotion.

ePrize's version of "Forward-to-a-Friend" conveyance is called "Tell-a-Friend." Tell-a-Friend is easier and more immediate than if the participant had to cut and paste the link to the promotion and then send it to her friend. In addition, the Tell-a-Friend component is integrated into the promotional experience. In these promotions, the promotion Web site typically prompts registrants to tell friends about the contest and earn extra entries and provides a form where they may enter up to a certain number of friends' names and e-mail addresses, typically no more than five. ePrize's server then automatically transmits the Tell-a-Friend message to the referred friend, identifying the original registrant in the "from" line and personalizing the e-mail with the sender and recipient's names. ePrize's server retains that information in an unreadable format, then deletes it permanently at the conclusion of the promotion. No lists are compiled with this information, no e-mails are ever sent by ePrize or its clients to these recipients, and none of this information is transmitted to or otherwise shared with ePrize's client. The sole purpose of this mechanism is to automatically transmit e-mails from registrants to their friends. If the recipient of a Tell-a-Friend e-mail were to click the "reply" button in her e-mail program, the reply e-mail would transmit directly back to the referring friend.

Tell-a-Friend e-mails are sent in extremely low volumes, but produce effective results for ePrize's clients. In ePrize-designed promotions, an average of 27% of participants refer friends to the promotion, and each referrer sends an average of only 3.7

¹ A typical sample Tell-a-Friend e-mail, taken from a recent ePrize-designed promotion, included the following text:

Hi Courtney,

I just entered for a chance to win an all expenses paid trip to Italy for 2 people for 4 nights from Zagat Survey in the Upgrade your Experience Sweepstakes. The good news is that you can enter for a chance to win too!

Just go to <http://www.zagat.com> and you could be the lucky Grand Prize Winner! Good luck!

Your Friend,

Raquel Vaughan



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e-mails to friends via the mechanism on the promotion Web site. An average of nearly 10% of total registrants in each promotion learn of the promotion from Tell-a-Friend e-mails. In all of the promotions ePrize designed and administered in 2004, between 7.5 and 10 million Tell-a-Friend emails were sent.²

ePrize's clients also typically employ a range of protections to minimize the potential for abuse. Promotions typically limit each registrant to a maximum of five or fewer Tell-a-Friend e-mails during the entire promotion. Promotions also often include a mechanism to ensure that a participant does not send a Tell-a-Friend e-mail to the same person multiple times or abuse the system to harass another person. Finally, the rules of a promotion, which participants must agree to in order to participate, always require that they may forward these messages only to actual friends, people with whom they have a personal relationship.

The Act Does Not Apply to All "Forward-to-a-Friend" Transmissions

Although the CAN-SPAM Act does not address "Forward-to-a-Friend" e-mails, the Commission has expressed certain viewpoints regarding how these e-mails should be interpreted under the language of the Act. Under the plain language of the Act, the transmission of "Forward-to-a-Friend" e-mails constitutes "routine conveyance" and is therefore exempted from the requirements of the Act. The appropriate analysis under the language of the Act when determining whether an e-mail has been "initiated" is to first consider whether the action falls within the definition of "routine conveyance." If it does, then that activity is an exception to the definition of "initiate" and, thus, to the requirements under the Act. Because "Forward-to-a-Friend" mechanisms simply transmit, through an automatic technical process, messages for which another person has identified and provided the recipient addresses, these transmissions fall well within the statutory definition of "routine conveyance" and are exempted from regulation by the terms of the Act.

This interpretation of the Act not only tracks the plain language of the statute, but is also consistent with Congress' desire to balance the efficiency and convenience of e-mail communication with the concerns related to the dangers and intrusions of massive amounts of unsolicited e-mail. Furthermore, this interpretation will not eviscerate the Act because it will still apply to e-mail marketing methods that use referral techniques to develop e-mail databases for marketing purposes—the real danger that Congress sought to regulate when it passed the CAN-SPAM Act.

² Contrast this number to the 180 million e-mails sent out every 12 hours by only one "spammer," Scelson Online Marketing, an e-mail marketing company whose owner testified before the Full Committee Hearing on the CAN-SPAM Act in the Senate Committee on Commerce, Science & Transportation (Hearing Transcript available at http://commerce.senate.gov/hearings/testimony.cfm?id=773&wit_id=2094). This company is just one example of the high-volume online marketers at whom the Act was targeted. By comparison, the number of Tell-a-Friend e-mails is *de minimis*.



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1. The "Routine Conveyance" Definition Does Not Include the Concepts of "Consideration" or "Inducement"

In the Notice, the Commission differentiates between "Forward-to-a-Friend" opportunities that provide inducement or consideration and those that do not, specifying that the former are not routine conveyance.³ Neither the statutory definition of "routine conveyance" nor the legislative history behind it differentiate between what is and what is not a routine conveyance based on whether consideration or inducement is provided. Consideration and inducement are factors that are mentioned in the statute to determine whether an e-mail has been "initiated," but "routine conveyance" is a category of activity that is wholly excepted from the definition of "initiate" by the statute.

The Commission's analysis focuses on language from the Report of the Senate Committee on Commerce, Science, and Transportation.⁴ There, the definition of "initiate" is explained more fully, noting that "a company that merely engages in routine conveyance, such as an ISP that simply plays a technical role in transmitting or routing a message and is not involved in coordinating the recipient addresses for the marketing appeal, shall not be considered to have initiated the message."⁵ In the Notice, the Commission explains its interpretation of this language, noting that "[i]n such cases [where a seller offers payment or consideration for the sending of an e-mail], the Commission believes that the seller is involved in coordinating the recipient addresses for the marketing appeal."⁶ However, there is nothing in the legislative history to indicate that Congress believed that providing consideration for the sending of an e-mail was tantamount to "coordinating the recipient addresses for the marketing appeal." This language should be read to mean exactly what it says—taking some affirmative action to provide or coordinate the recipient addresses for the e-mail. "Forward-to-a-Friend" opportunities, whether incentivized or not, do not involve the promoter's participation in providing or coordinating the recipient addresses. Therefore, "Forward-to-a-Friend" opportunities, whether incentivized or not, fall within the category of routine conveyance and are exempted from the application of the statute.

Of course, the scenario fundamentally changes where a company in addition to offering an incentive for registrants to refer friends, then retains and compiles the referred names and e-mail addresses for its own use, as described below on page 8 of this Comment. This type of program is, at bottom, simply the purchase and compilation of e-mail addresses. In these situations, the company's action would rise to the level of "coordination," and the "routine conveyance" exception should not apply. However, "Forward-to-a-Friend" mechanisms that do not compile or collect data, like ePrize's Tell-a-Friend, do fall within the "routine conveyance" exception because no action is taken on the part of the promoter to "coordinate[e] the recipient addresses for the marketing appeal."

³ 70 Fed. Reg. at 25442.

⁴ S. Rep. No. 108-102, at 15 (2003).

⁵ *Id.*

⁶ 70 Fed. Reg. at 25442.



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2. "Forward-to-a-Friend" Transmissions are "Routine Conveyance" Under the Act

The Act provides a clear definition of "routine conveyance," one which should require little refinement from the regulatory process. The Act defines "routine conveyance" as follows:

The term "routine conveyance" means 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* [emphasis added].⁷

This definition sets forth specific key elements: that the transmission of the message is carried out via an "automatic technical process" and that the recipients and recipient e-mail addresses have been provided by "another person." At no point does this definition specify that a transmission is not a "routine conveyance" if it is induced or incentivized.

The basic "Forward-to-a-Friend" model, as described above, is well within this definition of a "routine conveyance." Forwarded e-mails are transmitted via an automatic process by the promoter's computer servers, and no person at the promoter participates in this sending process or is even aware that it is happening. Similar to an ISP, the promoter's server is simply used as a technical vehicle to easily convey the forwarded message from one friend to another. Furthermore, the promoter plays no role in identifying recipients or recipient addresses. As the definition specifies, "another person," the friend in this situation, identifies the recipient and provides the recipient address. Therefore, this basic "Forward-to-a-Friend" opportunity falls clearly within the definition of a "routine conveyance" and is, under the language of the statute, exempted from regulation under the Act.

Congress Did Not Intend to Regulate These Types of E-mail

The interpretation of "Forward-to-a-Friend" opportunities as falling within the category of routine conveyance is consistent not only with the statutory language, but also with Congress' intent. As Congress articulated in the Congressional Findings and Policy section of the Act, it was attempting to balance the importance, convenience, and efficiency of e-mail as a means of communication against the dangers posed by rapid growth in the volume of unsolicited, often fraudulent or deceptive, commercial e-mails.⁸ "Forward-to-a-Friend" e-mails do not pose any of the problems that concerned Congress when it passed the Act, and so the application of the Act's exception for routine conveyance to these types of e-mails is entirely consistent with the purposes of the Act.

In providing an exception for routine conveyance, Congress clearly intended to exempt any company, "such as an ISP that simply plays a technical role in transmitting or routing a message and is not involved in coordinating the recipient addresses for the

⁷ 15 U.S.C. § 7702(15) (2005).

⁸ 15 U.S.C. § 7701(a)(1)-(2) (2005).

