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FEDERAL TRADE COMMISSION

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FEDERAL TRADE COMMISSION

IN THE MATTER OF:)
CAN-SPAM REPORT TO CONGRESS.)
) Matter No:
) P044405
)
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THURSDAY, JULY 28, 2005
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

The above-entitled matter came on for
conference, pursuant to agreement, at 3:08 p.m.

1 APPEARANCES:

2

3 ON BEHALF OF THE FEDERAL TRADE COMMISSION:

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11 ALSO PRESENT VIA TELEPHONE:

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13 BILL MCCLELLAN, Electronic Retailing Association

14 COLIN O'MALLEY, TRUSTe

15 NATHANIEL BORENSTEIN, IBM

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P R O C E E D I N G S

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MR. DAVIS: Thank you, everyone. This is Mike Davis. I'm a lawyer here at the FTC in Washington, and I am joined by Katie Harrington-McBride here in a conference room at the FTC, and also with me is Allyson Himelfarb who is an investigator at the FTC, and we would like to thank you very much for joining us on this afternoon's conference call.

Let me take a moment to ask if Debbie, the court reporter from For The Record is on the line.

MS. MAHEUX: Yes, I am, Mike. Thank you

MR. DAVIS: All right, Debbie. Why don't we just begin very quickly with a roll call to see who is here. We have a list of people that we are expecting.

Let me first ask if Susan Welch is on the line? Susan from Procter & Gamble? Okay. She might not be on yet. How about Thomas Boyd? How about Bill McClellan?

MR. MCCLELLAN: I'm here.

MR. DAVIS: Thank you,

MS. HARRINGTON-MCBRIDE: Hey, Bill, how are you.

MR. MCCLELLAN: I'm great.

MR. DAVIS: Fran Maier? Fran Maier? How about Colin O'Malley?

MR. O'MALLEY: This is Colin.

1 MR. DAVIS: Colin, Hi.

2 MR. O'MALLEY: And I believe Fran will be
3 joining us shortly.

4 MR. DAVIS: Oh, great. Nathaniel Borenstein?

5 MR. BORENSTEIN: Yep, I'm right here.

6 MR. DAVIS: How are you?

7 MR. BORENSTEIN: Doing just fine, thanks.

8 MR. DAVIS: Good. Glee Harrah Cady? Anyone on
9 from GMAC?

10 Alice Osburn?

11 MS. OSBURN: I'm here, thanks.

12 MR. DAVIS: Hi, Alice. How about Kim Quish?
13 Anyone on from Charles Schwab?

14 Okay. Anyone on from the FTC?

15 MR. SILVERVIN: Lou Silversin, Mike.

16 MR. DAVIS: Hi, Lou. That's Lou Silversin who
17 is an economist in our Bureau of Economics. Is there
18 anyone else on the call whose name I have not called?

19 MS. COLCLASURE: Yes. This is Sheila Colclasure
20 with Acxiom Corporation.

21 MR. DAVIS: How do you spell your last name,
22 please, Sheila?

23 MS. COLCLASURE: C O L C L A S U R E, and I'm
24 standing in for Jennifer Barrett.

25 MR. DAVIS: Jennifer Barrett. I'm sorry,

1 Sheila. We just didn't have an indication on the
2 handout that we walked into the conference room with
3 that Jennifer would be on the call.

4 MR. O'MALLEY: My apologies.

5 MR. DAVIS: Ours too. Do you guys have a
6 question? What organization again, Sheila?

7 MS. COLCLASURE: Acxiom Corporation, A C X I O
8 M.

9 MR. DAVIS: Sheila, thank you. Sorry for that.

10 MS. COLCLASURE: My apologies, too.

11 MR. DAVIS: Susan Welch, Thomas Boyd or Glee
12 Harrah Cady, have any of those folks joined?

13 I'll guess we'll get started. Once again thank
14 you for joining us. This will be a call of
15 approximately two hours of duration, and it is about the
16 federal CAN-SPAM Act. As you probably know in December
17 of 2003, Congress enacted and the President signed the
18 CAN-SPAM Act which, among other things, directs the FTC
19 to report on the effectiveness and the enforcement of
20 the CAN-SPAM Act, and the FTC's report is due to
21 Congress by the middle of December of 2005.

22 The FTC has been gathering data since the
23 passage of the Act, and this interview with all of you
24 will be transcribed for the record, and will be a part
25 of the record for the record.

1 this could include any development that you might be
2 aware of such as changes in filtering or methods of
3 authentication, the use of non traditional devices for
4 receiving Email, anything that you might be aware of.

5 Let me just ask if we've been joined by someone
6 on the line? Okay. I heard a beep.

7 The second of our four topics will be the extent
8 to which international transmission of Email may affect
9 the effectiveness of the Act and any suggestions for
10 changes.

11 The third topic will be ways in which consumers,
12 especially children, can be protected from obscene and
13 pornographic material. The FTC has a rulemaking from
14 April of 2004 which is meant to address that and we
15 refer to that as our Brown Paper Wrapper Rule. It also
16 requires that there be essentially sexually explicit
17 labels inserted into the subject line of Emails as
18 appropriate.

19 The fourth topic would be to discuss the
20 effectiveness of the various specific provisions of the
21 Act, and we'll just discuss each one in turn.

22 For each of these four main areas, I'll ask a
23 series of questions, and if you have any information
24 responsive to any of the questions, we request that you
25 signal your interest verbally, and then when you're

1 called on, please state again your name and the
2 organization for which you work and provide your answer.

3 On occasion, if you have a particularly
4 sophisticated technique that you're discussing or a
5 slightly unfamiliar acronym, I might interrupt and ask
6 for just a little explanation or to ask you to spell out
7 what the acronym stands for just so the record is clear
8 for even moderately sophisticated readers.

9 Why don't we go ahead and start with the first
10 issue, whether there are any marketplace developments or
11 technological changes since the passage of the Act in
12 December of 2003 that may affect the practicality or the
13 effectiveness of the CAN-SPAM Act, and let me just start
14 by asking specifically: Are there any new or
15 increasingly used methods for receiving Email for
16 consumers who receive Email such as perhaps cell phones
17 or hand-held Email devices, and if so, would those
18 developing affect the practicality or effectiveness of
19 the Act?

20 MS. COLCLASURE: This is Sheila Colclasure
21 Acxiom Corporation, and I will offer this to get us
22 started on this topic. Acxiom Corporation is of course
23 a service provider to many large companies in the United
24 States, spanning most of the major industries, and one
25 of the industries we serve is the telecommunications

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1 industry.

2 One of our clients, that shall remain nameless,
3 is interested in marketing via cell phone, and of course
4 they must accommodate CAN-SPAM if they use that device
5 to Email market and promote their product and service
6 offerings. This channel is their primary growth target.
7 Understanding how to structure an Email marketing
8 message that will arrive on the phone and do two things:
9 (1) Comport with CAN-SPAM and (2) Adjust to the medium,
10 meaning it's a very small screen, requiring a shorter
11 message, adjusting to much smaller space for the header
12 and subject line disclosure as you would on the
13 traditional email reception device on your laptop or
14 desktop Email.

15 So they're struggling to construct an Email
16 marketing message that could be effective for the medium
17 while comporting with the requirements of CAN-SPAM.
18 Because this is our client's primary marketing growth
19 channel, it's an interesting dialogue that we've been
20 having with them as their partner service provider.

21 MR. DAVIS: Thank you, Sheila.

22 MS. HARRINGTON-MCBRIDE: Sheila, this is Katie.
23 What are some of the specific concerns about CAN-SPAM
24 compliance? I'll tell you that some of the things that
25 we've heard in terms of messages on these mobile devices

1 is that there's some concern about recipient's ability
2 to opt-out from these devices.

3 There's also some concern, as you noted, about
4 the size of the screen and whether the disclosures and
5 such would be fully displayed. Are those some of the
6 issues that you're clients are concerned about?

7 MS. COLCLASURE: Spot on. That's exactly it.
8 The subject line disclosure, for example, there's not
9 much space to really do it justice, so you have to come
10 up with some shorthand method that your recipient may or
11 may not understand.

12 To accomplish all of the disclosure and
13 hyperlink requirements, plus create an opt-out mechanism
14 is challenging. They're being very innovative with
15 their technology, to figuring out a keying method that
16 the recipient could use on their phone to easily and
17 effectively key an opt-out; perhaps press a one or two
18 to trigger an action with regards to the message. This
19 is taking some innovative thinking and technology to
20 figure this out.

21 The piece that gets a little tricky and
22 difficult to navigate this is how to accommodate the
23 CAN-SPAM while conveying the innovative fixes to their
24 consumer. So if this innovative technology is in place
25 to say, hit the key one and opt-out that way, how does

1 this company communicate that technology function to the
2 recipient? The screen is so tiny. If they needed to
3 put some instructions in there, how is that physically
4 possible?

5 The medium is rather limiting. They have the
6 other obstacles. They have to make the marketing free,
7 of course, and that's very unique to the cell phone
8 medium. As they overcome those issues, how do they
9 make the medium effective?

10 They know from their testing that their consumer
11 is receptive to receiving email marketing via the cell
12 phone. They've got to figure out how to overcome
13 CAN-SPAM with all of its specified requirements. So,
14 yes, exactly what you said, spot on.

15 MS. HARRINGTON-MCBRIDE: That helps. Thank you.

16 MR. DAVIS: Anyone else have thoughts about
17 frequently used methods for receiving Email?

18 Let me ask a question about filtering. Have
19 there been any changes to Email filtering that affect
20 the practicality or the effectiveness of the Act?

21 If looking backward 18 or 19 months doesn't
22 generate much in the way of comments, you're invited to
23 look forward, to the extent you're able to, to see into
24 the future and comment or speculate about what might be
25 on the horizon or what might even be a year or two out

1 in terms of the effectiveness and the practicality of
2 the Act with regard to any of these evolving
3 technologies.

4 MR. BORENSTEIN: This is Nathaniel Borenstein
5 from IBM.

6 MR. DAVIS: Hi.

7 MR. BORENSTEIN: I think the most interesting
8 forward looking thing I've seen recently has been some
9 mathematical game theoretic work that has strongly
10 suggested that filtering is a vicious cycle that would
11 go on forever and that you can't limit it.

12 So in the last 18 months I've become far less
13 optimistic about filtering.

14 MS. HARRINGTON-MCBRIDE: What's the good news,
15 Nathaniel?

16 MR. BORENSTEIN: The good news I hope will be
17 the DKIM standard for authenticating mail at the domain
18 level, which together with some reputation services will
19 take a bite out of phishing at least.

20 MS. HARRINGTON-MCBRIDE: Okay.

21 MR. O'MALLEY: This is Colin O'Malley from
22 TRUSTe, and I would certainly echo what was just said,
23 certainly about the rise of Email authentication
24 protocols as the flip side of the inability of filtering
25 to keep up with the spam problem.

1 We interestingly think authentication is going
2 to enable reputation services and accreditation
3 services, services that have strict guidelines for
4 behavior, generally exceeding their requirements of
5 CAN-SPAM, but being consistent with all of CAN-SPAM's
6 provisions that enable receiving networks to identify
7 the good companies so that we're not just screening out
8 the bad mail, but we're identifying the good mail, and
9 we think that those two general types of programs, which
10 are really black list programs and white list programs,
11 will together reduce the impact of spam.

12 MR. DAVIS: Thank you. Let me open up for
13 comment anything else on authentication and how it may
14 be affecting the practicality or effectiveness of the
15 Act? We can move away from filtering if anyone has any
16 authentication thoughts.

17 MS. WELCH: This is Susan Welch from Procter &
18 Gamble. This isn't necessarily authentication. We push
19 all of our Email programs through DoubleClick, and one
20 of the things we did awhile ago is through the direction
21 of DoubleClick, we have a dedicated IP address so that
22 even though we might have 100 brands in the United
23 States with Email messages and marketing programs, it
24 all goes down under one IP address.

25 What we have found now is that we have

1 dramatically reduced the problems that we might have
2 blocking at an ISP because with a recognizable IP
3 address, the ISP realizes that we may be pushing a
4 large mailing, but we're not spamming, and so by just
5 pushing to a dedicated IP address, we've reduced the
6 kinds of problems that we see at an ISP where they might
7 be blocking our messages.

8 MR. DAVIS: Thanks, Susan.

9 MR. O'MALLEY: This is Colin again at TRUSTe,
10 and I think that's a really good illustration of where
11 we're going in general in the market. By establishing
12 one IP address for all of Procter & Gamble's mail,
13 what's been able to happen is the establishment of a
14 reputation for Procter & Gamble mail that's reliable,
15 and once that reputation can be established, receiving
16 networks can actually trust that they know the mail
17 coming from that IP address, and they can send that mail
18 through.

19 It's a glimpse of what authentication is going
20 to do generally for the market, that it's going to
21 enable the establishment of reputation for all
22 legitimate companies, which in turn enables delivery.

23 MR. DAVIS: Let me talk about zombie drones,
24 which would be innocent user's machines highjacked by
25 spammers as a result of insecure connections. Do you

1 think that the use by spammers of zombie PCs or network
2 have had an impact on the effectiveness of CAN-SPAM?

3 MR. BORENSTEIN: This is Nathaniel again. It
4 certainly has had an impact on the effectiveness of
5 spammers.

6 MR. DAVIS: What type of effect?

7 MR. BORENSTEIN: Oh, it lets them send a lot
8 more and be harder to trace. Another issue that is
9 probably worth raising though is the tracing issue. One
10 of the things that we at IBM think might be helpful with
11 the requirements are a stronger tracing and evidence of
12 how a message goes through each step.

13 MR. DAVIS: Let me ask you about a recent study
14 released by the Pew organization. The study seemed to
15 find that while the volume of Email has increased since
16 the passage of CAN-SPAM, frustration of recipients has
17 actually lessened. What do you make of that particular
18 finding?

19 MS. WELCH: This is Susan Welch from Procter &
20 Gamble again. What I can look to is we don't have hard
21 evidence to support that, but when CAN-SPAM first came
22 out, we noticed an increase in consumer's contacting
23 like our consumer relation organization, to ask to
24 opt-out, and that dropped off very, very quickly, so
25 that either our regular opt-out process that we fully

1 implemented for CAN-SPAM is working or that consumer's
2 frustrations with Email has lessened some because the
3 amount of comments we get directly from our consumer
4 group relations on spam has dropped off considerably.

5 MR. O'MALLEY: This is Colin from TRUSTe. I'll
6 make a couple points on that subject. I think, first of
7 all, that there are other areas of concern right now
8 that are a little fresher and a little more urgent on
9 consumer's mind, issues like Spyware and phishing, for
10 example.

11 This doesn't necessarily mean that consumers are
12 less frustrated with spam, in particular because
13 phishing, as an example, is delivered often through
14 spam. So spam is a vehicle for even more nefarious
15 practices at this point in time, practices that are a
16 little more top of the line for consumers.

17 Another point I make though is part of what
18 we're seeing is the beginning of that progression of
19 authentication and the establishment of reputation, and
20 then it's enabling certain ISPs, particularly AOL well,
21 for example, and Microsoft to get better at filtering
22 now that they have an increased ability to identify the
23 good mailers, thereby increasing filtering without
24 risking false positives, that we're beginning to see the
25 impact of established authentication reputation in the

1 original spam which is decreasing spam and the volume in
2 consumer's inboxes in some cases.

3 MR. DAVIS: Let me just ask one final question,
4 sort of a catchall. Are there any other marketplace or
5 technological developments that may affect the
6 practicality or the effectiveness of the Act?

7 Okay. Let's move on to the second topic that we
8 wanted to ask a few questions about, and that is how to
9 address commercial Email that originates in or is
10 transmitted through or to facilities or computers in
11 other countries.

12 Congress wants the report to include any
13 analysis and recommendations on this, including
14 initiatives or policy positions that the United States
15 could pursue, so let me ask if you a view on the extent
16 to which commercial Email that's received in the U.S.
17 originates in or gets transmitted through other
18 countries, and do you believe the method for identifying
19 the origin of Email are adequate?

20 MR. BORENSTEIN: This is Nathaniel again. At
21 the risk of being redundant with what I said before,
22 better tracing facilities will certainly help. I don't
23 think there's much doubt about that.

24 MR. DAVIS: Can you imagine some recommendations
25 that might help improve tracing?

1 MR. BORENSTEIN: Yes, actually I can. I can
2 imagine in particular putting regulations on anyone who
3 runs an affiliate program, an affiliate marketing
4 program, to keep a history of the identities of the
5 affiliates, because that's how spammers essentially
6 launder a lot of their money or their identity, but
7 there are several kinds of information that would be
8 nice if they kept.

9 MR. DAVIS: Thank you. Does anyone happen to
10 have reliable statistics on the extent to which Email
11 enters U.S. from overseas computers, or does anyone have
12 suggestions about what might be the best sources of
13 information on this?

14 MR. BORENSTEIN: This is Nathaniel again. I
15 apologize for leading so much, but I've heard several
16 ISPs say the vast majority of their spam comes from
17 within the U.S., but there is certainly a growing
18 percent from China and elsewhere.

19 MR. DAVIS: Does anyone have a view whether the
20 amount of Email originating in or transmitted through
21 other countries have changed, perhaps gone up or gone
22 down from the passage of CAN-SPAM? I think Nathaniel
23 was just saying it seems to be increasing.

24 MR. BORENSTEIN: It's still U.S. centric.

25 MR. DAVIS: Let me ask about any initiatives

1 that you think could be taken by the United States with
2 any other countries. As you may know the FTC works
3 closely with various international organizations to
4 monitor Email trends. Do you have any thoughts about
5 any initiatives that could be taken that would help with
6 the effectiveness or the enforcement of the CAN-SPAM
7 Act?

8 Okay. Well, let's move on to the third area of
9 interest. Congress was interested in hearing from us
10 about the issue of pornographic and obscene Email, so
11 we're curious to know if you think the FTC's April 2004
12 rule about sexually explicit Email, whether that has
13 been effective. That was promulgated in April of 2004,
14 and it required that the words "sexually explicit" be
15 put in the subject line and that there also be an
16 initially viewable area that does not contain any
17 obscene or pornographic content.

18 Does anyone think that the rule has been
19 effective in protecting consumers, including children,
20 from receiving and viewing obscene or pornographic
21 Email, or does anyone think it has not be very
22 effective?

23 MR. BORENSTEIN: I think it's not in the
24 spammer's interest to do it. So as long as he's
25 depending on not being identified, he's not going to do

1 it.

2 MR. DAVIS: That's Nathaniel, right?

3 MR. BORENSTEIN: Yes, I'm sorry.

4 MR. DAVIS: Thank you.

5 Does anyone have any comments about private
6 sector tools such as those that might be made available
7 by ISPs or Email service providers which exist to shield
8 consumers from obscene or pornographic Emails?

9 Are there any software programs which are
10 available that you're aware of that might be available
11 that are effective in disabling links or removing
12 graphics or how about the technology that allows only
13 Emails to be received from one's friend? Does anyone
14 have any thought, favorable or not, about any such
15 programs?

16 MR. BORENSTEIN: Well, I'll speak up again then.
17 This is Nathaniel. It seems to me that because the
18 opponents are changing here, the spammers react to all
19 of our counter measures, what is important is less any
20 particular program that there be sort of a healthy
21 market of competitors to make ever better spam filters.

22 MR. DAVIS: A healthy market of competitors to?

23 MR. BORENSTEIN: Make ever better spam filters.

24 MR. DAVIS: Thank you.

25 MR. BORENSTEIN: Because the spammers are going

1 to get ever more clever too.

2 MR. DAVIS: Any other thoughts or comments about
3 the effectiveness of the Act in protecting consumers
4 from obscene or pornographic Email?

5 Well, our fourth topic for this teleconference
6 is to walk through the various provisions of the
7 CAN-SPAM Act and just take them in the order of their
8 actual appearance in the Act and discuss those
9 provisions.

10 We would like to find out any thoughts you may
11 have on whether they are achieving their beg your
12 pardon, how effective they may have been so far, and
13 whether there are any concerns about the enforcement of
14 any of them, and the first two that show up in the Act
15 are the criminal provisions and the criminal penalties,
16 so we would like to know whether you think those have
17 been effective, and do you have any thoughts about their
18 enforcement? If you find in your mind that they have
19 been a useful deterrent, we would like to find out what
20 you think.

21 MS. COLCLASURE: This is Sheila Colclasure with
22 Acxiom, and I'll just start off this portion of the
23 discussion and say that from a service provider
24 perspective, where we fulfill campaigns on behalf of our
25 clients that span all of the major industries, all of

1 our clients are very conscientious and sensitive to the
2 enforcement components of CAN-SPAM.

3 In fact, because of some errors and through the
4 FTC's efforts to evaluate the industry's responsiveness
5 to accommodating CAN-SPAM, a couple of our Acxiom
6 clients have actually been examined by the Federal Trade
7 Commission. In one instance in particular, it was
8 clearly a technological glitch that caused the slight
9 processing error, which persisted for three days. This
10 error was discovered by the FTC. We worked with our
11 client very closely to do the forensics necessary to
12 determine exactly what had happened during this
13 three-day technical glitch span, and we remedied it very
14 quickly. The FTC was very satisfied with the response
15 from Acxiom and from our client.

16 I'll say this, that all the clients that we work
17 with are very, very sensitive to the enforcement
18 components of CAN-SPAM and I think intend to be very
19 conscientious about responding to it.

20 MR. DAVIS: Thanks, Sheila. I'm wondering if it
21 was contact prompted by the FTC, I wonder if it was
22 necessarily any criminal provision that was being
23 referenced or if it might have been any one of the other
24 provisions such as civil provisions that the FTC has
25 enforcement authority for.

1 Do you think your comment may have been more of
2 a general comment or was it one directly --

3 MS. COLCLASURE: No, I intended it to be more
4 general, just to begin the dialogue. It wasn't
5 specifically criminal, no.

6 MR. DAVIS: Great, okay. Thank you.

7 Let me move on to the remaining provisions,
8 which are primarily civil law enforcement provisions.
9 The first one is a prohibition on false header
10 information in commercial or transactional Email
11 messages. Do you have any thoughts on the effectiveness
12 or the enforcement of that particular provision,
13 prohibition of false header information?

14 A similar prohibition is on the prohibition of
15 deceptive subject lines in the Email message. Do you
16 have any comments on the effectiveness or the
17 enforcement of that particular provision?

18 MR. O'MALLEY: This is Colin from TRUSTe. I'll
19 add to Nathaniel's earlier comment about spammers that
20 are obscuring their identities to begin with, are
21 certainly not going to be complying with these
22 provisions in particular, in that we're obviously still
23 seeing all of this, quite a bit of spam with deceptive
24 headers and misleading subject lines.

25 With that being said, it's certainly not a fault

1 of the law, and these kinds of deceptive practices need
2 to be outlawed, and to the extent that anyone happens to
3 trip over these provisions and be identified, they
4 absolutely will not to be prosecuted.

5 MR. MCCLELLAN: This is Bill McClellan, ERA. I
6 completely agree with that, too. The good marketers are
7 following and being CAN-SPAM compliant, and it's the
8 spammers that continue to break the rules and should be
9 prosecuted

10 MR. DAVIS: Thanks, Bill.

11 MR. O'MALLEY: This is Colin again. One more
12 point I would like to add to that. While TRUSTe has
13 really best of breed, independent self regulation
14 programs with program requirements that exceed these
15 areas, we have concern that the perception that, as an
16 example, a provision against falsifying headers -- the
17 perception of that has been ineffective because there
18 are quite a few Emailers out there that are still
19 falsifying headers.

20 We have concern that that perception will lead
21 to encouragement to eliminate those provisions because
22 they're supposedly ineffective, and that's a real
23 concern of ours, and we would absolutely like to see
24 those provisions in the Act.

25 MR. DAVIS: Thank you.

1 MR. BORENSTEIN: This is Nathaniel again here.
2 I think it keeps coming back to authentication, but in
3 this case there is a real point to authentication for
4 the commercial spammers. This is when identities on
5 the Internet are translated into money, actual dollars,
6 and that's where affiliate programs are an example of a
7 big hole. They don't keep records long enough to be
8 traced in the event of -- well, basically all spam is
9 gets laundered at some point.

10 MR. DAVIS: Why don't we talk about the two
11 provisions then that relate to opting out. The first
12 one is a requirement that Emails include a functioning
13 return address or other opt-out mechanism that must work
14 for 30 days, and of course there's a safe harbor for
15 unavailability.

16 Do you have any thoughts about the effectiveness
17 or the enforcement of that provision or perhaps have you
18 seen any literature or do you have any information that
19 discusses the compliance rates of Email messages with
20 that particular provision?

21 MR. BORENSTEIN: Nathaniel again. It seems to
22 be almost received folk wisdom, that if you click on one
23 of those unsubsubscriber links, you'll get more spam, but
24 I've heard of a couple of studies that have said just
25 the opposite.

1 MR. DAVIS: Thank you for bringing that up,
2 Nathaniel. We are interested in learning about any
3 studies or data that would either debunk that theory or
4 support that. Certainly it does seem to be conventional
5 wisdom that there is some negative consequence that may
6 await a user who either would subject herself to some
7 malware, if she goes to a particular site in trying to
8 do an unsubscribe, or could just possibly subject
9 herself to more Email.

10 Does anyone have any information that would tend
11 to support or not support the concern that in general if
12 you're a consumer and you opt-out, you subject yourself
13 to negative consequences?

14 MS. COLCLASURE: This is Sheila Colclasure with
15 Acxiom. I'll contribute something anecdotal. After a
16 workshop that I attended at the FTC, in which the FTC
17 reported that its experience opting out was, in fact,
18 effective and you did not generate more Email, and then
19 subsequent to CAN-SPAM going into effect, a few folks on
20 my policy team put it to the test.

21 We deliberately went through the spam in our own
22 inboxes and attempted to unsubscribe all of it, and then
23 we tracked to see what happened to our spam rate and
24 computers. In every instance, our spam rate went up.
25 In one instance, an individual's machine received

1 malware from the new spam that launched a series of
2 pop-ups on his machine that actually ended up wrecking
3 his C drive. He had to have his C drive wiped and
4 reloaded before he could operate his machine normally.

5 That's anecdotal. That's just our team's
6 experience.

7 MR. BORENSTEIN: There are methodological
8 problems here in any study. Where did your sample come
9 from?

10 MS. COLCLASURE: There you go. That's why I'm
11 saying it's anecdotal.

12 MR. DAVIS: Sheila, I'm sorry, Nathaniel. Was
13 that during 2004 when you did that?

14 MS. COLCLASURE: Yes.

15 MR. DAVIS: Okay. Thank you. And you consider
16 those to be negative consequences?

17 MS. COLCLASURE: Yes.

18 MS. WELCH: This is Susan from P&G again. I
19 think this speaks to the whole problem that we have here
20 because the good marketers put in programs that work, so
21 if you get something in your inbox that reasonably looks
22 like it comes from a good marketer, you relatively are
23 comfortable hitting an opt-out link, but if there's
24 anything suspicious about that Email, nobody is going to
25 hit an opt-out link because they're afraid of what's

1 going to happen.

2 MR. BORENSTEIN: And people are too easily made
3 comfortable as with all the phishing scams.

4 MS. COLCLASURE: Exactly.

5 MR. O'MALLEY: This is Colin again from TRUSTe.
6 We have a number of enforcement monitoring tools that we
7 use to keep tabs on the behavior of our licensees and
8 also sometimes to collect data from the Internet at
9 large as a basis for comparison.

10 One of the tools that we are going to be using
11 shortly, that has already been put into production with
12 a partner, is also an unsubscribe link monitoring
13 technology, and we've had that or our partner rather has
14 had that in place for about four to six months now, and
15 they've been monitoring several thousands of Email
16 domains and the unsubscribe links that are being used by
17 these domains, and they have actually collected a fairly
18 strong set of data, certainly the strongest set that
19 I've seen in this area.

20 There's nothing new here, only to back up with
21 that data what's already been said, and that's that by
22 far and away, we've learned that unsubscribe links do
23 work, that there are a minority of cases where they
24 don't work, and that there are fringe cases where they
25 generate more mail, and we found that to be genuinely

1 less than 5 percent, in the range of 2 to 4 percent of
2 unsubscribe links generating either additional mail or
3 some kind of additional negative consequence.

4 It speaks to both sides, both that legitimate
5 marketers, even most spammers are not using unsubscribe
6 links to harvest Email addresses, but that there still
7 persists a fringe of spammers that are actually using
8 unsubscribe links to harvest as a sign of activity in
9 that Email address.

10 MR. DAVIS: Colin, thank you. I'm sorry to
11 interrupt you.

12 MR. O'MALLEY: I was only going to say that it
13 does substantiate on an ongoing basis the general
14 concern that consumers have about touching an
15 unsubscribe link.

16 MR. DAVIS: By the way, has that study been made
17 public, or is it something internal that you're able to
18 comment on now?

19 MR. O'MALLEY: Yes. It's not actually a
20 published survey at this point. It's simply an
21 observation that I can make in looking at the data that
22 we've collected thus far.

23 MR. DAVIS: Okay.

24 MR. O'MALLEY: I would be happy to follow-up
25 with someone or be available if you would like to get

1 more information.

2 MR. DAVIS: Yes, thank you. I'll be giving my
3 Email address at the end of our call, and when we have
4 the transcript and we start to go over it, I think we
5 might want to contact you at that time to ask a
6 follow-up question.

7 MR. O'MALLEY: Absolutely.

8 MR. DAVIS: I appreciate that information.

9 Nathaniel, I don't know if we cut you off at one
10 point.

11 MR. BORENSTEIN: I don't think so.

12 MR. DAVIS: Thank you okay. There's another
13 provision in the Act that deals with the prohibition on
14 transmission of business commercial Email after the
15 consumer has opted out, and there's a ten-day window for
16 compliance. Does anyone have a comment on the
17 effectiveness or the enforcement of that particular
18 provision?

19 MR. MCCLELLAN: This is Bill McClellan, ERA.
20 The marketers that I've talked to say the ten-day window
21 is about right. I know that FTC has looked at moving
22 that to a three-day window, I believe, and they've had
23 comments and concerns about the ability to opt people
24 out in that amount of time.

25 MR. DAVIS: Thank you, Bill.

1 There are three similar disclosure requirements
2 in the Act. I'll just take each one, but they're all
3 sort of a sweep or a package. One is that there should
4 be in a commercial Email an identifier clearly denoting
5 that the Email is an advertisement or solicitation. Do
6 you have any thoughts on the effectiveness or the
7 enforcement of that particular notice requirement?

8 I'll just go ahead and mention the other two.
9 The second one is that there be a clear and conspicuous
10 notice of an opt-out, and then the third is the
11 provision of the valid physical postal address. A valid
12 physical postal address of the sender must be included
13 in the message.

14 Any thoughts on any of those three in terms of
15 their effectiveness or their enforcement?

16 In the context of the criminal provisions, I was
17 asking for any thoughts on the criminal penalties that
18 the Act had. The Act also implicates civil penalties
19 for the violations of the civil provisions is. Does
20 anyone have any thoughts about the effectiveness of
21 those penalties, the civil penalties, and whether they
22 have served as a deterrent?

23 MR. BORENSTEIN: This is Nathaniel again. The
24 spammers are very aware of them and talking about them
25 and planning how to avoid them so they must have had

1 some effect.

2 MR. DAVIS: The Act also provides that certain
3 activities constitute aggravated violations. Those are
4 harvesting, dictionary attacks and creation of multiple
5 Email accounts, and the user of senders, the use of
6 relays and zombies. Any thoughts on the effectiveness
7 of those aggravated provisions and any thoughts about
8 their enforcement?

9 Okay. We'll just continue through the
10 provisions of the Act then. The FTC was required to
11 promulgate a rule dealing with sexually explicit Email,
12 and we spoke about it earlier, and I solicited any
13 thought on the effectiveness of that, but in case anyone
14 has any additional comments, you could mention them now
15 on whether that rulemaking has been effective and if
16 there are any concerns about its enforcement.

17 There's another provision that prohibits
18 promotion of a person's trade or business in a
19 commercial Email message, the transmission of which
20 violates the false or misleading header provision that
21 we discussed earlier, and this is a provision that the
22 FTC only is permit the to enforce.

23 Does anyone have any thoughts about that
24 provision, about its effectiveness or its enforcement?

25 One other provision in the CAN-SPAM Act is

1 preemption of state laws that except for those that are
2 not specific to Email. Does anyone have any thought
3 about the effectiveness of that particular provision of
4 the CAN-SPAM Act, the preemption provision?

5 MS. COLCLASURE: This is Sheila Colclasure of
6 Acxiom. I would actually ask a question: Has the FTC
7 received any feedback from companies with regards the
8 Michigan and Utah Email registries?

9 MS. WELCH: This is Susan Welch from PG. I was
10 going to ask that same question.

11 MR. DAVIS: I can tell both of you that we have
12 been following those state laws and with interest. I
13 guess though our confidentiality procedures here at the
14 FTC would not allow us to make any revealing comments
15 about whether any specific companies have contacted us
16 with questions.

17 Sorry if that seems a little bit tight lipped.
18 I guess in general I think about the agency and the
19 information that we get is infrequently a one-way
20 street. We hear things but we only make statements
21 about things in a limited context, so I apologize.

22 I don't have anything to say about that other
23 than we're aware of those laws, and we're very
24 interested in them.

25 MS. COLCLASURE: Could you characterize your

1 regard for the preemptive powers of CAN-SPAM over those
2 two new state laws?

3 MR. DAVIS: Well, I wouldn't want to do that
4 either, and I'm sorry, but I can certainly appreciate
5 where you're coming from. Do you want to make a
6 statement here about any perceived difficulties relating
7 to those particular laws?

8 MS. COLCLASURE: I think they're fraught with
9 difficulty. I think the language that would permit an
10 Email to be registered is at best loose and overbroad.
11 I think that the mechanism by which a company must avail
12 itself of the scrub of each of those registries is
13 counterintuitive to the way that companies steward their
14 own data. Further, it's costly, prohibitively costly.
15 The guidance on how you must submit a list for scrubbing
16 is difficult to understand and difficult to comply with.

17 I think both of those registries are fraught
18 with difficulties.

19 MR. DAVIS: Thanks, Sheila. Anyone else have
20 any thoughts on the preemption provision?

21 The last provision of the CAN-SPAM Act that I
22 have a question about is the one that requires the
23 Federal Communications Commission to issue a rulemaking
24 about unwanted commercial messages sent to cellular
25 phones. That rulemaking occurred about a year ago.

1 Does anyone have any thoughts on the effectiveness or
2 the enforcement of that?

3 Okay. Well, that concludes the series of
4 questions that we had. Now that we've been thinking
5 about and talking about this for about an hour, does
6 anyone have any thoughts that they would like to either
7 amplify or add or for the record?

8 MS. CONCLASURE: For the record, this is Sheila
9 Colclasure with Acxiom, and I harken back to the
10 preemption conversation of just a moment ago, and I
11 would like to compliment the preemptive component of
12 CAN-SPAM for companies that operate nationally.

13 That is a very effective standard for governing
14 Email marketing campaigns, and we are very appreciative
15 on behalf of all our clients, and in fact for the small
16 Email marketing that we actually do to our own clients,
17 and the large amount of Email marketing we execute on
18 behalf of our clients, we find it's a very productive
19 standard, so we extend gratitude for that standard and
20 the enforcement of it.

21 MR. DAVIS: Thank you, Sheila. I would like to
22 mention if you have any further thoughts on these issue,
23 if there are any individuals you think we ought to speak
24 to, any particular studies you would like to draw our
25 attention to, perhaps articles that you would like to

1 make sure that we've been able to look at, please
2 contact us.

3 I'll give you my Email address and ask that at
4 any point before December, if you could send me anything
5 that you would like to send, we'll take a look at it.
6 We'll be doing our drafting on this report during the
7 next several weeks.

8 Then we'll have to let the report go up through
9 the management channels, so if you can get things to us
10 by mid August, that would probably give us the best
11 chance to read the material or speak with the individual
12 and contemplate it for our report, but in any event, the
13 report will not be due until mid December, so if you
14 have anything between now and then, I invite you to send
15 it to me, Mike Davis, at the FTC, and my Email is M D A
16 V I S @ F T C . G O V, mdavis@ftc.gov.

17 A transcript of this call will be available
18 shortly, and once the transcript is available, it will be
19 circulated to all of you so that you may have an
20 opportunity to review it and to make any corrections.

21 Because there are so many participants on our
22 various calls, we would be most grateful if you could
23 make any corrections that you have in a red line format
24 and then send us that red line document.

25 We'll also be asking for fairly quick

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1 turnaround, again because of our drafting deadline, and
2 Allyson Himelfarb, the person who has corresponded with
3 you by Email for this conference call, will be the
4 person who will be in touch with you shortly, as soon as
5 the transcripts are ready.

6 Thank you all so much for taking time out of
7 your afternoon to join us and to talk about the CAN-SPAM
8 Act. Your input is very helpful, and it will assist us
9 in completing the report to Congress on the
10 effectiveness and the enforcement of the Act. Have a
11 good afternoon.

12 (Whereupon, at 4:02 p.m., the conference was
13 concluded.)

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CERTIFICATE OF REPORTER

DOCKET/FILE NUMBER: P044405
CASE TITLE: REPORT TO CONGRESS
HEARING DATE: JULY 28, 2005

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the steno notes transcribed by me on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: AUGUST 11, 2005

DEBRA L. MAHEUX

CERTIFICATION OF PROOFREADER

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

DIANE QUADE