

**Regarding Comments On :**

CAN-SPAM Act - Advanced Notice of Proposed Rulemaking ("ANPR")

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**Introduction:**

My comments are reflective of my experiences in the opt-in B2B email industry starting in 1996. In 1996 I published one of the first HTML based email newsletters called NewsLinx at the request of Netscape Corporation. In 1998 I was employed by Mecklermedia (now Jupiter Media, Inc., jupm) heading their business email newsletter division. They were the largest opt-in B2B email newsletter publisher with over 200 email newsletters sent to their subscribers. In 2000 I founded iEntry, Inc. which is now one of the largest B2B email newsletter publishers with over 4 million opt-in subscribers. We employ approximately 40 writers, editors, web designers, sales people and IT professionals in Lexington, Kentucky. Our newsletter topics include search engine trends and strategies, internet marketing tactics, internet professional news, IT technologies and trends, CRM news, web development software releases and much more.

I am a supporter of the Act but am concerned that the regulations enforcing the Act may unintentionally impact opt-in newsletter publishers and opt-in B2B email marketing. B2B newsletters typically cover similar topics as related print industry trade publications. As with print publications they contain advertising. It would be a serious misinterpretation of the Act to include informational newsletters with advertising (email trade publications) within the scope of the Act unless a publisher violates the **aggravated violations** section.

Additionally, I strongly encourage the FTC to specifically state that any email that is opt-in does not fall within the scope of the proposed Do-Not-Email-Registry. If someone signs up for an email newsletter we are obliged to send them what they signed up for. The Registry should specifically be only for opt-out lists.

**Additional comments follow:****A. MANDATORY RULEMAKING – Determining whether “the primary purpose” of an email message is commercial.**

All business oriented email newsletters have advertisements. Email newsletters with content such as articles should be specifically excluded as a commercial message whether they have advertisements or not. However, if the FTC considers more definition needed then I would propose that if the email message content is over 50% commercial advertising for third parties then the emails primary purpose is considered commercial.

**B. Modifying what is a “transactional or relationship message”.**

A transactional or relationship message should include any message agreed within a Terms of Service ("TOS") that is agreed upon in a contract or when pressing a "Submit" button electronically, such as when downloading or installing software, signing up for an online service such as submitting your site to a search engine or obtaining a web-based email account. It should not matter whether the service being signed up for is free or paid. Often times, free services do include TOS statements that allow the provider of the free service to send announcements including announcements from advertisers. That is the payment for getting something free. These should be considered transactional or relationship messages.

**B-3. Some transactional or relationship messages may also advertise or promote a commercial product or service. In such a case, is “the primary purpose” of the message**

**relevant, and if so, what criteria should be applied to determine the “primary purpose” of such a message?**

Simply because a transactional or relationship message contains an advertisement it is not sufficient to change its primary purpose as transactional. In both the non-email and email world it is customary to include an advertisement within a service billing, member announcement, customer service follow up, etc. . . . All one has to do is take a look at your last phone or credit card statement. According to Forrester, email has become the number one business communication tool and is continuing to grow. Regulations should not be implemented that restrict email but do not restrict business messages delivered via the Postal Service.

**E.1 Issuing Regulations to Implement Various Aspects of CAN-SPAM -- Defining who is the “sender” of a commercial email message.**

Anyone with knowledge of the opt-in email marketing industry will tell you that the Publisher, not the advertiser, owns the relationship with the subscriber. From a practical standpoint, the Act will not change this. When a subscriber subscribes to opt-in email lists the subscriber knows who the sender is . . . and it is not the advertiser. Whether the message is sent as a newsletter with several ads or on behalf of a single advertiser the subscriber has an email relationship with the Publisher, not the advertiser. The Publisher has the IP number and time stamp showing the subscriber signed up, not the advertiser. When the subscriber un-subscribes and properly expects to be removed, they usually do that by clicking a link at the bottom of their emails which informs the publisher of the unsubscribe request, not the advertiser. The publisher is the owner of their email list, not the advertiser. Therefore, only the sender (and Publisher) of the message should be defined as the “Sender” under the Act. The advertiser should not be considered the “Sender”, since by definition they are not. This is traditional in the industry and commonly understood by all. The only provisions should be that the “Sender” clearly identify that they are the “Sender” and not the advertiser(s) by identifying their name in the “from” line and including proper identification that they are the sender at the bottom of the email message.

**F. REPORTS.**

**The implementation of a National Do Not Email Registry.**

The National Do Not Email Registry will not work and is not practical. There are several points to consider:

- Email is international and spammers will simply utilize servers beyond the reach of the U.S. government as they often do now.
- The **National Do Not Email Registry** will only work if applied to opt-out lists where consumers have not signed up for emails.
- Unlike the Do Not Call List, many people sign up to receive email. Not many people sign-up to receive Telemarketing messages. If a subscriber signs up for an opt-in email messages and also signs up for the Registry, this may cause confusion. Obviously, if you sign up to receive certain email such as a newsletter you cannot complain you are getting the newsletter simply because you are in the Registry. I predict that thousands of consumers will not understand this distinction.
- Opt-in publishers and email marketing companies where the subscriber has requested the email should not be subject to comparing their lists to the Registry list since opt-in lists ONLY consist of those who have signed up. The FTC should make clear that the Registry only applies to those who have NOT signed up to receive a particular email from a specific sender. If opt-in email senders are not exempted from comparing their lists to the proposed Registry then the Registry will not work. Consumers must be able to continue to receive messages they signed up for. The Registry must be required for senders using Opt-out lists only.

**The implementation of a system for rewarding those who supply information about CAN-SPAM violations.**

No monetary system (bounty) should be in place. There are more spam messages sent in a day than there are people in the World. Don't reward people for identifying the obvious. Additionally, people should not be rewarded when they cause an investigation that incorrectly labels a sender as a violator of the Act. All people that cause an investigation should also not be anonymous in the interest of due process to the accused. Unfounded spam accusations have become commonplace with ISP's and will become common with the FTC.

**The effectiveness and enforcement of the CAN-SPAM Act.**

It won't be effective at all in stopping spam because most spam originates outside the U.S. However, it is an extremely important Act because within the United States it precluded 50 States from having conflicting laws regulating an important aspect of business communication, marketing, and dissemination of news and information. Unfortunately, it will harm legitimate companies that have always been opt-in and have honored unsubscribe requests. Harm can be averted by writing regulations that understand that there is a legitimate opt-in email industry. Regulations should focus on spammers and opt-out senders of email. Opt-in email is a job creating multi-billion dollar industry. Opt-in email publishers helped found the principals in this Act and are an industry that is flourishing by providing what the consumer wants; free email newsletters and email trade publications, information on products and services related to the consumer's profession and simple and efficient ways to deal with companies they are doing business with.

Thank you,

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