June 27, 2005

Via Electronic Filing

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

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

Dear Secretary Clark:

The Electronic Retailing Association ("ERA") hereby submits the following comments in response to the Commission's latest request for comments on proposed rules and further implementing guidelines for the CAN-SPAM Act ("CAN-SPAM" or the "Act") (70 Fed. Reg. 25426, May 12, 2005). ERA is the leading association representing over 300 entities in the electronic retailing industry, including advertising agencies, direct response marketers, telemarketers, Internet and "brick and mortar" retailers, fulfillment service providers and television shopping channels. ERA submits these comments in addition to those filed jointly in this proceeding with several other trade associations and business coalitions. We urge the Commission to: (1) clarify the standard for designating a single entity as the "sender" of messages involving multiple advertisers; (2) provide a "safe harbor" for marketers who rely on third-party vendors or service providers to assist in disseminating messages; (3) retain the 10-day period for processing opt-out requests; (4) allow opt-out requests to expire within 5 years; (5) allow marketers to verify opt-out requests by requesting additional information from message recipients; and (6) clarify that "forward to a friend" e-mail messages are outside the scope of the Act, regardless of whether an inducement is provided to the consumer forwarding such message.

1. The Commission Should Further Clarify the Standard for Determining the Sender of Commercial E-mail Messages with Multiple Advertisers.

CAN-SPAM currently defines a "sender" as "a person who initiates a [commercial electronic mail] message and whose product, service, or Internet web site is advertised or promoted by the message." A sender is, among other things, responsible for disclosing its physical postal address, providing a functioning return email address or Internet-based opt-out mechanism that recipients can use to make opt-out requests, and for honoring those opt-out requests.

The Commission has proposed that, when more than one seller's products or services are advertised or promoted in a single message, each will be deemed a "sender" *except that* if one such seller's products or services are advertised only

that person will be deemed the “sender” if (a) that seller either: (1) controls the content of the message; (2) determines the electronic mail addresses to which the message is sent; or (3) is identified in the “from” line as the sender; and (b) none of the other sellers whose products or services are advertised in the message meet any of those three criteria. If no single seller controls the content of the message, determines the e-mail address to which the message would be sent, or is identified in the “from” line, then all persons who satisfy CAN-SPAM’s definition of “sender” will be responsible for “sender” compliance obligations.

ERA supports the Commission's proposal to allow sellers to designate one as the "sender" when multiple advertisers are involved. As the Commission noted in the NPRM, designating a single sender will enhance accuracy and compliance efforts, streamline the opt-out process for consumers and seller/advertisers, and avoid confusion by, among other things, avoiding cluttered or repetitious information in messages or multiple suppressions lists. It also helps address privacy concerns that may attend to sharing consumer suppression data. ERA, however, urges the Commission to further clarify the rule with respect to identifying who "controls" the content of the message. Absent additional guidance, the proposed standard is likely to be of little or no use in designating one entity as a sender.

Specifically, messages containing the advertisements of more than one seller will nearly always involve each seller to some extent – each seller will exert influence or control over its own contribution to the content of the message at least in terms of approving what is said about its own goods or services. For example, an advertiser that designs and creates a banner ad to be included in another advertiser’s commercial e-mail message might provide or approve the content of the banner, yet another advertiser might control the content and layout of the message as a whole. Or, if Advertiser A sends a message that includes a link to the commercial web site of Advertiser B in the advertiser’s commercial message, but Advertiser B retains the right to approve the message before it is transmitted, there is a question whether or not Advertiser B may be said to “control” the content of the message even though Advertiser A is primarily responsible for the creation, design, layout, and destination of the message.

The Commission must clarify the meaning of “control” to allow room for sellers to remain involved in the development of some aspects of the content yet still, whenever possible, structure messages with multiple advertisements so that there is only one “sender.” In particular, a seller should not be deemed a "sender" merely because it provides its own promotional content or has the right to review and/or approve the advertising content of another seller. Rather, control should vest with the entity that ultimately determines the design, layout, structure, and content of the overall message. Additional factors evidencing control could include determining the list of recipients who should receive the message and determining whether the message is sent.

2. The Commission Should Include a "Safe Harbor" For Content Providers Who Contract With Third Parties to Send Messages.

The Commission stated that it has held sellers liable for the actions of third-party representatives if those sellers have failed to adequately monitor the activities of such third parties and have neglected to take corrective action when those third parties fail to comply with the law. Nonetheless, it has requested comment on whether it should create a "safe harbor" with respect to opt-out and other obligations for companies whose products or services are advertised by affiliates or other third parties.

ERA supports the creation of a "safe harbor." Advertisers have limited control over the activities of third party service providers that they hire to transmit messages on their behalves. Even if the advertiser obtains contractual assurances that the third party will comply with CAN-SPAM requirements, the advertiser cannot control the actions of such third parties or their employees. ERA thus supports a "safe harbor" that protects e-mail marketers who implement reasonable procedures against unauthorized actions of their third party vendors, suppliers, or contractors. For example, under a "safe harbor" marketers would not be responsible for the unauthorized actions of their third party service providers if they obtain assurances that the third party complies with CAN-SPAM and monitor the activities of such third parties by "seeding" e-mail distribution lists.

3. The Commission Should Provide No Less Than 10 Business Days to Effectuate Opt-Out Requests.

The Commission's proposal to reduce the number of days that marketers have to effectuate opt-out requests from 10 business-days to three business-days is impractical, burdensome, and costly for businesses of all sizes, and it is not evident that reducing the timeframe would provide any meaningful benefit to consumers. It is already difficult to process opt-out requests within the existing 10 business day period. Shortening this time frame to anything less than 10 business days would inevitably cause marketers to rush compliance procedures to ensure that CAN-SPAM requirements are met, particularly the opt-out requirement. Such haste could compromise the integrity of e-mail opt-out lists and prompt inadvertent mistakes among those who make earnest attempts to comply with the Act.

Since the CAN-SPAM Act became effective, businesses have taken considerable efforts to implement policies and procedures for processing opt-out requests and planning e-mail marketing campaigns that are not delivered to those who have requested not to receive them. Regardless of size, many businesses have found that 10 business-days is barely enough time to scrub a distribution list, upload the list to software, double-check the list for opt-outs, send a test message, review the test message, and, finally, transmit the final version.

ERA members have reported that it takes at least a full day to scrub a large mailing list even when new database technologies and computer equipment are used. The process can take longer if a database is not quickly able to merge and purge distribution and suppression lists, or if the marketer is a small company that must do some or all of its list hygiene manually.

While current technology allows email recipients to submit opt-out requests quickly, for most marketers, an automated opt-out procedure does not translate to "instant" processing of an opt-out request. Moreover, creating and maintaining an opt-out list is not an automated process. The Commission has noted the ease with which consumers can submit opt-out requests via reply e-mail or a web-based mechanism. It is common, however, for marketers to also receive opt-out requests through a variety of other channels, such as mailed or faxed requests and telephone calls. The Commission should not underestimate the burden that results from having to process opt-out requests received through multiple channels. The various opt-out options provided to consumers require marketers to sort through, identify, and prioritize those opt-out requests, regardless of how they are received. In some cases, the marketer may need to match-up the name of a person who has submitted a mailed or faxed opt-out request with that person's e-mail address. In other cases, the marketer has to read through a customer letter sent to the marketer's physical postal address to determine that the communication includes an opt-out request. All of these opt-out requests must be combined and entered into the marketer's database. Combining these requests must occur before the marketer can scrub its distribution list, upload the distribution or otherwise prepare a final list of campaign recipients, test the campaign, and correct errors.

Since opt-outs may be received at any time and from multiple channels – not simply in response to the most recent solicitation – an e-mail marketing campaign must either conclude within the time allowed for processing opt-outs, or be halted and re-started with a newly-purged list after 10 days, to ensure that any opt-outs received during the campaign are processed within the 10-day limit. If all of the steps required to complete transmission of an e-mail messages – from list scrubbing to testing to sending of the final message – are not completed within the limit for processing requests then the cycle must start over, beginning with merging and purging of a new e-mail distribution list that accounts for opt-out requests received within the last three days. Given that it may takes several days to properly prepare a distribution list, reducing the allotted time to process opt-outs from 10 to 3 business days will seriously threaten marketers' ability to send commercial messages at all – they will hardly have started before the list will need to be recalled to be purged again.

The proposed three business-day time frame would be particularly burdensome on marketers who used third party vendors to help transmit commercial messages. Among such marketers, many of them choose to maintain their own e-mail distribution and suppression lists in order to protect the security of their lists and the privacy expectations of their customers and prospects. Thus, for each e-mail

campaign, these marketers must follow the steps above for collecting and combining opt-out requests and scrubbing e-mail distribution lists, and then upload or otherwise provide to the vendor a distribution list that the vendor would use to transmit the marketer's message. If a marketer uploads a distribution list but cannot complete a test of the message or correct an error identified in the test within three business days, then the marketer must scrub and upload a new distribution list and start the process over again, at the marketer's additional expense. Moreover, particularly for those marketers who maintain their own e-mail marketing database but use third parties to transmit messages, collecting opt-out requests that have been received by the vendor adds extra time to the process.

At the same time, there is no evidence that consumers have been harmed by the 10-business-day opt-out period. Indeed, the Commission noted that earlier commenters who complained that 10 business days gives spammers "a lot of time to send junk" did not support these concerns with factual evidence. As a practical matter, it is unlikely that most marketers will send further or repeat unsolicited email to the same individual within less than 10 days. Real "spammers" who bombard consumers with junk e-mail are no more likely to adhere to a three-business-day opt-out rule any more than a ten-business-day rule or a 30-day rule. The Commission's proposed three-business-day rule would only burden marketers who make earnest efforts to comply with the law. Reducing the permissible time frame for processing opt-out requests would thus impose tremendous burdens on marketers without providing any corresponding benefit to consumers.

4. <u>Opt-Out Requests Should Expire Within Five Years.</u>

The Commission has tentatively refused to impose a limit on the duration of an effective opt-out request. ERA urges the Commission to set a limit of no more than five years on the duration of opt-out request. This is the standard that the Commission and the Federal Communications Commission have adopted for honoring Do-Not-Call requests. E-mail addresses are at least as likely – and probably more likely – to fall into disuse as telephone numbers. As marketers take steps to create suppression lists and honor opt-out requests, their efforts are made considerably more difficult by increasing amounts of non-functional e-mail addresses. The process of identifying and scrubbing non-functional email addresses from an email distribution list is particularly time consuming, complicated, and expensive for smaller businesses and organizations. As individuals change jobs, Internet service providers, and email service providers, they are likely to also change email addresses. The Commission has noted that there is no workable database that makes it easy for marketers to purge defunct email addresses from their lists. An expiration date on opt-out requests would help marketers eliminate defunct e-mail addresses from the growing list of contacts they manage.

5. <u>The Commission Should Allow Marketers to Request Additional Information from Message Recipients Who Submit Opt-Out Requests or</u>

Require Recipients to Take Additional Steps to Submit an Opt-Out Request for Verification Purposes.

The Commission has stated that submitting an opt-out request should not be encumbered by any extraneous requirements, such as paying a fee, submitting information other than an e-mail address, or receiving an additional sales pitch prior to being able to make an opt-out request. ERA agrees that it should not be costly or difficult for message recipients to submit opt-out requests. However, marketers should be permitted to implement a reasonable mechanism to verify that the person submitting the opt-out request is the person to whom the e-mail address provided is assigned.

Particularly when web-based opt-out mechanisms are used, whether accessed via a link in a commercial message or on a web site privacy policy, individuals not authorized to use an email address can simply type that address into the opt-out box and hit "submit." This may be subject to competitive abuse and marketers should have some means to protect against it. For instance, a competitor may have the ability to enter into a web-based opt-out mechanism any number of common names and e-mail domain names, or email addresses from its own database, in order to remove those addresses from a rival's list. For those marketers whose e-mail distribution lists are comprised solely of individuals who have purchased products or services from the marketer in the past, the illegitimate and fraudulent removal of e-mail addresses from their e-mail distribution lists is especially harmful to both businesses and consumers. To guard against this problem, a marketer whose e-mail distribution lists are comprised only of individuals who have set up a username and password with the marketer's web site might be asked to enter the username and/or password to submit an opt-out request. Or, a marketer may wish to send a non-commercial e-mail message in response to an opt-out request to confirm receipt of the opt-out request, and give the addressee an opportunity to reply if the opt-out request were received in error. The Commission should give marketers some flexibility in implementing opt-out mechanisms that includes some cost-free means to verify the identity of the person making the opt-out request.

6. The Commission Should Deem Forward to a Friend Messages to Fall Outside the Scope of the CAN-SPAM Act, Even Where an Incentive is Provided to Forward Such Messages.

Finally, the Commission should conclude that Forward-To-A-Friend ("FTF") e-mails are routine conveyances within the meaning of the Act and hence not subject to CAN-SPAM limitations and requirements. The term "routine conveyance" is defined as "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 addresses." 15 U.S.C. § 7701(15) (2000). Such routine conveyance are exempt from the Act's restriction and limitations. Id § 7701(9). We submit that FTF messages meet the definition of

routine conveyance in all respects and, accordingly, fall outside the scope of the Act.

The definition itself provides the starting point for our analysis. Any process designed to transmit, route or relay an email message through "an automatic technical process" to an address provided by "another person" is, by definition, a routine conveyance within meaning of the Act. The plain language permits no other conclusion. As a typical FTF process is designed to permit one consumer (the "FTF forwarder") to transmit an e-mail message to a second consumer (the "FTF recipient") at an e-mail address the FTF forwarder provides, the process is, by definition, a routine conveyance when a third party – e.g., the sender of the underlying e-mail message (the "underlying marketer") – merely "transmits, routes or relays" such message to the FTF recipient through an "automatic technical process."

This analysis applies even where the underlying marketer provides the FTF forwarder with an incentive to engage in the FTF program. Nothing in the definition of routine conveyance, or any other language in the Act, makes the presence or absence of an incentive a controlling factor. Thus, even assuming that an underlying marketer, upon sending a commercial e-mail message, "induces" or "procures" the participation of an FTF forwarder through, for example, a sweepstakes entry or payment, such inducement would not bring the FTF message within the scope of the Act if it otherwise qualifies as a routine conveyance. Accordingly, where the FTF forwarder provides the address and his or her message is routed to the FTF recipient through an automatic technical process, then the forwarded message is, per se, a routine conveyance even in the presence of an inducement. Clearly, Congress intended this result when it carved out the routine conveyance exception in the Act.

Clarifying that FTF messages are routine conveyances outside the scope of the CAN-SPAM Act would further serve to eliminate several practical compliance problems relating to such messages. Deeming the underlying marketer to be the sender of the forwarded message would presumably subject such marketer to opt-out obligations with respect to the FTF message. However, the FTF message would be sent "from" the FTF forwarder, not the underlying marketer, and the opt out request would typically be sent from the FTF recipient to the FTF forwarder. The underlying marketer cannot control whether the FTF forwarder will provide it with the FTF recipient's opt out request for inclusion in its suppression list. In addition, if the underlying marketer were deemed the sender in the FTF process, it would violate the Act through no fault of its own if the FTF forwarder sent a message to an FTF recipient who had already opted-out of receiving messages from the underlying marketer.

In sum, Congress by providing the routine conveyance exception, clearly intended to exempt from the Act those whose involvement is limited to providing a

electronic facility for the dissemination of friend-to-friend information, and where they do not obtain a email recipient list in the process.

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ERA appreciates the opportunity to comment on this proceeding. If you need additional information or have questions, please contact Barbara Tulipane at (703) 908-1038.

Respectfully submitted,

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