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Federal Trade Commission
CAN-SPAM Act
P.O. Box 1030
Merrifield, VA 22116-1030

Re: CAN-SPAM Act Rulemaking
Project No. R411008

Introduction

These comments are submitted by the American Council of Life Insurers ("ACLI") a national trade association representing three hundred sixty-eight (368) legal reserve life insurance companies operating in the United States. These 368 companies account for 69 percent of the life insurance premiums, 76 percent of annuity considerations, 53 percent of disability income insurance premiums, and 72 percent of long-term care insurance premiums in the United States.

These comments are in response to the Commission's Advance Notice of Rulemaking Request for public comment on various aspects of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act" or "the Act"). ACLI member companies are active participants in the Internet-based economy. Virtually all ACLI member companies maintain an online presence, with more than half (57%) allowing potential customers to download applications and one-quarter (24%) allowing applications to be submitted online as of 2002[1]. In addition, ACLI member companies are increasingly using the Internet to communicate with customers, and are offering greater functionality to customers and potential customers on life insurer web sites.

Life insurance companies are highly regulated financial services firms. The sale and servicing of life insurance products entails numerous disclosures and notices. Life insurer conduct is subject to the laws and regulations of each state and other jurisdiction in which they conduct business. In addition, certain life insurer activities are further regulated by the SEC.[2] Given the stringent regulatory environment in which life insurers function, it is critical that legally mandated records reach the intended consumer.

Because the Commission's notice sets forth an earlier time deadline for comments concerning the proposed "National Do-Not-E-Mail" Registry than for the remaining issues, these comments address the proposed Registry first.

[1] Catching up with E-commerce: A Study of Life Insurance Business Online, ACLI Publication, 2002.
[2] Primarily related to variable insurance products, their registration and sale.

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ACLI Opposes a National Do-Not E-Mail Registry

ACLI has long-supported a clear and workable National law designed to curb the abuses of spam. ACLI was and remains a supporter of the CAN-SPAM Act. ACLI and its individual member companies participated in the legislative process over the course of several congressional sessions as the CAN-SPAM Act evolved from proposal to law. ACLI recognizes the serious costs associated with spam, and has consistently supported efforts to curb the most noxious characteristics of much of today's spam, including fraudulent originating and subject matter information, e-mail address harvesting and the prevalence of unsolicited pornography. However, ACLI opposes the implementation of a National Do Not E-Mail Registry at this time.

ACLI recognizes that spam threatens to turn individuals away from e-mail, thereby jeopardizing a fundamental prerequisite for an electronic commerce-based financial services relationship: A reliable means of electronic communication and record keeping. Unlike many online business propositions, life insurance, and financial services generally, is predicated on an ongoing relationship. Many life insurance contracts last for decades. Over the course of this time there are many notices, statements and other records that the consumer must receive. Spam threatens to so overwhelm consumers in-boxes that they will inadvertently delete important, legitimate e-mail.

Spam also threatens to divert consumers from the Internet altogether; or at best participation will be less than it otherwise would be. In fact, there is already evidence that spam is eroding consumers' faith in the trustworthiness of e-mail as a communications tool. If this trend persists the U.S. economy will suffer. It is therefore essential that the FTC state attorneys general and Internet service providers act quickly and forcefully to curtail and reverse the growth of spam.

The Commission should first evaluate the effectiveness of CAN-SPAM's existing enforcement tools.

ACLI urges the Commission to employ its resources to enforce the myriad provisions of CAN-SPAM intended to put a stop to fraudulent, deceptive and unsolicited pornographic e-mail messages. CAN-SPAM contains tough civil and criminal penalties. The Commission is empowered to bring enforcement actions against spammers that employ deceptive and abusive practices, including e-mail harvesting,[3] automated e-mail account registration[4] and relay or retransmission via unauthorized means.[5] In addition, CAN-SPAM contains numerous affirmative requirements and prohibitions that apply to commercial e-mail messages. These include the inclusion of a valid postal address[6] by the sender, providing and honoring opt-out requests,[7] and using non-deceptive or misleading subject matter headings.[8]

The Commission has limited funds and personnel to apply the enforcement of CAN-SPAM. Unfortunately, the early indications are that CAN-SPAM has had no impact on the volume of spam.[9] Internet service providers have only in the past few days filed the first major lawsuit under CAN-

[3] CAN-SPAM Act, Pub. L. No. 108-187. Section 5(b)(1).
[4] CAN-SPAM, Section 5(b)(2).
[5] CAN-SPAM, Section 5(b)(3).
[6] CAN-SPAM Section 5(d)(5)(iii).
[7] CAN-SPAM Section 5(a)(5).
[8] CAN-SPAM Section 5(a).
[9] One Company that tracks the volume of spam states that the percentage of e-mail which qualifies as spam has actually increased from 68 percent to 79 percent since CAN-SPAM took effect. Jonathan Krim, "E-mail Giants Join in Court Fight Spammers," Washington Post, March 11, 2004 at E1.

SPAM.[10] There is no indication yet that the Commission has begun to enforce CAN-SPAM in earnest through the application of the enforcement tools at its disposal. In fact, the FTC has yet to bring an enforcement action under CAN-SPAM. We urge the Commission not divert resources away from enforcing CAN-SPAM to the creation of a national Do-Not-E-Mail Registry.

A Do-Not-E-Mail Registry is likely to be complex and costly to both government and industry.

The Commission is in the best position to evaluate the complexities of designing a Do-Not-E-Mail National Registry. There is little doubt, though, that such an undertaking will be far more difficult than was the Do-Not-Call National Registry. Several Commissioners have highlighted this very point in congressional testimony and elsewhere. These difficulties include the fact that many consumers have multiple e-mail accounts that are in a constant state of change. E-mail accounts and addresses are far more numerous and less stable than telephone accounts and numbers. Some Internet service providers give consumers up to five (5) e-mail addresses, and encourage the use of all as a way to manage spam. Consumers intentionally attempt to divert spam to several of these addresses which the consumer never checks. It will be very cumbersome for a national registry to keep pace with these changes, as consumers will likely be constantly adding new e-mail addresses without necessarily removing dormant ones. Conversely, to the extent that a national registry is successful in capturing tens of millions of accurate e-mail addresses, it will become a primary target for hackers who will have no qualms about distributing those addresses to spammers.

Consumer expectations will not be realized.

By all accounts the Do Not Call Registry has been a success. Consumers will understandably believe that this same recipe for success will be readily transferable to unsolicited commercial e-mail. Because of the difficulties of compliance noted above this is unlikely to be the case. But more important is the fact that spammers are not going to comply with a Do Not E-Mail National Registry. Spammers are too often not legitimate business people. Spammers as most consumers know them promote products and services that are unwanted, and even harmful in the case of pornography. They will simply ignore a Do Not E-Mail National Registry, just as they now ignore the CAN-SPAM's opt-out requirement.

The very existence of CAN-SPAM obviates the need for a Do Not E-Mail National Registry. The impetus for the Do-Not-Call National Registry was the significant intrusion telemarketing telephone calls imposed on consumers and the time burden imposed in connection with removing the consumer's telephone number from the company's list. By contrast, the opt-out requirements under CAN-SPAM are simple and straightforward for consumers. Legitimate companies make it very easy for consumers to opt-out from receiving additional e-mails from the company. As a result, the burden on consumers is minor and insignificant.

It is important for the Commission to recognize that most complaints about spam relate to companies that are not complying with the opt-out requirement. If the opt-out requirement were complied with by all commercial e-mailers, we believe that there would be few consumer complaints about commercial e-mail because consumers would have an effective way to prevent unsolicited messages. Unfortunately, the establishment of a National Do-Not-E-Mail Registry will not reduce the proliferation of SPAM, for the entities that now ignore the opt-out requirement of CAN-SPAM will simply ignore a National Do Not E-Mail Registry. We believe the best approach is to fully evaluate the enforcement mechanisms of CAN-SPAM prior to implementing a registry.

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[10] Id.

Liability for Acts of Third Parties

Apart from opposing the implementation of a Do Not E-Mail National Registry, the largest concern facing life insurers arising from CAN-SPAM is the question of potential liability for the acts and omissions of independent agents. ACLI member companies believe that provisions of CAN-SPAM could be interpreted in a manner that would expose companies to liability arising from actions over which they have no control. Specifically, Subsections 6(a) and 6(b) address potential liability of third parties for the transmission of e-mail messages in violation of Section 5(a)(1). This also brings into play the question of "multiple senders" concerning which the Commission has specifically solicited comments.

The majority of life insurance is sold through agents. However, there are different types of life insurance agents, and the relationship between life insurer and agent is defined by contract, state statute and case law. Not surprisingly given the many years that insurance has been sold this way, there are many variations to the life insurer-agent relationship. At the most basic level, some companies employ "captive" or "employee" agents who sell and service only the products of that company. Other companies use "independent" agents and other partners, who by definition market the products of more than one insurer. In addition, almost all life insurers do at least some business with insurance "brokers", who generally are understood as representing the proposed insured (consumer). These basic categories can and do overlap, and life insurers may make use of all three in addition to selling products directly to consumers through mediums such as the Internet.

Independent agents and brokers guard the relationships they have cultivated with consumers. Life insurers would typically not have access to, much less oversee, an e-mail marketing list of potential customers maintained by an independent agent or broker. The agent or partner is the only party with a relationship with and information about the consumer. Given this state of affairs it is easy to envision a consumer "opting-out" of a life insurer's mailing list, and then receiving an e-mail from an independent agent or broker that contains references to a product or service of that life insurer. In this scenario, opting out of receiving e-mails from the life insurer adds little value to the consumer. If the primary objective of the Act is to give the customer the opportunity to opt-out of receiving e-mail messages from parties that have his or her contact information, the real value of the Act is when it is directed to the party with whom the customer has a relationship on which the e-mail message relies. Clarification on this provision would provide greater certainty in developing a strategy for addressing the Act's requirements in these and similar scenarios.

In order to ensure that Sections 6(a) and 6(b) are not construed as imposing liability on a life insurer whose products or services are referenced in an e-mail over which it has not control, ACLI recommends that the Commission clarify that a company be held accountable under the CAN-SPAM Act only if it directs or controls the sending of electronic messages advertising its product and/or services.

Labeling Commercial Electronic Mail

ACLI has a particular concern regarding labeling that surfaced in several state anti-spam laws. A number of states[11] sought to require "ADLT", "ADV-ADULT" or similar prominent labels to indicate the content of the message contains adult oriented or pornographic material. Curtailing the proliferation of pornographic e-mail is a laudable goal that ACLI whole heartily endorses. A problem occurs, however, if the definition of adult advertisement is tied to a particular age. Several states enacted laws

[11] These states included: Alaska, Arkansas, Illinois, Indiana, Kansas, Louisiana, Maine, Minnesota, Missouri, New Mexico, North Dakota, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah and Wisconsin.

that provided for the adult subject heading if the product or service offered could only be view or purchased by a person eighteen (18) years or older. For example, Tennessee requires "ADV: ADLT" to appear in the subject heading of any electronic advertisement featuring products that only can be purchased by individuals eighteen (18) years or older.[12]

Under state law insurance laws minors typically cannot purchase life insurance; or at a minimum such contracts are voidable until the owner reaches the age of majority (typically 18 years of age). Therefore it is possible that a life insurance advertisement could technically be considered an adult product. While we consider life insurance to be a sexy topic, this is not the outcome anyone presumably intends. We ask that any labeling requirements directed toward adult material focus on the sexual content of the message, and not on a specific age associated with the product or service.

Modifying what is a "Transactional or Relationship Message"

The Commission has asked for specific comments concerning whether the definition of "transactional or relationship message" should be modified or elaborated. ACLI asks that any such modification or elaboration be cognizant of long-standing business practices regarding the commingling of product/service promotion and transactional material in the non-electronic world. Consumers are used to, and seemingly not over-bothered, by the inclusion of marketing materials in envelopes containing utility bills, credit card and bank statements, and similar mailings. Life insurers take advantage of this opportunity of communicating with its customer base to offer additional products and services in the same manner as other businesses. Because consumers expect this joining of promotional and transaction information in the non-electronic environment, they will likely expect to see it in the electronic environment.

We urge the Commission not to promulgate guidance that invites a complex weighing of relative content within a particular "transactional or relationship message." So long as a message conveys information to the consumer consistent with one of the purposes set forth in Section 3(17) of the Act, it should not matter that (and in what form or to what extent) supplementary information accompanies the message.

As the Commission examines this issue we ask that consideration be given to Section 214 of the "Fair and Accurate Credit Transactions Act of 2003" ("FACT" Act).[13] Life insurance can be very complex and many consumers need additional communications after an initial purchase to help them understand and take advantage of the benefits of their policy. Life insurers and their agents in particular are expected to communicate with owners of various types of policies to ensure that the owner is receiving

[12] Tenn. Stat. § 47-18-2501 (e) (2003).

[13] Sec. 214. Affiliate Sharing ''(d) DEFINITIONS.—For purposes of this section, the following definitions shall apply:''(1) PRE-EXISTING BUSINESS RELATIONSHIP.—The term 'preexisting business relationship' means a relationship between a person, or a person's licensed agent, and a consumer, based on—''(A) a financial contract between a person and a consumer which is in force;''(B) the purchase, rental, or lease by the consumer of that person's goods or services, or a financial transaction (including holding an active account or a policy in force or having another continuing relationship) between the consumer and that person during the 18-month period immediately preceding the date on which the consumer is sent a solicitation covered by this section; ''(C) an inquiry or application by the consumer regarding a product or service offered by that person, during the 3-month period immediately preceding the date on which the consumer is sent a solicitation covered by this section; or ''(D) any other pre-existing customer relationship defined in the regulations implementing this section. ''(2) SOLICITATION.—The term 'solicitation' means the marketing of a product or service initiated by a person to a particular consumer that is based on an exchange of information described in subsection (a), and is intended to encourage the consumer to purchase such product or service, but does not include communications that are directed at the general public or determined not to be a solicitation by the regulations prescribed under this section.''

the benefits of the policy and that there is no lapse in coverage. This is particularly important in direct response or Internet insurance transactions in which there is no face-to-face communication between an agent and the consumer. The language set forth in Section 214 of the FACT Act is the result of careful deliberations that sought to provide a definition of "Pre-Existing Business Relationship" that encompasses financial transactions, including insurance. We believe this to be an important point of reference with respect to any similar deliberations by the Commission.

Modifying the 10-Business-Day Time Period for Processing Opt-Out Requests

The Commission has requested comments regarding industry standards for the time period between the consumer exercise of the opt-out right and removal from an electronic mailing list. The Commission has also asked whether the 10-day period can and should be shortened. ACLI is not aware of any industry standard regarding the processing of opt-out requests. There certainly is no such standard within the life insurance community. As permission-based electronic marketing is a new reality, there are likely many different methods that are and will be employed. CAN-SPAM anticipated these different methods by, for example, allowing consumers to be directed via link to a web site in order to self-execute the opt-out. Given the different ways that opt-out will be effectuated ACLI believes the Commission should refrain at this time from imposing any standards concerning the method of opt-out or shortening the 10-day period.

Another point to consider is the extent to which opt-out mechanisms remain a tool in the hands of spammers to confirm active e-mail address rather than to remove an individual from a list. Most IT professionals continue to advise consumers not to use opt-outs for this reason. Before issuing additional guidance concerning opt-outs, we believe the Commission should focus on ensuring that senders are actually honoring the opt-outs they present.

Referral Marketing

The Commission has invited comments regarding "forward-to-a-friend" and similar referral marketing campaigns. It is a fact that life insurance agents (really all insurance agents and probably many other similar professionals) derive a large part of their business from referrals. Therefore, an agent may write to an existing customer requesting that he or she forward an e-mail with information supplied by the agent to individuals who may be interested in a particular type of coverage.

Because the above scenario does not involve consideration going to the customer, and the e-mail forwarding is limited to known individuals the customer wishes to help (the control is with the customer), we do not believe this is a practice subject to abuse. We propose that the parameters of "inducing" a person to initiate a message exclude situations like the above where the "forwarder" does not receive any gift, prize, monetary inducement or other tangible benefit from the sender in exchange for forwarding an e-mail.

Valid Physical Postal Address

The Commission has asked whether a P.O. Box should satisfy the Section 5(a)(5)(A)(iii) requirement of disclosure of "a valid physical postal address of the sender". ACLI believes P.O. Boxes should suffice as meeting this requirement. It is a common business practice to employ P.O. Boxes as a mechanism to receive communications for reasons of cost and efficiency. It should not matter to the consumer whether the physical address is comprised of a street address of a P.O. Box, so long as one or the other is present.

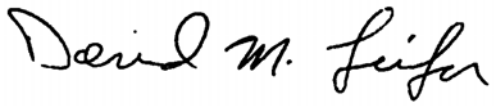
Conclusion

ACLI and its member companies support the CAN-SPAM Act and look forward to working with the Commission, as well as with state insurance regulators, in implementing the law in a manner consistent with the objective of protecting consumers from harmful and unwanted spam. ACLI does not believe that implementation of a Do Not E-Mail National Registry at this time will advance that objective. It will have the more likely result of frustrating consumers and burdening legitimate businesses while doing little to deter spam. ACLI urges the Commission to focus its resources on tracking down and punishing spammers with the many regulatory weapons provided by the CAN-SPAM Act. ACLI also urges the Commission to clarify that a "third party" as that term is used in Section 6(b)(1), will not be responsible for the illegal electronic transmissions of others absent clear indicia of control over the party that transmits the illegal message.

We also ask that any labeling requirements adopted by the Commission take into account state legal requirements that may restrict or prohibit minors from purchasing certain products and services. ACLI believes the Commission should refrain from attempting to over-regulate the content of "transactional or relationship" messages. Finally, we ask that referral marketing should not be prohibited absent an exchange of value.

Thank you for considering the comments of ACLI. If there is any additional information that we can provide to you, please let us know.

Sincerely yours,



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