

April 19, 2004

Mr. Donald S. Clark, Secretary
Federal Trade Commission
CAN-SPAM Act
Post Office Box 1020
Merrifield, VA 22116-1030

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

Dear Secretary Clark,

On behalf of the Email Service Provider Coalition (“ESPC”), I am submitting the following comments to the FTC in response to the Advance Notice of Proposed Rulemaking for the CAN-SPAM Act.

The ESPC is made up of 48 leading companies – all of which are struggling with the onslaught of spam, as well as the emerging problems related to the deliverability of legitimate and wanted email. Email service providers (ESPs) enable their customers to deliver volume quantities of email messages. These messages originate from the full spectrum of the US economy – large and small businesses, educational institutions, non-profits, governmental agencies, publications, and affinity groups – who use the services of ESPs to communicate with their customers, members, and constituents. While ESPs serve the marketing needs of the business community, it is by no means the only customer group served. Email service providers also deliver transactional messages (such as account statements, airline confirmations, and purchase confirmations); email publications; affinity messages; and relational messages.

The ESP industry is robust and growing. Within the ESPC, we estimate that our 48 members provide volume email services to over 250,000 customers. These customers represent the full breadth of the U.S. marketplace: from the largest multi-national corporations to the smallest local businesses; from local schools to national non-profit groups and political

campaigns; from major publications with millions of subscribers to small affinity-based newsletters.

It has become quite clear that Email is indeed the “killer app”. Jupiter Research estimates that the email marketing industry (which, again, is only a portion of the total spectrum of ESPC customers) will grow in size to \$8.2 *billion* in 2007. But the size and importance of email in the marketplace should not be measured by dollars alone. Over the past ten years, email has been a strong driver of productivity and efficiency in the marketplace. It has also been an important social tool. Email has shortened distances in the world – allowing communication to occur with unprecedented speed and detail.

As an example of the importance of email, a recent study by the META Group showed that, given a choice between email and telephones, 74% of business people would give up their phones before email. In other words, 74% of people now find email to be more critical than the telephone in their daily work.

Given the significant status of ESPs in the email industry, the membership of the ESPC has a deep understanding of the implications and effects of the CAN-SPAM Act. Our membership has spent a great deal of time reviewing the Act and the ANPR. We are happy to provide the following comments and would welcome the opportunity to discuss our views further.

1 **Primary Purpose**

The scope of the CAN-SPAM Act centers largely upon the definition of *Commercial Electronic Mail Message*. This definition states in part:

The term “commercial electronic mail message” means any electronic mail message the **primary purpose** of which is the commercial advertisement or promotion of a

commercial product or service (including content on an Internet website operated for a commercial purpose.)

The CAN-SPAM Act mandates that the FTC issue regulations “defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message.” As the definition of commercial electronic mail message is so closely tied to the meaning of “primary purpose”, the regulations will undoubtedly have a significant effect on the scope of the Act.

The membership of the ESPC provides email services for a sizable percentage of the legitimate commercial email sent online today. As a result, the ESPC has a strong interest in clear, objective, predictable and understandable standards within the definition of commercial electronic mail message. Failure to articulate manageable standards in the regulations related to the primary purpose of an electronic mail message could result in a lack of predictability in the email marketplace. Such a result would not serve the interest of promoting effective solutions to spam while protecting the legitimate use of email marketing.

The CAN-SPAM Act contemplates that the Sender of a message determines the primary purpose of the email. That is, the Sender’s intent in delivering the message is the lens through which primary purpose should be viewed. A Sender of a message may have many purposes for delivering an email. The CAN-SPAM Act makes clear that there may only be a single primary purpose. As a result, the ESPC feels that the intent of the Sender and the primary purpose of the Sender are important factors in the determination of the primary purpose of the message.

1(a) *The “Overall Impression” Standard*

The FTC raised a number of possible criteria for determining the primary purpose of a commercial electronic mail message. Of these criteria, the ESPC believes that the “net impression” standard is the most manageable. We do, however, recommend that the test be rephrased as an “overall impression” test to reflect the need to view the message in its

entirety. (“Net impression” suggests that the email must be distilled down to a subset of the impression from the entire message.)

The overall impression standard would require that an email message be viewed in its entirety to determine the primary purpose. Many factors could be considered as part of the assessment under this standard, including, but not limited to:

1. Relative placement of the advertising material;
2. Relative size of the advertising material;
3. Prominence given to advertising within the email;
4. Color, font, or graphic treatments within the email;
5. Whether the advertising material is incidental to the email;
6. Whether the advertising material is provided in a banner ad, sponsorship, or link in an email newsletter;
7. Whether the advertising material is used as a mechanism to support free content within the email (i.e., an email newsletter);
8. Whether the email would still be sent absent the advertising material;
9. Subject line text; and
10. The “from” address.

The overall impression standard should be assessed based upon the perception of a reasonable person. That is, what would a reasonable person consider the primary purpose of the email message to be, when viewed in its entirety? In addition to the overall impression of the recipient, the actual intent of the Sender should not be ignored.

The advertising industry (including marketers using email) has managed disclosures under such standards for some time. The FTC’s guidance related to online disclosures (DotCom Disclosures) provides a valuable framework for implementing similar standards within commercial email. The members of the ESPC feel that an overall impression standard will

build upon the experience of the FTC and industry in online disclosures – and will provide a workable, predictable tool for email to be assessed under the CAN-SPAM Act.

Please note that we have included within the overall impression standard some of the concepts proposed separately in the ANPR. We believe that the overall impression of an email can take into account whether the advertising is incidental to the email, as well as financial considerations relevant to email newsletters.

1(b) Additional Considerations are Necessary

While the overall impression standard (with the additions described above) provides a solid framework for assessing primary purpose, we do feel that additional considerations are necessary in some situations. For example, in situations where advertising is sold merely to financially support the content of the email, we feel that the primary purpose should be derived from the core content of the message. Indeed, in such situations it may be that the email is not commercial in nature at all, as it was created for purposes of delivering content (and not advertising). This analysis may result in some email messages with relatively prominent advertising content being found to have non-commercial purposes. Including this consideration within the overall impression test is important so as to protect email newsletters that are supported by sponsorships, ads, and other promotional material within the newsletter.

Additionally, the determination of whether a message is a Commercial Electronic Mail Message under the Act should be certain to exclude email that would not have been sent, **but for** the transactional or relationship component of the message (the “but for” test). That is, the message would not have been sent if the transactional or relationship component of the message were not part of the message. It should be noted that the “but for” test works to identify messages that should be excluded, but is not necessarily indicative of a message that should be included in the definition of Commercial Electronic Mail Message. If a message does not satisfy the “but for” test, the message should still be assessed against the

overall impression test to determine whether the message is a Commercial Electronic Mail Message.

We expect that there will be additional categories of email that are appropriate to exclude from the definition of Commercial Electronic Mail Message. Such exclusions could readily be provided through the rulemaking in support of “primary purpose.”

It should be noted that the ESPC does not support the other mechanisms presented within the ANPR as methods for evaluating primary purpose. For the reasons described above, we feel that the “balance” tests presented in Sections VI(A)(1) and VI(A)(2) are inappropriate. Such tests fail to recognize that some non-commercial email may be heavily supported by advertising (such as newsletters), but should not be included within the definition of commercial electronic mail message. Also, the balance tests are problematic due to the formulaic nature of the tests. We feel that the “overall impression” standard (with the additional considerations described above) offers much more flexibility (and considers many more factors) in assessing primary purpose.

2 *Transactional and Relationship Messages*

The CAN-SPAM Act excludes “transactional or relationship messages” from the definition of commercial electronic mail messages. This exemption is important, as transactional and relationship messages encompass an enormous variety of communications that are not soliciting or advertising. It is critical that the vast array of transactional communications – including account statements, shipping confirmations, subscription deliveries, and more – not fall under the broad requirements applied to commercial electronic mail messages in the CAN-SPAM Act.

The FTC has asked if the definition of “transactional or relationship message” should be modified under the CAN-SPAM Act. We feel that a few modifications will assist greatly in clarifying the definition.

2(a) *Low-volume and Business Relationship Messages as Transactional or Relationship Messages*

One of the compliance challenges presented by the CAN-SPAM Act comes from the multi-faceted use of email in the workplace today. Sales departments within large, decentralized organizations send many low-volume messages to contacts and potential prospects every day. These messages may indeed be commercial in nature. But they do not rise to the level of public policy concern (spam) to which the Act was targeted.

Similarly, the CAN-SPAM Act does not include any standards for the volume of email sent from an organization. In other words, a single email sent by an employee could be deemed a violation of the Act. The ability of a large organization to police the individual use of email by employees is very limited.

As an example, a large financial institution may have a multitude of affiliates that operate around the country. Some of these affiliates could have local branches. And some local branches could have loan officers, business development professionals, or other employees responsible for selling services to the community within which their branch resides. Presume that a loan officer from a bank wants to send a personalized note to the owner of a business within the same town. The purpose of the message may indeed be commercial and the content of the message could indeed be promotional. If such messages were subject to CAN-SPAM, they would need to be reviewed against a global opt-out list maintained by the parent organization. Such a result is absurd and would hinder the free flow of business relationship communications.

Due to this concern, we feel that a new category of transactional or relationship message is necessary: *business relationship messages*. Such messages would be exempted from the definition of commercial electronic mail messages (as they would be considered transactional or relationship messages). We would be happy to work further with the FTC to provide a

formal definition for such messages. Without formalizing a definition at this point, we do feel that business relationship messages may have some, but not necessarily all, of the following attributes:

1. Low volume (the message is sent to a limited number of email addresses and is not part of a systematic campaign sent by the company to many email addresses)
2. Limited volume over time;
3. Personalization is involved (the message may include content that makes clear the message was intended for a specific person);
4. The messages may be unique (and not part of a larger campaign);
5. An existing relationship between Sender and recipient may exist;
6. The message is relevant to the recipient; and
7. The message is relevant to the relationship between the Sender and recipient.

We feel that this addition to the definition of transactional and relationship messages is critical to the compliance efforts of organizations with employees that may create low-volume messages to prospects and clients on a regular basis. The lack of such a definition leaves such organizations with the very real prospect of preventing, limiting, or drastically delaying such communications in order to ensure compliance with the standards of the CAN-SPAM Act.

2(b) Newsletters as Transactional or Relationship Messages

The CAN-SPAM Act includes in the definition of transactional or relationship messages, those email messages that *facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the Sender*. We ask that the FTC clarify that the delivery of newsletters or other content-driven messages should be included in this definition. In other words, an email newsletter should be considered a transactional or relationship message if a recipient has provided *affirmative consent* (as defined in the CAN-

SPAM Act) to receive the email newsletter. This would be the case even if the newsletter includes advertising material.

This clarification would assist greatly in clarifying some of the confusion that currently exists under the CAN-SPAM Act with relation to email newsletters and content-driven email messages. It would also help to clarify the concerns associated with multiple advertisers within a newsletter (see additional comments on multiple advertisers below).

2(c) *Transactional and Relationship Messages and Primary Purpose*

The definition of transactional and relationship messages includes the same “primary purpose” test included in the definition of commercial electronic mail message. We feel it is important that the use of the primary purpose test be consistent within the CAN-SPAM Act. As a result, our comments above in support of the overall impression test (with modifications as noted) extend to the definition of transactional and relationship messages.

3 Opt Out Processing

The Act requires that a Sender (or any person acting on behalf of the Sender) process an opt out request and cease further sending of commercial e-mail no later than 10 business days after receipt of the opt out request. The Act goes on to provide the Commission with the authority to alter the time frame required for such processing. The Commission has requested comments on a number of aspects of the opt out function.

Most ESPC members are able to process opt out requests in real time. In other words, the opt out request is processed as soon as it is received and no further messages are sent to that recipient. However, it is important to note that many factors exist that can delay the processing of an opt out request.

ESPC members generally deliver on behalf of other Senders. In such situations, the ESP may be able to process the opt out request immediately, but may also need to convey the opt out request to the Sender of the message for processing. This transmission may create delays in the processing of the opt out.

Additionally, many Senders have enormous and distributed operations. Managing an opt out request across a number of affiliates, sales offices, marketing departments, vendors, and agencies can take significant time. Indeed, it may take a number of weeks to ensure that an email address is properly suppressed from all of the operations and lists that may be used by a single large company.

For these reasons, we feel that a longer period is necessary for opt out processing. Again, most ESPs are able to process opt out requests expeditiously. However, many situations arise where the 10 day opt out period is simply not sufficient. We recommend that 30 days is appropriate and should suffice for legitimate industry to process opt out requests across broad affiliate, vendor and internal operations.

3 (a) Opt Out not Submitted Properly

One major concern for legitimate businesses is the number of opt out requests that are submitted incorrectly, or in a manner that is inconsistent with the opt out instructions provided. Many opt out functions are automated. When a recipient submits an opt out that is inconsistent with the opt out instructions provided, the opt out may not be recognized by the Sender. In some cases, these opt out requests can be handled manually (which can lengthen significantly the processing time required). In other situations, the non-conforming opt out request may be lost entirely.

We urge the Commission to clarify that opt out requests must be submitted in the manner specified in the message in order to trigger the processing timelines of the CAN-SPAM Act.

In addition, we feel that the Commission should clarify that non-conforming opt out requests do not need to be recognized by the Sender (although in many cases they may be processed). Given the volume and breadth of email in today's marketplace, it would be inappropriate to require Senders to process non-conforming opt out requests. If a Sender provides an opt out process that is acceptable under CAN-SPAM (through a return address or Internet-based mechanism), the Sender should not be held accountable for opt out requests that do not conform to the process.

3 (d) Opt Out Requests: Where Sent v. Where Received

The CAN-SPAM Act states that, after receiving an opt out request, a Sender is prohibited from sending further messages to the "electronic mail address where the message was *received*". The use of the word "received" in this context creates considerable difficulty for email Senders. Many situations exist where the address to which a message is sent is different from the address where the message is received (i.e., automatic forwarding of email messages from one account to another). In such situations, the Sender may not be able to prevent future messages from being delivered to the address where the message was received as that address may not exist in the original mailing list. Alternatively, the Sender may be able to process the email address where the message was received, but will not have an opt out request for the address where the message was sent. In either scenario, the recipient may receive messages after exercising an opt out request.

The ESPC urges the Commission to clarify that an opt out should be processed so that messages are not delivered to the address where the message was originally *sent*. Alternatively, the Commission should clarify that a Sender is not responsible for opt out requests when the address submitted for the opt out is different from the address where the original message was sent.

4 The Definition of Sender

Under the CAN-SPAM Act, a number of issues have arisen with regards to the definitions of “Sender”, “Initiate”, and “Procure”. When drafted, the Act could not have contemplated the myriad business models involved in email. As a result, significant confusion has arisen as to which entity (or entities) is the Sender in messages with multiple advertisers, in “forward to a friend” scenarios, and in traditional list rental relationships.

The ESPC members regularly provide delivery services for customers engaged in all of these practices. As a result, our membership has experienced first-hand some of the confusion associated with the current definitions.

In the CAN-SPAM Act, a Sender is defined as a “person who initiates such a message and whose product, service, or Internet web site is advertised or promoted by the message.” This definition has two components: (1) whether the person initiates the message; and (2) whether the person has a product, service, or web site advertised or promoted within the message. Thus, if a message contains promotional or advertising material, the second part of the definition is satisfied. This means that any person with products, services, or web sites advertised or promoted in an email is potentially a Sender under the Act, if they also initiate the message.

The definition of Initiate in the Act states that the term means “to originate or transmit such message or to procure the origination or transmission of such message. The definition goes on to exclude the “routine conveyance” of email.¹ It is important to note that the definition also states that “more than one person may be considered to have initiated a message.”

Consistent with the possibility of multiple advertisers within a message, the definition of Initiate appears to create the possibility of multiple parties initiating a message. Clearly, in a

¹ Most email service providers will fall under the exception for “routine conveyance” when merely providing delivery services for their clients. Email service providers, when only providing delivery services and not identifying or providing the recipient addresses, are routine conveyors of the message.

situation where multiple parties are involved, not all parties can originate or transmit the message. As a result, the analysis turns to whether multiple parties have *procured* the origination or transmission.

The definition of Procure within the Act means “intentionally to pay or provide other consideration to, or induce, another person to initiate such a message on one’s behalf.” It is possible to read the term “induce” quite broadly to find multiple Senders of a single email message. It is therefore possible to interpret the Act in a way that creates compliance obligations for many parties within a single message.

Many of the uses of email in today’s marketplace involve many parties within a single message. For example, email newsletters may include advertisements for many different companies. If each of these advertisers is considered a Sender, the results under the Act could be, at best, confusing to consumers, and at worst, damaging to the continued legitimate use of email. Many problems may emerge under multiple-Sender scenarios:

1. **Requiring multiple opt out functions.** If multiple Senders are recognized within a single message, all would need to process opt out requests from recipients. Consumers would be confused if presented with a multiplicity of opt out functions. Conversely, if presented with only a single opt out (which is then passed on to all of the Senders), a consumer may be forced to opt out of an advertiser from which they still wish to receive messages.
2. **Multiple postal addresses.** The Act requires that the Sender’s valid physical postal address be included in the message. With multiple Senders, the Act would presumably require multiple addresses to be listed. This is, again, very confusing for the recipient. Even more importantly, the recipient will have limited ability to find one party that is primarily responsible for the message – they will be presented with a bewildering list of multiple Senders, opt outs, and addresses.
3. **Cost.** Needless to say, the processing and data management involved in this complicated web of opt out requests would be costly and burdensome for the

companies involved. It can reasonably be assumed that some advertisers will avoid email entirely if the mere placement of an ad in an email newsletter creates an obligation to process opt out requests (particularly where the advertiser is not in any way responsible for the list of email addresses used for the email newsletter).

4. **Privacy.** While the transfer of email addresses for opt out suppression between Senders is arguably pursuant to the demands of the Act, it does raise troubling questions about privacy. An interpretation of the Act that recognizes multiple Senders may have the unintended consequence of lessening privacy protections (or increasing the risk of privacy problems).

Congress could not have intended for mere advertisers in commercial email messages to have full compliance obligations under the Act. Given the confusion and cost that will result from such an interpretation, the ESPC strongly urges the Commission to promulgate standards that will avoid unnecessary costs, unintended consequences, and consumer confusion. Several possible interpretations and criteria exist that we believe will alleviate many of the problems described above.

4 (a) *Traditional List Rental; Single Advertiser; List Owner Not Identified*

One issue that emerges under the definitions of Sender, Initiate, and Procure involves the common use of list rental in the marketplace. Every day, companies use third-party lists to deliver marketing messages. In these situations, an advertiser provides consideration to a list owner in exchange for the ability to send messages to the email addresses on the list. *Where the advertiser is the only entity identified on the message*, it is clear that the Act would deem the advertiser to be a Sender (they have satisfied the two components of the definition of Sender). As a result, the advertiser is appropriately responsible for compliance with the Act – the advertiser would need to include its valid physical postal address in the message, and the list owner would need to pass back any opt out requests to the advertiser.

4(b) *Traditional List Rental; List Owner Identified*

One paradoxical result of the definition of Sender in the Act is the ability of a list owner to avoid opt out requests (they must, however, pass them back to each advertiser). If a list owner does not advertise within the message, they do not satisfy the definition of Sender. Therefore, the list owner does not need to offer an opt out function.

We feel that the list owner, when clearly and conspicuously identified in the email, should be able to assume the role of Sender for the entire message – regardless of whether the message contains a single advertiser or multiple advertisers. Consumers should be able to remove their email addresses from the list through which the commercial email is being generated. Exercising an opt out request in a list rental situation is futile if the opt out is only processed by the advertisers, and not the actual list owner (the consumer will continue to receive email from subsequent advertisers as their name remains on the list).

It is important to note that the list owner in this situation has the ability to assume all responsibilities of the Sender under the Act. The advertisers within the email message do not own the list. As a result, they should not be subject to the requirements of a Sender. This interpretation would resolve many of the concerns associated with multiple Senders, described above. It would also provide important tools to consumers to control the use of their email addresses.

4(c) *Joint Marketing Messages: Primary Sender*

Many email marketing messages are composed through joint marketing relationships between companies. In such situations, there may not be a list vendor involved – the parties may be delivering to email addresses held on a “house” list (a list built and used by the party). These situations raise all of the multiple Sender concerns described above. Significant confusion, cost, and burden will be created if the CAN-SPAM Act is interpreted to place the

Sender obligations on all parties within a joint marketing email campaign. However, it is also clear that the definitions of Sender, Initiate, and Procure allow for more than one Sender to exist for any one message.

The ESPC feels that it is appropriate to allow only a single Sender to be recognized when one party within a joint marketing message is clearly and conspicuously identified as the primary Sender of the message. In other words, if one party within the message is willing to step forward and bear the responsibility of the Sender obligations, the other parties within the message should not be considered to have initiated the message. However, several criteria should be applied to this analysis:

1. The Primary Sender must be clearly and conspicuously identified within the message;
2. The return address must be that of the Primary Sender;
3. The Primary Sender must provide or identify the addresses to which the message will be sent; and
4. The other parties within the message have not provided or identified the addresses to which the message will be sent.

It follows that, if there is no Primary Sender in a joint marketing message, all of the parties to the message should be considered Senders and carry the obligations of compliance with the Act. In other words, in the absence of a Primary Sender, all of the parties that satisfy the definitions of Sender should be required to comply with the Act.

4(d) Advertisements Within Email: The “But For” Test.

In addition to the standards described above, we also support the creation of a “but for” test for determinations of Sender status. In such cases, an advertiser would not be considered a Sender if the email message would have been sent irrespective of the inclusion of the advertisement. Further, an advertiser would not be considered a Sender where the email is sent on a regular basis and it contains different advertisers from time to time.

The question then arises as to financial support of the email message. Many of the email newsletters distributed today include advertising to support the delivery of the newsletter. As described above, we feel that advertising that is used solely to financially support the delivery of otherwise free content should be considered as a factor when assessing the “primary purpose” of the message. Consistent with that opinion, we feel that an advertiser that is included in an email message should not be considered a Sender if the advertisement is merely provided as a means to support the delivery of other content in the message. This result should still occur, even if the email could not be sent without the financial support generated through advertising.

5 Forward to a Friend

Many marketers and publishers use referrals from existing customers or email recipients to promote their products, services, or publications more broadly. This is commonly done through a mechanism called “forward to a friend.” Basically, an email is sent to the original recipient with a request that the recipient forward the message to a friend. The actual forwarding may occur through a web-based system (i.e., the recipient is directed to a web site where they enter the friend’s email address) or directly through the email client. The Commission has asked for comments on the CAN-SPAM obligations that are, or should be, created from this practice.

5(a) *Sender Provides Consideration*

The ESPC believes that the definitions of Sender, Initiate, and Procure provide some guidance for handling “forward to a friend” situations. Two factors in this analysis are relevant: (1) consideration provided by the Sender; and (2) whether the original Sender has access to the email address where the message is forwarded. When the Sender of the email

procures the forwarding of the message by providing some consideration to the recipient, the obligations of the CAN-SPAM Act should apply to the forwarded message.

This result is consistent with the definition of “Procure” under the Act, which states:

The term “procure”, when used with respect to the initiation of a commercial electronic mail message, ***means intentionally to pay or provide other consideration to, or induce, another person to initiate*** such a message on one’s behalf. (emphasis added)

Given this definition, it seems clear that a Sender has procured the initiation of a message if they provide consideration or have paid the recipient to forward the message to a friend. The ESPC supports this interpretation and feels strongly that compliance with the Act is required where the Sender has paid or provided consideration for the forwarding of the message.

While the Sender should be accountable for messages forwarded with consideration, it is not appropriate to hold a Sender accountable if the recipient forwards the message through a method that has not been sanctioned by the Sender. For example, if the Sender asks the recipient to provide forwarding email addresses through a web-based interface, the Sender should be accountable only for those emails sent as a result of the web-based interface. Recipients that use non-approved methods to forward a message should not create compliance obligations for the original Sender.

5(b) Senders Merely Prompting

Under the definition of “Procure”, it is less clear how the Act should apply to situations where the Sender merely prompts the recipient to forward the message (without paying or providing consideration). Many email newsletters and marketing messages have statements within the email asking recipients to forward the message to a friend. Where no consideration is

provided, the Sender should not be required to comply with the CAN-SPAM Act with respect to the forwarded message.

As a result, the Sender should not need to have access to the forwarded email address for purposes of suppressing against an opt out list. Nor should the Sender need to process an opt out from the recipient of the forwarded message. Requiring the Sender to provide these features would be costly to implement and would not be supported by the language of the Act.

5(c) *Independent Forwarding*

One of the powerful aspects of email is the ability of individuals to freely forward emails. It is important to highlight the complete lack of control a Sender has in those situations where a recipient independently hits the “forward” button in their email client and sends an email along to a friend. In such situations, the original Sender should not be held accountable for compliance with the Act. This is appropriate given that the Sender does not have any ability to control the act of forwarding, and compliance with the CAN-SPAM Act would therefore be impossible.

6 Valid Physical Postal Address

Under the CAN-SPAM Act, a “valid physical postal address” of the Sender is a required component of Commercial Electronic Mail Messages. The Act does not provide a definition for this term. As a result, questions have arisen as to whether certain types of addresses – post office boxes, corporate mailstops, and the addresses of agents – are acceptable. These issues generally turn on the “physical” and what constitutes “physical” postal address. Clearly, the open questions mentioned above would be answered if the Act referred to only a “valid postal address.” All of the examples would then qualify. However, the word “physical” in the Act suggests that some sub-set of valid postal addresses is necessary.

Within this requirement, it is clear that Congress intended to create a mechanism through which Senders could easily be located. The inclusion of a valid physical postal address should permit recipients, ISPs, and enforcement agencies to more readily find Senders in violation of the Act. If this is the public policy goal desired, then post office boxes, mailstops, and agent-based addresses should satisfy the Act. However, it is possible that the inclusion of a “valid physical postal address” was meant to facilitate the service of process for violations of the Act. If this is the case, then the examples above may not satisfy the intent of the Act.

The ESPC feels strongly that broad latitude should be given in the types of addresses permitted under this requirement. Any postal address that has a physical manifestation – such as a post office box, a mailstop, or an agent’s address – should be acceptable. The consequences of prohibiting such addresses could be confusing, or even damaging, to legitimate businesses.

Many businesses use post office boxes for managing the various programs, offers, campaigns, or services that they offer. Requiring a street address, and prohibiting post office boxes, would mean that businesses would have a single address for all of their business operations. This is simply unworkable. Businesses need the ability to segment their operations (and the addresses through which they operate) through the use of post office boxes. The same concerns apply to corporate mailstops – businesses need the ability to reference internal routing details under the Act.

One unique aspect to home-based businesses is raised by this discussion. Many small or home-based businesses use post office boxes (as opposed to the home address) to process their business. Requiring small home-based businesses to disclose the address of the home, as opposed to a post office box, could seriously compromise the privacy and security of the family within the home. Post office boxes are an important tool for home-based and small businesses, offering them a degree of separation between work and home. Interpreting the Act to prohibit post office boxes would remove this shield.

Many business models also involve agents of the Sender. In some cases, it may be an advertising agency or consultant's address that is represented in the email. This is an important tool when the Sender is relying upon the agent for a service (perhaps even the delivery of the email message). The use of the agent's address in this situation should therefore be permitted under the Act.

7 The Bounty System

The Commission is required to report to Congress on the feasibility of a "bounty" system whereby individuals would be rewarded for identifying persons acting in violation of the Act. The ESPC strongly objects to any such program. A bounty system would swamp enforcement agencies with consumer complaints. Millions of pieces of spam are delivered every day. Consumers reporting even 1/100th of a percent of the total volume of spam would create a completely unmanageable morass of complaints through which enforcement officials would be expected to wade. The pursuit of spammers requires sophisticated technological investigative resources. Consumers do not generally have access to the data and systems necessary to track spammers. But ISPs, Attorneys General, and the Commission do. It is for this reason that Congress created enforcement tools for the Commission and Attorneys General and a cause of action for ISPs.

8 Conclusion

The members of the ESPC have been at the forefront of the debate over spam and have actively pursued technological and industry solutions to the spam problem. The ESPC also strongly supported the passage of the CAN-SPAM Act. We strongly encourage the Commission to ensure that any regulations promulgated under the Act be carefully drafted to pursue the goal of reducing spam and holding spammers accountable for their actions. At the same time, we urge the Commission to carefully construct regulatory standards so as to avoid unnecessary complications and expense for legitimate businesses.

The Email Service Provider Coalition therefore respectfully submits these comments for the Record.

For the Email Service Provider Coalition:

J. Trevor Hughes
Executive Director