



Make Privacy Your Choice

April 20, 2004

Mr. Donald S. Clark, Secretary
Federal Trade Commission
CAN-SPAM Act
Post Office Box 1020
Merrifield, VA 22116-1030

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

TRUSTe is pleased to have the opportunity to provide comments on various topics related to the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act" or "the Act").

About TRUSTe

TRUSTe is the leading online privacy brand. Its mission, as an independent, nonprofit organization, is dedicated to enabling individuals and organizations to establish trusting relationships based on respect for personal identity and information in the evolving networked world. Founded in 1997, today TRUSTe runs the largest and award-winning global privacy certification and seal program with more than 1,300 Web sites certified throughout the world including AOL, Microsoft, IBM, Nationwide and The New York Times. Its seal programs are considered safe harbors for the Children's Online Privacy Protection Act (COPPA) and the EU Safe Harbor Framework.

For its Web site seal and certification program, TRUSTe recently introduced License Agreement 9.0 – which includes updated program

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requirements regarding email. TRUSTe's program has evolved since its inception to reflect changes in law, technology, and industry practices.

In addition, TRUSTe is extending standards, certification and oversight into legitimate email for IronPort's Bonded Sender Program and wireless with the Wireless Privacy Principles and Implementation Guidelines.

TRUSTe is participating in anti-spam efforts by operating an Independent Trust Authority for email. In this model, TRUSTe works with anti-spam or legitimate email program providers to develop legitimate email standards, certify email senders to the standards, and to support dispute resolution. We believe that self-regulation can be an effective part of the overall solution to reducing spam and increasing respect for consumer choice. Bonded Sender is TRUSTe's primary effort as an ITA for email.

The Bonded Sender Program, for which TRUSTe provides certification, oversight, and dispute resolution services, brings accountability to email with a unique complaint rate enforcement mechanism. TRUSTe certifies participating senders to a baseline set of standards that include consent with robust disclosure and easy unsubscribe tools, as well as technical requirements to ensure that mailers servers do not assist spammers. Senders must post a significant bond that is debited in the event that consumer complaint rates surpass set thresholds. ISPs participating in Bonded Sender's network agree to deliver email from Bonded Senders, producing increased delivery rates for senders who can maintain low complaint rates. In sum, Bonded Sender involves the consumer directly in the enforcement process and

rewards senders who honor consumer preferences. This self-regulation model provides tangible economic incentives for the adoption of industry best practices and has the effect of elevating overall behavior in the industry.

1. Criteria for determining whether the “primary purpose” of an electronic mail message is commercial

The scope of the CAN-SPAM Act centers largely upon the definition of *Commercial Electronic Mail Message*. This definition states in part:

The term “commercial electronic mail message” means any electronic mail message the **primary purpose** of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose.) Section 3(2)

The CAN-SPAM Act mandates that the FTC issue regulations “defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message.” Section 3(2)(C). As the definition of commercial electronic mail message is so closely tied to the meaning of “primary purpose,” the regulations will undoubtedly have a significant effect on the scope of the Act.

During the summer and fall of 2003, prior to the passage of the CAN-SPAM Act, TRUSTe and IronPort developed a set of email best practices for the Bonded Sender program. In considering the categories of email that should be covered by the baseline principles of Bonded Sender, TRUSTe gave much thought to the ‘primary purpose’

test described in CAN-SPAM. From the perspective of Bonded Sender, the primary purpose test was problematic because it left many of the messages sent by commercial groups in an uncertain category. In particular, the many forms of email that include advertisements with specialized content (e.g., free email newsletters) and those with more than one objective (e.g., product enhancement surveys) could easily be argued by either side to meet or not meet the primary purpose test. It seemed to TRUSTe that the commercial purpose of these messages is certainly prominent, and that consumers should therefore have the usual protections afforded in the case of commercial email: a consent mechanism, an unsubscribe, and contact information. The important point is that, in the absence of clarity, consumers have no such protection, and businesses run the risk of unintentionally running afoul of the law.

In place of a primary purpose test for commercial email in Bonded Sender, TRUSTe considers all email that meets a certain volume threshold, for example above 1,000 emails per day, to be commercial, and therefore subject to the Bonded Sender program requirements, unless its primary purpose is transactional or relational. By shifting the default categorization from 'non-commercial unless definitively otherwise' to 'commercial unless definitively transactional or relational,' TRUSTe sought to reduce confusion in the marketplace and to extend a baseline level of consumer protection into all commercial email.

This principle has served TRUSTe well thus far, and market indicators suggest consumers agree with our default to protections. As an example, virtually all free email newsletters sent through the Bonded

Sender program contain an unsubscribe link, despite the nebulous categorization of newsletters in CAN-SPAM.

2: Transactional and Relationship Messages

The CAN SPAM Act excludes “transactional or relationship messages” from the definition of commercial electronic mail messages. This exemption is important, as transactional and relationship messages encompass an enormous variety of communications that are not solicitations or advertising. It is critical that the vast array of transactional communications – including account statements, shipping confirmations, and more – not fall under the broad requirements applied to commercial electronic mail messages in the CAN SPAM Act.

The FTC has asked if the definition of “transactional or relationship message” should be modified under the CAN SPAM Act. We feel that modifying the definition slightly to take into account the volume of messages sent would greatly assist in clarifying the definition.

Low-Volume, Personal Correspondence Email Messages should be Considered Transactional or Relationship Messages

One of the compliance challenges presented by the CAN SPAM Act comes from the multi-faceted use of email in the workplace today. Sales departments within large, distributed organizations send many low-volume messages to contacts and potential prospects every day. These messages may indeed be commercial in nature, but they do not raise the public policy concerns to which the Act was targeted.

Moreover, the CAN SPAM Act does not include standards based upon the volume of email that an organization sends. In other words, a single email sent by an employee could be deemed a violation of the Act. The ability of a large organization to police the individual use of email by employees is very limited.

As an example, a large financial institution may have a multitude of affiliates, each with its own local branches around the country. Local branch loan officers, business development professionals, or other employees are tasked with selling services to the community within which their branch resides. Assume that a loan officer wishes to send a personalized note to the owner of a business in the same town. The purpose of the message may indeed be commercial. Must that message be reviewed against a global opt-out list maintained by the parent organization? Such a result is absurd and would hinder the free flow of business relationship communications.

TRUSTe believes that the Commission should consider expanding the definition of "transactional or relationship messages" to include a category of messages called "*personal correspondence email messages*" that would include the branch loan officer's message described above. We would be happy to work further with the Commission to provide a formal definition for such messages. Without formalizing a definition at this point, we do feel that "business relationship messages" may have some, but not necessarily all, of the following attributes:

- *Individual Sending*: The email is sent by an actual person who is clearly identified in the message;

- *Low Volume:* This person sends no more than 1,000 messages per day;
- *Replying:* Replying to the message sends a copy of the reply to the person who originally sent the message;
- *Targeted and Appropriate:* Reasonable measures are in place to ensure that the email messages are targeted to the individual recipient;
- *Appropriate Address:* Email messages sent to one of the following role addresses cannot be considered Personal Correspondence Email Messages if they contain sales-related material, unless the address owner has publicized that the address should be sent such sales-related material.
 - root@domain
 - postmaster@domain
 - hostmaster@domain
 - abuse@domain
 - ipadmin@domain
 - noc@domain
 - security@domain
 - webmaster@domain

TRUSTe believes that this addition to the definition of “transactional and relationship message” is critical to the compliance efforts of organizations whose employees may create low-volume messages to prospects and clients on a regular basis. Without expressly exempting such messages, the Act leaves organizations with the very real prospect of limiting, or drastically delaying, such communications in order to ensure compliance.

The addition of a Personal Correspondence Email Message category also better reflects the preferences of consumers. Localized, low-impact, well-targeted commercial campaigns consistently produce complaint rates comparable to higher volume campaigns using affirmative consent. Volume is one of the most critical components of the current spam problem and we highly recommend that CAN SPAM provide language to reflect this.

3. Modifying the 10-Business-Day Period for Processing Opt-out requests

TRUSTe requires licensees in its privacy seal programs to respond and remediate any privacy issues, such as requests to unsubscribe, within 10 business days of receipt of notification of a complaint from TRUSTe. The exception would be if an extraordinary problem has arisen and the company has informed both TRUSTe and the consumer when it will be able to remediate the problem. (Problems with unsubscribe have not typically required more than ten business days to resolve.) This requirement has served both TRUSTe and consumers well, so that problems do not carry on indefinitely. Based upon its experience in facilitating the resolution of consumer complaints of all sorts, including problems with unsubscribes, TRUSTe does not support lengthening the amount of time given beyond 10 business days.

4. Additional Aggravated violations

Recently, a particularly nefarious type of unsolicited commercial email has arisen that is commonly referred to as “phishing.” An email is sent by an individual posing as an upstanding company, requesting extensive personal information, including financial information. These

scams are used to perpetrate identity theft. A TRUSTe licensee of long standing, eBay has worked hard to educate consumers on its own practices, and has asked that such phishing scams be emailed to them. More consumer education efforts like eBay's, and more enforcement actions, are required. TRUSTe believes that "phishing" should be considered an aggravated violation of the Act.

5. Definition of Sender

Under the CAN-SPAM Act, a number of issues have arisen with regard to the definitions of "Sender", "Initiate", and "Procure". When drafted, the Act could not have contemplated the myriad business models involved in email. As a result, significant confusion has arisen as to which entity (or entities) is the Sender in messages with multiple advertisers, in "forward to a friend" scenarios, and in traditional list rental relationships.

In the CAN-SPAM Act, a Sender is defined as a "person who initiates such a message and whose product, service, or Internet web site is advertised or promoted by the message." Section 3(16). This definition has two components: (1) whether the person initiates the message; and (2) whether the person has a product, service, or web site advertised or promoted within the message. Thus, if a message contains promotional or advertising material, the second part of the definition is satisfied. This means that any person with products, services, or web sites advertised or promoted in an email is potentially a Sender under the Act, if they also initiate the message.

The definition of "Initiate" in the Act states that the term means "to originate or transmit such message or to procure the origination or

transmission of such message.” Section 3(9). The definition goes on to exclude the “routine conveyance” of email. It is important to note that the definition also states that “more than one person may be considered to have initiated a message.”

Consistent with the possibility of multiple advertisers within a message, the definition of “Initiate” appears to create the possibility of multiple parties initiating a message. Clearly, in a situation where multiple parties are involved, not all parties can originate or transmit the message. As a result, the analysis turns on whether multiple parties have *procured* the origination or transmission.

The definition of Procure within the Act means “intentionally to pay or provide other consideration to, or induce, another person to initiate such a message on one’s behalf.” It is possible to read the term “induce” quite broadly and find that there are multiple Senders of a single email message. It is therefore possible to interpret the Act in a way that creates compliance obligations for many parties within a single message.

Many of the uses of email in today’s marketplace involve many parties within a single message. For example, email newsletters may include advertisements for many different companies. If each of these advertisers is considered a Sender, the results under the Act could be, at best, confusing to consumers, and at worst, damaging to the continued legitimate use of email. Many problems may emerge under multiple-Sender scenarios:

1. **Privacy.** While the transfer of email addresses for opt out suppression between Senders is arguably pursuant to the demands of the Act, it does raise troubling questions about privacy. An interpretation of the Act that recognizes multiple Senders may have the unintended consequence of lessening privacy protections and increasing the risk of privacy problems.
2. **Requiring multiple opt out functions.** If multiple Senders are recognized within a single message, all would need to process opt out requests from recipients. Consumers would be confused if presented with a multiplicity of opt out functions. Conversely, if presented with only a single opt out (which is then passed on to all of the Senders), a consumer may be forced to opt out of an advertiser from which they still wish to receive messages.
3. **Multiple postal addresses.** The Act requires that the Sender's valid physical postal address be included in the message. With multiple Senders, the Act would presumably require multiple addresses to be listed. This is, again, very confusing for the recipient. Even more importantly, the recipient will have limited ability to find one party that is primarily responsible for the message – they will be presented with a bewildering list of multiple Senders, opt outs, and addresses.
4. **Cost.** Needless to say, the processing and data management involved in this complicated web of opt out requests would be costly and burdensome for the companies involved. It can reasonably be assumed that some advertisers will avoid email entirely if the mere placement of an ad in an email newsletter creates an obligation to process opt out requests (particularly where the advertiser is not in any way responsible for the list of email addresses used for the email newsletter).

Congress could not have intended for mere advertisers in commercial email messages to have full compliance obligations under the Act. Given the confusion and cost that will result from such an interpretation, TRUSTe strongly urges the Commission to promulgate standards that will avoid unnecessary costs, unintended consequences, and consumer confusion. There are a number of possible interpretations and criteria that we believe will alleviate many of the problems described above.

5 (a) Traditional list rental with a single advertiser where the list owner is not identified.

One issue that emerges under the definitions of "Sender," "Initiate," and "Procure" involves the common use of list rental in the marketplace. Every day, companies use third-party lists to deliver marketing messages. In these situations, an advertiser provides consideration to a list owner in exchange for the ability to send messages to the email addresses on the list. *Where the advertiser is the only entity identified on the message*, it is clear that the Act would deem the advertiser to be a Sender (they have satisfied the two components of the definition of Sender). As a result, the advertiser is appropriately responsible for compliance with the Act – and the list owner will need to pass back any opt out requests to the advertiser. Further, the advertiser would need to convey a suppression list to the list owner to ensure that any opt out requests previously received by the advertiser were suppressed against the list owner's file. The advertiser would obviously need to include a valid physical postal address in the message as well.

5(b) Traditional list rental where the list owner is clearly and conspicuously identified.

One paradoxical result of the definition of “Sender” in the Act is the ability of a list owner to avoid opt out requests (they must, however, pass them back to each advertiser). If a list owner does not advertise within the message, they do not satisfy the definition of Sender. Therefore, the list owner does not need to offer an opt out function.

We believe that the list owner, when clearly and conspicuously identified in the email, should be able to assume the role of Sender for the entire message – regardless of whether the message contains a single advertiser or multiple advertisers. Consumers should be able to remove their email addresses from the list through which the commercial email is being generated. Exercising an opt out request in a list rental situation is futile if the opt out is only processed by the advertisers, and not the actual list owner (the consumer will continue to receive email from subsequent advertisers as their name remains on the list).

It is important to note that the list owner in this situation has the ability to assume all responsibilities of the Sender under the Act. The advertisers within the email message do not own the list. As a result, they should not be subject to the requirements of a Sender. This interpretation would resolve many of the concerns associated with multiple Senders, described above. It would also provide important tools to consumers to control the use of their email addresses.

5(c) Joint marketing messages: Primary Sender.

Many email marketing messages are composed through joint marketing relationships between companies. In such situations, there may not be a list vendor involved – the parties may be delivering to email addresses held on a “house” list (a list built and used by the party). These situations raise all of the multiple Sender concerns described above. Significant confusion, cost, and burden will be created if the CAN-SPAM Act is interpreted to place the Sender obligations on all parties within a joint marketing email campaign. However, it is also clear that the definitions of “Sender,” “Initiate,” and “Procure” allow for more than one Sender to exist for any one message.

TRUSTe believes that it is appropriate to allow only a single Sender to be recognized when one party within a joint marketing message is clearly and conspicuously identified as the primary Sender of the message. In other words, if one party within the message is willing to step forward and bear the responsibility of the Sender obligations, the other parties within the message should not be considered to have initiated the message. However, there are criteria that should be applied to this analysis:

1. The Primary Sender must be clearly and conspicuously identified within the message;
2. The return address must be that of the Primary Sender;
3. The Primary Sender must provide or identify the addresses to which the message will be sent; and

4. The other parties within the message have not provided or identified the addresses to which the message will be sent.

It follows that, if there is no Primary Sender in a joint marketing message, all of the parties to the message should be considered Senders and carry the obligations of compliance with the Act. In other words, in the absence of a Primary Sender, all of the parties that satisfy the definitions of Sender should be required to comply with the Act.

5(d) Advertisements within email – the “but for” test.

In addition to the standards described above, we also support the creation of a “but for” test for determinations of Sender status. In such tests, an advertiser is not considered a Sender if the email message would have been sent irrespective of the inclusion of the advertisement. Further, an advertiser would not be considered a Sender where the email is sent on a regular basis and it contains different advertisers from time to time.

The question then arises as to financial support of the email message. Many of the email newsletters distributed today include advertising to support the delivery of the newsletter. As described above, we feel that advertising that is used solely to financially support the delivery of otherwise free content should be considered as a factor when assessing the “primary purpose” of the message. Consistent with that opinion, we feel that an advertiser that is included in an email message should not be considered a Sender if the advertisement is merely provided as a means to support the delivery of other content in

the message. This result should still occur, even if the email could not be sent without the financial support generated through advertising.

While some market solutions, such as Unsub Central, are being built to handle some of these problems, TRUSTe recommends that the Commission use its broad authority under Section 13 of the Act to issue regulations that clarify what meets the definition of sender.

5 (e) Definition of Sender for Forward-to-a-Friend

In instances where a company has implemented a "Forward-to-a-friend" or similar marketing campaign, the company should not be considered the Sender. The email should be considered a one-to-one personal message. Therefore, TRUSTe believes that companies employing "forward-to-a-friend" campaigns should have to scrub such emails through their own suppression lists for opt-outs.

TRUSTe's general web seal program includes requirements for the collection and use of third party personal information. Instances of "Forward-to-a-Friend" fall into this category of third party information. TRUSTe considers this type of email a personal email from the "Friend," rather than a commercial email. TRUSTe requires that its licensees may use the information obtained in the "Forward-to-a-friend" function for purposes other than forwarding the email to the Friend only if they have obtained opt-in consent. If implemented by the Commission on an industry-wide basis, this type of requirement should prevent a proliferation of unwanted email.

6. Report to Congress on the effects of CAN SPAM

The Commission is required to write a report detailing the effectiveness and enforcement of the CAN-SPAM Act. Determining effectiveness and enforcement may be difficult in the immediate future, since we are unlikely to see a sudden drop in the amount of unsolicited commercial email. Statistics indicate that, in fact, unsolicited commercial email has actually increased rather than decreased since the Act went into effect (Brightmail March 2004), but this doesn't necessarily mean the Act or its enforcement is ineffective. Much of the increase in spam is undoubtedly illegal spam. Those intent upon sending spam that was illegal prior to the passage of CAN-SPAM are not going to stop doing so simply because a law has been passed.

In the long term, a judgment as to the Act's effectiveness should turn upon whether there has been a decrease in *both* illegal spam and unwanted commercial email. In the short term, however, the Commission should consider conducting consumer research on how much control consumers currently feel they have over their inboxes, on how much of a problem unsolicited commercial email – both illegal and legal – really is to them, and on the remedies they believe are appropriate. If we see improvements in consumers' perceptions of their control over their inboxes and a decrease in problems with illegal and legal commercial mail, we will know that headway is being made.

At the same time, the Commission, should survey businesses to identify how much time and money are being spent to comply with CAN-SPAM, on the one hand, and to stop unwanted commercial mail

and illegal spam, on the other. If we see a decrease in the second, again this should show that the Act is having some effect.

7. Regulatory Flexibility Act and Burden on Small Businesses

TRUSTe's current base of licensees for its web seal program includes many small and medium sized companies. Over 70% of our licensee base has annual revenues of less than \$10 million. Knowledge of the law and how to comply with it are the major hurdles for small businesses using email. Through its Bonded Sender Program, TRUSTe is working to help small companies bring their email practices up to speed.

If the definition of "Sender" continues to be very broad as described above in Section 5, small and medium sized companies will be required to maintain more robust programs that are able to be shared with other companies. These programs will be particularly burdensome for small and medium sized companies. In fact, we are concerned that this expense will force many small, permission-focused companies to abandon using email as a commercial outlet altogether. We do not believe this was the original intent of CAN-SPAM.

Conclusion

In conclusion, TRUSTe has (1) provided further background information on how it handles issues of "primary purpose" in its Bonded Sender program, (2) recommended that personal communication messages that meet certain requirements be considered transactional and relationship messages, (3) recommended that the 10 Business Day Period not be increased, (4) recommended that "phishing" be considered an aggravated violation, (5)

recommended that the definition of "Sender" be interpreted narrowly such that multiple senders is the exception rather than the norm, (6) recommended that "Forward-to-a-Friend" not be considered a commercial electronic mail message, (7) recommended that the Commission do consumer testing on expectations as one aspect of its Report to Congress on the effectiveness of the Act, and (8) noted that small and medium sized businesses are likely to have compliance issues if some of the above mentioned issues are not clarified.

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