Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

COMMENTS
of
CHARTER COMMUNICATIONS, INC.

On the

CAN-SPAM ACT RULEMAKING, PROJECT NO. R411008

Notice of Proposed Rulemaking

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I. INTRODUCTION

Charter Communications, Inc. ("Charter" or the "Company"), by its attorneys, hereby submits these Comments in response to the Commission's May 12, 2005 Notice of Proposed Rulemaking ("NPRM"). In the NPRM, the Commission seeks comments on numerous issues pertaining to the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act" or "Act"). Charter is a broadband communications company with over 6 million customers in 37 states. Through its broadband networks, Charter offers traditional cable video programming (both analog and digital), high-speed cable Internet access, advanced broadband cable services (such as video on demand ("VOD"), high definition television service, and interactive television) and, in some markets, telephony service, primarily through voice over Internet Protocol ("VoIP") technology.

The CAN-SPAM Act requires that commercial electronic mail messages whose primary purpose is the commercial advertisement or promotion of a product or service must meet certain criteria. These criteria include having: non-misleading subject heading; an opt-out mechanism for recipients to prevent a company from sending further e-mails at that address; the physical address of the sender; clear identification that the message is an advertisement or solicitation; and certain labels for sexually oriented materials. The Commission previously issued final rules on labeling standards for e-mails containing sexually explicit material and for determining whether the primary purpose of an e-mail message is commercial in nature.

In the current NPRM, the Commission addresses several distinct provisions of the CAN-SPAM Act under its discretionary authority. The Commission proposes new rules that include adding a definition for the term "person;" modifying the definition of "sender" for those situations where multiple persons advertise in a single e-mail message; clarifying that post office

boxes are sufficient "valid physical postal addresses" under the Act; shortening from ten business days to three business days the time within which a sender must honor opt-out requests; and clarifying that a fee cannot be required to process an opt-out and that only limited information need be provided to the sender to process such request. In addition, the NPRM discusses other areas without proposing specific rules. These other areas include "forward-to-a-friend" emails, which contain a mechanism through which an e-mail recipient can forward an e-mail message to others; whether certain e-mails should be considered "transactional or relationship" e-mails; how to treat debt collection e-mails; whether the categories of aggravated violations under the Act should be expanded, and whether a time limit on opt-out requests is appropriate.

Charter addresses five issues from the NPRM in these Comments. First, the Commission should not shorten from ten business days to three business days the time a sender may take before fully processing and effectuating a recipient's opt-out request. Second, the original sender of a commercial e-mail should not be responsible for CAN-SPAM compliance of e-mails delivered through a forward-to-a-friend mechanism unless payment or other consideration is provided to the original recipient to forward the message. Third, the Commission should establish a maximum timeframe after which companies can remove e-mail addresses from opt-out retention lists. Fourth, the Commission's proposed definition of "sender" is inadequate. While Charter applauds the Commission's attempts to fashion a rule that would allow promotional material from more than one company to be in an e-mail without all providers of that material being deemed "senders," the rule as proposed is unworkable. It lacks guidance on what constitutes "control of the content" in an e-mail message and therefore undercuts the very

purpose of the proposed rule. Finally, the Commission should not consider debt collection e-mails to be commercial.

Charter supports fully the goals of the CAN-SPAM Act. Charter's interest in this proceeding is as a company that wants to efficiently market its services to its existing and potential customers, while valuing consumers' privacy rights. In its role as a high-speed cable Internet access provider, Charter diligently acts to protect its consumers from spam, by, among other things, deploying spam filters, implementing other network security functions, and initiating lawsuits under the CAN-SPAM Act where appropriate. At the same time, Charter also recognizes the legitimate use of commercial e-mails by reputable businesses seeking to market to, and educate, customers and potential customers about product and service offerings. The Commission should not unduly restrict and over-regulate the marketing efforts of legitimate companies, like Charter, who consistently work to protect consumer privacy and respect the privacy choices of consumers under the Act. Some of the Commission's proposals and interpretations of the Act will only make it more difficult for legitimate companies to comply. Those entities that have no regard for the requirements of the Act, and who will not abide by the current or any future rules, should be the focus of the rules as they cause the greatest nuisance for consumers and should be the target of law enforcement efforts.

II. THE COMMISSION SHOULD NOT SHORTEN THE OPT-OUT REQUEST PROCESSING TIME FROM TEN BUSINESS DAYS TO THREE

Charter opposes any change in the Commission's rules to shorten the timeframe for processing opt-out requests. In its NPRM, the Commission notes that CAN-SPAM's underlying objective is to "afford e-mail recipients maximal privacy *consistent with reasonable compliance*

costs."[1] However, in proposing to shorten the opt-out processing timeframe, the Commission ignores the reasonable compliance cost component of that objective. While the Commission notes that some entities can process requests almost instantaneously, that is not true for all entities. Charter is well into the process of implementing a system where, because of its use of a third party vendor, it can take up to eight business days to process an opt-out request so that such email address will not be included in any future commercial e-mailings. Charter has already entered into a long-term contract with this third-party vendor. Changing the current timeframe would impose unreasonable costs upon Charter and generate very limited benefits, if any, for consumers.

A. Legitimate Businesses Will Not Improperly Take Advantage of the Ten-Business-Day Window

In its NPRM, the Commission did not find valid the concerns of those commenters to the Commission's March 11, 2004 Advanced Notice of Proposed Rulemaking ("ANPRM") who believed that commercial e-mailers would mail-bomb recipients who had opted-out during the ten-business-day period.[2] It is, however, at least implicit in the Commission's proposed rule that there is a concern that even legitimate businesses would unduly violate customers' privacy during the ten-business-day time period, or it would not have proposed shortening the timeframe. At its core, the ten-business-day timeframe is simply a reasonable processing time to protect businesses while they complete the updating of records and suppression lists. Legitimate businesses such as Charter do not view the ten-day timeframe as an opportunity to violate customers' privacy rights by squeezing in some additional emails.

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[1] 70 FR at 25444 (emphasis added).

[2] 70 FR at 25443.

In this context, it is important to acknowledge the differences between legitimate business use of commercial e-mail and illegitimate spammers. For example, legitimate business users of commercial e-mail identify themselves in the "From" line, do not use false or misleading subject headings, provide a physical address and respect consumer's privacy options and afford them the opportunity to exercise such options. Legitimate business users of commercial e-mail use such marketing techniques responsibly, so as to avoid offending or harassing their customers or potential customers. On the other hand, spammers often send identical e-mails many times a day and for consecutive days, do not accurately identify themselves in the "From" address (and oftentimes use multiple misleading identities), have false subject header information, and do not afford consumers with genuine opt-out options. Many spammers provide an apparent opt-out option, but use a consumer's response simply to verify that the e-mail address is live and active and then send even more unwanted e-mails to the recipient that was attempting to opt-out.

Less than two weeks ago the Commission acknowledged the difference between legitimate marketers and spammers in its report to Congress recommending against an "ADV" labeling requirement for commercial e-mail.[3] The Commission found that the labeling requirement would not reduce spam because "[o]nly law-abiding commercial emailers would label their [unsolicited commercial email while] [s]pammers would simply ignore such a requirement."[4] The Commission's proposed rule to reduce the opt-out processing time frame would similarly punish only entities that engage in legitimate commercial emailing practices and who strive to honor recipients' privacy requests. Entities predisposed to take advantage of the

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[3] *See Federal Trade Commission, Subject Line Labeling As a Weapon Against Spam, A Report to Congress* (June 2005), available at http://www.ftc.gov/opa/2005/06/adv1.htm.

[4] *Id*. at 13.

ten-business-day window through repeated e-mailings are likely already violating other aspects of CAN-SPAM as well and would ignore a shortened three-business-day opt-out period anyway.

B. The Benefits to Consumers From Shortening the Opt-Out Timeframe Would Be Minimal, if Any

The risk that consumers will receive additional unwanted emails from Charter and others like Charter is minimal if the ten-business-day processing timeframe remains in place. Shortening the opt-out processing time to three business days only ensures legitimate businesses that unintentionally violate the timeframe are more likely to be the subject of an enforcement action than illegitimate businesses, who have no intention to comply with any opt-out timeframe, who disguise their identities, and who are difficult to locate. The customer is not likely to receive substantially more commercial e-mails from a legitimate businesses during the three to ten business day period after he or she makes an opt-out request to that business. Therefore, there is little, if any, benefit to the consumer from shortening the timeframe.

In fact, although not impossible, it is unlikely that Charter would send a commercial e-mail to a consumer who has previously opted out of e-mails from Charter during the ten-business-day processing timeframe. Generally, Charter sends at most two commercial e-mailings a month to the same consumer, although the usual frequency of a commercial e-mail to a single customer is spread out over a longer timeframe than that. In the rare occurrence where Charter might send two e-mails to the same customer within ten business days, and the customer opted-out after receiving the first e-mail, Charter should not be subject to liability while it is processing the original opt-out request. Under Charter's recent contract with a third-party vendor, almost the full ten business days for processing opt-out requests is required.

C. Charter's Contractual Agreement with an Outside Vendor Prevents it from Processing Opt-Out Requests Within Three Business Days

The reason Charter is unable to process opt-out requests within three business days is because of its e-mail databases and its relationship with third-party vendors.[5] Currently, a third-party vendor sends out all e-mails on Charter's behalf. The third-party vendor then processes any opt-out requests and maintains the suppression list. However, for efficiency and cost reasons, Charter is now in the process of building a single, centralized internal marketing e-mail database. Up to this point, it has maintained e-mail addresses in separate databases that are used for different functions such as billing databases, an on-line customer preference database, a separate high-speed customer database, and e-mail lists obtained from third parties. Upon completion of its centralized marketing e-mail database, Charter itself will directly process e-mail opt out requests and maintain its e-mail suppression list although a third-party vendor will still be the entity actually transmitting the e-mails. The inability to process opt-outs within three business days occurs because of other third-party vendor relationships, not because Charter will be unable to add an e-mail address to its own suppression list within three business days.

Specifically, Charter has recently entered into a multi-year contract with another third-party vendor. This third-party vendor utilizes marketing campaign management tools and maintains a database of customer preferences that enable Charter to engage in focused marketing campaigns, including e-mail campaigns for different customer segments. The vendor will pull specific e-mail lists for Charter depending on criteria Charter gives it for the type of customer or

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[5] In the NPRM, the Commission requested details on why processing opt-out requests in fewer than 10 days is not feasible. Charter is providing the following information so that more detailed information is available but it also is limiting the information provided because of proprietary and confidentiality concerns.

area that Charter wants to target and then another third-party vendor will do the actual e-mailings.

Charter will receive all e-mail opt-out requests, which will be added to a suppression list the same day and that will be synchronized with Charter's internal centralized e-mail database by the following business day. The day after that, the second business day after the opt-out is received, Charter enters the information into another Charter database that also contains certain customer billing and other information. It is at this point that delay occurs.

Charter's recent long-term contract with the third-party vendor that creates these tailored e-mailing lists on Charter's behalf was previously negotiated and priced. The terms of the contract prevent full processing of opt-out requests in fewer than three business days before any new e-mailings may occur. Moreover, re-negotiating the terms of the contract could result in significant expense to Charter. Under the terms of the contract, after Charter processes the opt-out request, synchronizes that request with its internal centralized marketing e-mail database, and then adds the opt-out information to its other centralized database containing other information. Charter then provides the third-party vendor an updated e-mail list (including the updated suppression list with the new opt-outs), and the list is not processed by the marketing vendor, who does similar work for many companies, until several days later. In fact, Charter is contractually obligated to wait for one specifically designated day of the week to send the updated e-mail list to the marketing vendor. It then takes up to five days before the vendor uploads the information into its own database. In all, this results in a minimum of seven days to a maximum of twelve days (eight business days), depending on the day of the week Charter received the opt-out request, between the e-mail recipient's opt-out request and its entry into the

vendor's database, from which Charter ultimately pulls the email addresses for relevant marketing campaigns.

The costs involved in amending Charter's long-term contract with the vendor are significant. Increasing the frequency to more than once a week that Charter provides the vendor its updated list, as well as increasing the frequency with which the vendor loads Charter's files to its database (to more often than the once a week after Charter provides the data) would cost Charter well over $100,000 a year. Yet, the additional benefit to subscribers is minimal, if any, because, as explained above, the likelihood of Charter sending more than one e-mail to the same consumer within a ten-day period is low.

To ensure compliance with the proposed rule, Charter would have to modify its contract with the third-party marketing vendor at significant expense or somehow ensure that any new e-mail campaign could never commence until an eight-business-day timeframe has passed from the last e-mail campaign. While Charter strives for the latter approach, imposing a rule such as the Commission proposes with penalties attached is not feasible because Charter is a large corporation and may have various e-mail campaigns to different consumer segments originating from different points within the Company ongoing at the same time over successive days. Moreover, that approach would involve other yet unexplored and additional administrative costs to ensure compliance.

In sum, ten business days is a reasonable period of time to process opt-out requests and to protect consumer privacy. The bulk of consumers' privacy invasion will come from spammers who will not honor opt-out requests, no matter what timeframe is adopted. The Commission

must not ignore the significant costs and burden a shortened timeframe would impose on Charter and similarly situated companies.[6]

III. CAN-SPAM REQUIREMENTS SHOULD APPLY TO AN ORIGINAL SENDER ONLY IF PAYMENT OR OTHER CONSIDERATION IS PROVIDED FOR SENDING "FORWARD-TO-A-FRIEND" E-MAILS

Although the Commission did not propose a rule in the NPRM pertaining to "forward-to-a-friend e-mails," it offered guidance and sought comment on the issue. The Commission should make it clear, however, that only when the original sender of an e-mail makes a monetary payment or provides other consideration to procure the forwarding of e-mails should CAN-SPAM requirements apply to the original sender of the forwarded message.

In general, forward-to-a-friend e-mails are simply traditional commercial e-mails that are either forwarded by the recipient through the recipient's own "forward" button contained in the recipient's e-mail program, or that contain a mechanism, such as a web-based click tab that enables the recipient to forward the message to friends after entering e-mail addresses. If the original sender is deemed the initiator of the forwarded e-mail message, then it could be liable if the forwarded message is not CAN-SPAM compliant, even though the message is CAN-SPAM compliant in its original form as sent to the original recipient. A forwarded e-mail message can be altered so that it might not include all of the disclosures required by CAN-SPAM or it might be forwarded to someone that has previously opted-out of e-mails from the sender. Imposing liability in such instances would harm companies like Charter who might include a forwarding mechanism in its commercial e-mails.

As an initial matter, a recipient of a commercial e-mail can forward the message anywhere through the recipient's own e-mail program's "forward" button. It would be absurd to

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[6] *See* 15 U.S.C. § 7704(c)(1)(C).

impose liability on the original sender for subsequent CAN-SPAM violations in such situations because the original sender has absolutely no control over whether and to whom the e-mail is forwarded. A web-based forwarding option contained in a commercial e-mail is really no different.

The Commission's approach in the NPRM to this issue is too restrictive. By focusing on the statutory definitions of "initiate" and "procure," the Commission concludes that even in the absence of monetary payment or other consideration, the initial sender of an e-mail could be liable for complying with CAN-SPAM requirements for forwarded e-mails (including insuring that forwarded messages are not sent to those who previously opted-out of e-mails). The Commission would impose liability if an e-mail was "designed to encourage or prompt the initiation of a commercial e-mail" by simply including language such as "Tell-A-Friend – Help spread the word by forwarding this message to friends!"[7] This approach ignores the legislative intent behind the definition of "procure."

The Senate Report makes plain that "[t]he intent of [the] definition [of 'procure'] is to make a company responsible for e-mail messages that it *hires* a third party to send … ."[8] Congress was concerned with holding a company responsible for CAN-SPAM requirements in appropriate circumstances when the company pays or hires another to send e-mail messages on its behalf. Congress' intent was not to prohibit a sender of commercial e-mail from including a web-based forwarding mechanism that includes language like that mentioned in the previous paragraph.

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[7] 70 FR at 25441 n. 178.

[8] S. Rep. 108-102 at 15 (emphasis added).

In situations where there is no hiring or monetary payment as consideration for forwarding e-mail messages, e-mail messages with a web-based tab and message for forwarding are more properly considered "routine conveyances." As the Commission notes, a routine conveyance involves "the transmission, routing, relaying, handling, or storing, through an automatic technical process, of an electronic mail message for which *another person has identified the recipients or provided the recipients addresses*."[9] Absent monetary payment, Forward-to-a-Friend e-mail messages are routine conveyances because the message merely provides a simplified mechanism for another person (the original recipient) to forward a message to someone they choose only if the original recipient believes the forwarded message would be of interest to the new recipient. It provides only a technological short-cut because the original recipient could have just as readily forwarded the e-mail message even without the web-based mechanism. The Act's legislative history clarifies that a routine conveyance by a company involves "simply play[ing] a technical role in transmitting or routing a message [where the company] is not involved in coordinating the recipient addresses for the marketing appeal."[10]

In addition, even accepting that "induce" should be considered separate and apart from Congress' intent in the definition of procure, the NPRM does not provide adequate guidance on what would not be considered inducement in a commercial e-mail message. Charter agrees with the Commission's assessment that "making available the means for forwarding a commercial e-mail message, such as using a Web-based 'click-here-to-forward' mechanism" should not violate the Act. Under the same reasoning, if the mechanism is labeled "forward-to-a-friend", there would be no violation of the Act either. However, the Commission's approach creates a very

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[9] 70 F.R. at 25441 (quoting 15 U.S.C. § 7702(15)) (emphasis in NPRM).

[10] 70 FR at 25442 (citing S. Rep. 108-102, at 15).

gray area between that and the text that the Commission argues goes too far ("Tell-A-Friend – Help spread the word by forwarding this message to friends! To share this message with a friend or colleague, click the 'Forward E-mail' button"). Something more should be required before a message should rise to the level of inducement. It is also unclear if there were only a few words in the message but not as many as in the Commission's example, whether that would be an inducement under the Commission's approach.[11] It is impossible to know from the Commission's proposal whether a single word, multiple words, or what combination of encouraging words would rise to the level of inducement

Charter agrees only that a payment or provision of other consideration to forward a message might meet the definition and legislative intent of "procure" so as to require the original sender to ensure the forwarded message meets all of the CAN-SPAM requirements. Charter also agrees with applying the requirements where, as the Commission noted, the recipient's forwarding of a message is procured – through the provision of "money, coupons, discounts, awards, additional entries in a sweepstakes, or the like in exchange" for forwarding the message.[12] Charter requests clarification, however, that an e-mail containing such items as coupons or sweepstakes entries directed to the recipient can be forwarded without the CAN-SPAM requirements being applicable to the original sender as long as the coupons or sweepstakes entries and other similar offers are not used to procure the forwarding of the email. In other words, the coupons, sweepstakes and other similar offers are separate and apart from the

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[11] For example, drawing from the Commission's example, if the only language was "Help spread the word by forwarding this message to friends!" without more, the language may or may not rise to inducement under the Commission's analysis.

[12] 70 FR at 25441.

forwarding of the e-mail and the recipient is entitled to receive them regardless of whether the recipient forwards e-mails to others.

IV. THE COMMISSION SHOULD IMPOSE A LIMIT ON HOW LONG OPT-OUT REQUESTS REMAIN IN EFFECT

In the NPRM, the Commission declined to propose a limit on how long a recipient's opt-out request remains in effect. Accordingly, senders must retain opt-out requests indefinitely. The Commission should impose at least some maximum timeframe for retention of recipient opt-out requests, preferably two to three years, but not more than five years.

The Commission notes that in the "somewhat similar context of the National Do Not Call Registry", the duration of a person's registration is five years.[13] The Commission also explains that it is not aware of any databases that commercial e-mail senders can use that are comparable to those used by the Do Not Call Registry's administrator to purge defunct email addresses. Nonetheless, the Commission believes that the likely smaller size of commercial e-mail opt-out lists means it would be easier to scrub defunct or changed addresses and therefore any limit on maintaining opt-out requests is unnecessary.

While a given company's e-mail suppression list may not approach the size of the federal Do Not Call Registry, it still may continue to grow significantly over time. As the years pass, many e-mail addresses will become non-functional or unused. Being able to purge email addresses periodically makes maintaining e-mail lists more manageable.

E-mail addresses may be reassigned or they may lie dormant and unused for an extended period and then come back into use at a later time. Anywhere between two to five years is still a lengthy period of time for a consumer to be excluded from receiving e-mails from a given

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[13] 70 FR at 25444.

company. After the specified timeframe, a recipient could simply renew an opt-out request if he or she receives commercial e-mail that is not wanted.

Charter itself reassigns e-mail addresses that become inactive. If a customer leaves Charter or changes e-mail addresses, the old e-mail address remains unassigned for 90 days in case service is reactivated. If the account is not reactivated, however, the e-mail address becomes available at some future date and can then be requested by a new or existing subscriber. The person with the re-assigned address may not have opted-out of commercial e-mails and may actually want to receive them. Placing a time limit on the opt-out list at least allows legitimate commercial e-mails to be sent to the re-assigned address after a period of time, rather than locking-in that e-mail address as an opt-out indefinitely. Charter's understanding is that at least some other ISPs also reassign addresses after a customer terminates service or changes e-mail addresses.

Finally, although Congress did not impose a timeframe and did not "specifically authorize" the Commission to do so, the Commission undoubtedly still has sufficient statutory authority to impose such a requirement. The Act provides the Commission with broad rulemaking authority "to implement the provisions of th[e] Act."[14]

V. THE COMMISSION'S PROPOSED MODIFIED DEFINITION OF SENDER DOES NOT PROVIDE SUFFICIENT GUIDANCE ON WHAT CONSTITUTES "CONTROL OF THE CONTENT"

Charter agrees that the definition of "sender" should be modified to accommodate commercial e-mails that contain the advertisement or promotion of more than one person's products or services. The Commission's proposed definition was intended to allow multiple sellers of products or services in a single e-mail "to structure the sending of the e-mail message

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[14] 15 U.S.C. § 7711.

so that there will be only one sender of the message for purposes of the Act."[15] This is a worthy goal designed to avoid burdensome and unwieldy situations such as multiple suppression lists, e-mails with multiple opt-out mechanisms and physical addresses, possible violation of privacy policies and statutes, and interference with consumer expectations.[16] However, Charter believes the Commission's proposed definition is inadequate and unworkable.

The Commission's proposed definition of sender utilizes the existing definition "provided that, when more than one person's products or services are advertised or promoted in a single electronic mail message, each such person … will be deemed to be a 'sender,' *except that*, if only one such person both is within the ACT's definition [of sender] and meets one or more of the following criteria set forth below, only that person will be deemed to be the 'sender' of that message:

(i) the person that controls the content of such message;

(ii) the person that determines the electronic mail addresses to which such message is sent; or

(iii) the person identified in the 'from' line as the sender of the message."[17]

This approach theoretically allows companies that send individual or joint e-mails containing marketing materials from multiple companies to control who will be the "sender" by allowing one company to either control the message's content, control the recipient list, or by being identified in the from line as the sender. However, if any company is a sender based on any one of these criteria, it would be the sole sender **only if** no other company meets any of the criteria.

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[15] 70 FR at 25430.

[16] 70 FR at 25429 (addressing the comments of various entities to the ANPRM).

[17] 70 FR at 25428.

The problem with the Commission's proposed definition is not with criteria (ii) and (iii). Those two criteria are relatively straightforward and easily applied. The Commission's proposed definition is problematic because of the first criteria – control of the content of the message. The Commission's proposed rule fails to provide any guidance on what constitutes "control of the content" in an e-mail message. If one company provides advertising content for inclusion in another company's e-mail message, does that mean the former company controls content because it provided content in a particular form that cannot be altered?

Charter, for example, sends periodic e-mail newsletters to its customers that include some commercial advertising or content from other companies. Although Charter designs and formats the newsletter and provides almost all of the content, a small percentage of the content is advertising material provided by other companies. There may be various ways to display the third parties' material depending on the specific contractual terms of the parties' relationship. Nevertheless, these other companies may exercise control over the very limited advertising material relevant to their products, which are only a small portion of Charter's newsletter.

Charter should be considered the sole sender of its newsletter. Charter is listed in the "from" line, Charter's contractor distributes the e-mail newsletters on Charter's behalf, and the newsletters are distributed using Charter's e-mail list. Because of the ambiguities in the proposed rule regarding the "control" of content, Charter might not be considered the sole sender of the messages if any other companies are deemed to exercise control over even a small amount of the content in the newsletter that Charter sends.

Charter recommends retaining alternative criteria (ii) (determining the e-mail addresses for sending) and (iii) (the company identified in the "from" line). Criteria (iii) specifically accords with consumer expectations. A consumer receiving an e-mail from a company identified

in the "from" line would expect to be opting out of e-mails from that sender. Similarly, if an entity determines the e-mail addresses that will receive the content, it would be within its control to remove consumers who have opted-out of receiving e-mails from such entity. However, Charter recommends eliminating criteria (i) (control of content). For example, in the newsletter context, the newsletter publisher, *i.e.*, Charter in the example above, should be the sole sender, not any other entity that merely provided advertising material that is included in the e-mail newsletter. The same approach should be taken for other e-mails that contain some advertising material or other form of content from other companies but which primarily contain material from the company who is distributing the e-mail and who is listed in the "from" line. In the alternative, the Commission should modify criteria (i) to provide clear guidance on what constitutes "control of the content" in an e-mail message and not allow it to be simply the provision of advertising material inserted into an e-mail that another party actually controls.

VI. DEBT COLLECTION E-MAILS SHOULD NOT BE CONSIDERED COMMERCIAL E-MAILS OR ARE AT MOST TRANSACTIONAL AND RELATIONSHIP E-MAILS

Debt collection e-mails are not "commercial" and are either not regulated by CAN-SPAM at all or are "transactional or relationship messages." "Commercial electronic mail message(s)" are "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service …"[18] Debt collection e-mails are not made to advertise or promote a product or service.

The situation is analogous to the approach the Commission takes in its Telemarketing Sales Rule ("TSR"). Under the TSR, if a company makes calls with the purpose to induce the

[18] 15 U.S.C. § 7702(2).

sale of goods or services, it is engaged in telemarketing.[19] Accordingly, telemarketing necessarily involves the commercial advertisement or promotion of a commercial product or service, just over the telephone instead of through e-mail. As the Commission stated in its January 2003 TSR Order, "debt collection and market research activities are not covered by the Rule because they are not 'telemarketing' – *i.e.*, they are not calls made 'to induce the purchase of goods or services.'"[20] Similarly, debt collection e-mails do not have advertising or promotion as a primary purpose.

Debt collection e-mails could be "transactional or relationship" messages if the sender is the entity to whom the debt is owed and not a third-party debt collector. Such e-mails seem to fit under three aspects of the definition of "transactional or relationship" messages. First, they have a primary purpose to "complete … a commercial transaction that the recipient has previously agreed to enter into with the sender.[21] Second, such messages can have a primary purpose to provide "notification of a change in the recipient's standing or status with respect to" the purchase or use of products or services offered by the sender.[22] Finally, these messages could be part of notification provided at "regular periodic intervals [of] account balance information or other type of account statement with respect to the purchase or use of products or services offered by the sender.[23]

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[19] 16 C.F.R. § 310.2(cc).

[20] 68 FR at 4664 n. 1020.

[21] 15 U.S.C. § 7702(17)(A)(i).

[22] *Id*. at § 7702(17)(A)(iii)(II).

[23] *Id*. at § 7702(17)(A)(iii)(III).

If debt collection messages are sent by third-party debt collectors, the messages would be neither commercial nor "transactional or relationship" and would not be regulated by CAN-SPAM at all. Furthermore, there are distinct state and federal statutory and regulatory regimes dedicated to regulating third-party debt collectors and their communications with debtors. Such regimes already provide consumers with adequate protection against any objectionable practices of third-party debt collectors. For example, under the Fair Debt Collection Practices Act there are certain requirements applicable to "communications" regarding a debt "through any medium."[24] Thus, e-mail debt collection practices are already regulated separately.

VII. CONCLUSION

As set forth above, the Commission should not shorten from ten business days to three business days the time a sender may take before effectuating a recipient's opt-out request. The original sender of a commercial e-mail should not be responsible for CAN-SPAM compliance of e-mails delivered through a forward-to-a-friend mechanism unless payment or other consideration is provided to the original recipient to forward the message. The Commission should establish a maximum timeframe after which companies can remove e-mail addresses from opt-out retention lists. The Commission's proposed definition of sender should remove the "control of content" factor for e-mails containing the advertisement or promotion of more than one person's products or services, or, at a minimum, provide clarification regarding such criteria. Finally, the Commission should not consider debt collection e-mails to be commercial.

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[24] *See e.g.*, 15 U.S.C. § 1692a(2). *See also* 15 U.S.C. § 1601 et. seq.

Respectfully submitted,

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