

BAKER  
&  
HOSTETLER ILLP  
COUNSELLORS AT LAW

WASHINGTON SQUARE, SUITE 1100 • 1050 CONNECTICUT AVENUE, N.W. • WASHINGTON, D.C. 20036-5304 • (202) 861-1500  
FAX (202) 861-1783

BARRY J. CUTLER  
WRITER'S DIRECT DIAL NUMBER (202) 861-1572  
E-MAIL: BCUTLER@BAKERLAW.COM

September 13, 2004



Via Electronic Mail

Secretary  
Federal Trade Commission  
Washington, D.C. 20580

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

Dear Mr. Secretary:

I am filing a comment on behalf of clients of this firm who are engaged in the selling and providing of newsletters and other subscription materials online and who are concerned that otherwise proper and necessary rules for the implementation of the CAN-SPAM Act (the "Act") could frustrate the legitimate and efficient use of electronic mail to notify consumers of the pending expiration of their subscriptions and/or to assure the uninterrupted continuation of online services previously agreed to by the consumer. Because I have worked with other trade associations who will file comments about the "primary purpose" issue in general, I will restrict this comment to the specific question of subscription "renewals."

**A. Overview**

The Commission is well aware that publishers and others in the last decade have greatly increased the use of the internet and electronic mail for the delivery of periodicals and other "subscription services." In many cases, electronic mail supplements, but does not replace, traditional "hard copies" of publications. The new technology has given consumers the choice of how they want to receive the information and other subscription material so that they can select the manner most compatible with their work style or other preference.

Historically, the cost to publishers and others who must seek renewal of subscription services from time to time has been significant. Whether the cost is for regular or postal card postage, or labor and telephone costs for internal or external telemarketing, the "hard dollar" costs for obtaining and processing renewals can be substantial. The fact that it may be human

nature to procrastinate on such renewals until the time of expiration (or beyond) exacerbates the situation.

Electronic mail offers a faster, easier, and less expensive alternative for renewals. In terms of saving money and more intangible benefits, an electronic renewal process helps publishers and consumers alike.

My clients and other parties, including trade associations with which I have collaborated on this issue, appreciate the potential for abuse that “spam” has produced. Such abuses affect legitimate businesses as well as consumers and my clients and others fully support sensible regulation to target abuses without (1) interfering with efficient processes that consumers want and expect, or (2) forcing sellers to switch to less consumer-friendly processes in order to guard against potential legal liability that could result from the Rule as proposed.

As noted below, I recommend an approach for renewals that makes clear that they are inherently “transactional or relationship messages,” perhaps with an exception for sham efforts. Even if the FTC retains the general approach of the pending “dual purpose” proposal, it should recognize that “renewals” present a special situation for which a safe harbor is fully warranted both on the legal and policy grounds that I discuss below.

#### **B. The Nature of “Renewals”**

The foundation for this comment is that notices regarding expiration and renewal are inherently “transactional” in nature. From the standpoint of the publisher or other seller, renewals are, along with new subscriptions, the lifeblood of their business. From a consumer standpoint, where there has been a prior decision to receive periodic editions of a subscription, it is hard to think of a type of email communication that is less likely to confuse consumers as to its purpose than a notice about expiration and renewal.

Carving out “renewal” messages as presumptively “transactional or relationship” in nature is justified both for legal and policy reasons, even if the Commission does not issue a final rule that would, by its terms, accomplish that end. Some may argue that notice of pending or recent expiration is within the statutory definition for “transactional or relationship messages,” but that any communication about renewing the subscription (even to assure continuity of service without interruption) is somehow a “commercial electronic mail message” that is outside the statutory definition. The concepts of “expiration” and “renewal” are so inextricably linked both in consumers’ minds and as a matter of common sense that any attempt to treat them as separate elements for purposes of the Rule is destined to lead to unnecessary mischief for publishers and consumers alike, without offsetting benefits. To separate the “notice” part of a message from the “renewal” part of the message is plain silly as a matter of policy, unnecessary as a matter of law, and certainly does not promote consumer welfare, as I note below.

While the Commission may find instances where the linkage of commercial and transactional messages presents a situation where criteria must be used to decide which purpose is “primary,” it is hard to imagine that any “reasonable consumer” within the meaning of the

FTC's Deception Statement would ever consider an expiration/renewal notice not to be "primarily transactional or relationship" in nature. Given the importance to publishers of renewals, the efficiency of the email renewal process, and the high benefits and low risks to consumers of such a process, the Commission should provide a high degree of certainty that the renewal process will not turn into a minefield of legal risks based on unreasonable or subjective judgments about a message that all consumers understand.

### **C. Policy Considerations**

Several policy issues unanimously point in support of special treatment for renewals. It is hard to think of a legitimate policy reason against establishing presumptive clarity for renewal offers.

#### **1. Efficiency**

As noted above, use of email for renewals is much more cost effective and convenient for consumers than alternate means, such as postal service, private express mailers, or telephone solicitation (the costs of which often will be passed on). Moreover, the recipients of electronic renewal notices are a "self-selected" group. Unlike the general public (including many casual email users) that is subjected to spam, consumers who receive electronic mail notices about expiration and renewal are those who have opted not only to receive a subscription series, but in many cases to receive it online. They are consumers who, by choice, are more comfortable with the receipt of services online than in other formats. It makes no sense to create disincentives to using email to reach such consumers for renewals, as well.

#### **2. Clarity of Law**

The FTC's final regulations will not be enforced only by the FTC and State Attorneys General. In many cases, they will provide a foundation for private causes of action by individual consumers, or class actions, under "little FTC Acts" or other state provisions, such as California's Business and Professions Code § 17200. To create a "subjective" or "net impression" test that is based on consumer interpretations or perceptions exposes businesses to a wide variety of legal actions that are hard to justify in the context of a simple renewal message, even in instances where the FTC itself would either not see a violation of law or would exercise discretion not to pursue a borderline case. It also seems to fly in the face of the FTC's concerns about vexatious class actions.

For example, it seems intolerable that a publisher should have to worry about the distinction between "your subscription is about to expire" in a subject line, as opposed to "Don't let your subscription expire. Act now!" in an alternative subject line. One can wonder how consumers could take substantially different messages from those two phrases. Publishers should not need to seek legal advice as to whether a phrase like "Act now!" could transform an otherwise obviously "transactional message" into one that a small number (but legally "significant minority") of consumers could assert was "primarily commercial" in nature. At the

same time, a “reasonable” publisher might feel that there is no choice and be unwilling to undertake the risk of private and other enforcement without seeking the comfort of legal advice.

### 3. Injury to Consumers

In the case of expiration/renewal notices, as opposed to most forms of “spam,” it is hard to imagine how consumers would be injured by either of the two phrases cited above or by reasonable variations that link the “renewal” request to the subscription that is about to “expire.” Most consumers who appreciate the content of their subscriptions will want to renew in a convenient manner. However, even the certain percentage of consumers who choose not to renew subscriptions from time to time face no injury, and certainly none that outweighs the benefits to be gained from certainty in the renewal process. First, they will not be misled by the message. Second, they have a self-help remedy, which is simply to notify the publisher of their decision to cancel or to ignore the messages and let the subscriptions lapse in due course, without any risk to the consumer’s money.

### 4. Alternative Procedures

What can a publisher or other vendor of subscription services do to avoid the potential for legal liability that stems from such a subjective or ambiguous standard? Switching to telephone and regular mail processes are possibilities (although not very efficient or attractive ones), but they are not the only options. Another more likely approach would be for sellers of subscription services to switch from standard renewal notices to increased use of “advance consent” offers on the front-end. In other words, to avoid a risky electronic renewal process, a publisher could provide in the original contract that the subscription will automatically renew on a periodic basis unless or until the consumer cancels his subscriptions. I would feel hard-pressed myself not to recommend that clients consider that option.

The Commission regards such offers as having a “negative option feature,” as that term is used in the Telemarketing Sales Rule, 16 C.F.R. Part 310 (“TSR”). The Commission has expressed concern about negative option features, particularly where a vendor already has account information (“pre-acquired account information”) for that consumer. Although it is perfectly legal to use negative option features, even in conjunction with pre-acquired account information, by following the requirements of the TSR or other applicable law, it would be surprising for the Commission to create a strong incentive for vendors to switch to such practices because the ambiguity of the CAN-SPAM rules could make traditional electronic renewal notices fraught with potential legal risk.

## **D. Legal Issues**

While the policy bases noted above consistently point in the direction of a clear rule for renewal notices, there are also strong legal bases for the outcome I am advocating. In my view, the legal basis for treating expiration/renewal notices as presumptively “transactional” in nature is solidly grounded in the language of the statute.

1. The Statutory Definition for “Commercial Electronic Mail Message”

The Act makes clear, as the Commission recognizes, that a message must be judged as to its “primary purpose,” even when there are mixed elements in the message. *See* Act, Section 3(2)(a). The fact that the term commercial email “does not include a transactional or relationship message” means that the terms “commercial” and “transactional” are mutually exclusive, that is, regardless of the various components, the integrated message must be classified as one or the other of those options.

As noted, even if one views “expiration” and “renewal” as legally separate components of a message, it is hard to imagine that consumers will not view the whole message, with those conjoined components, as presenting anything other than a clear “transactional or relationship” message regarding their account with the publisher. There should be no doubt that the Commission has both legal authority and a factual basis to determine that a combined expiration/renewal notice has a “primary” transactional purpose, whether viewed from the intent of the publisher or the reasonable net impression of the subscriber.

2. The Definition of “Transactional or Relationship Message”

Not surprisingly, the FTC adopts the statutory definition of the Act. Several aspects of the statutory definition could logically be used to describe an expiration/renewal notice. These include subsection 3(17)(a)(i) (to “facilitate, complete or confirm a commercial transaction that the recipient has previously agreed to enter with the sender”) and subsection 3(17)(a)(iii) (notification concerning “a change in the terms” or “the recipient’s standing or status” or “other type of account statement” regarding “a subscription” or “the ongoing purchase or use by the recipients of products or services offered by the sender”). The basis for a Rule provision that renewal messages are deemed or presumed to be “transactional” in nature is the recognition that expiration and renewal elements create a clear “message” in the mind of the consumer about the need to continue or end a subscription. And unlike some of the schemes with “negative option features” that the FTC has challenged in recent years, the consumer (subscriber) should recognize immediately from the name and subject lines that the email is from or involves a party to whose services the consumer subscribes.

The Commission may have hesitated use this rationale for renewal messages because the Act does not contain an explicit exemption for an “established business relationship” (“EBR”), which is a term that is used and defined in the TSR. However, the fact that Congress did not include an express EBR exemption in the CAN-SPAM Act does not mean that the it meant to prohibit the Commission from considering the fact of an ongoing relationship in a context like this one, where the EBR bears on a material element of this statute, such as the “primary purpose” of the email. The established relationship the publisher has with the subscriber provides a context in which a expiration/renewal message will be clear and perceived as “transactional” by the recipient. The Commission would not be creating any kind of EBR “exemption.” Rather, it would be using the fact of the relationship to implement the requirements of the CAN-SPAM Act in a sensible manner.

### 3. Modifying the Congressional Definition

The FTC, by Congressional authority, has some discretion to “modify the definition” of “transaction or relationship message,” but the delegated authority is much narrower than the Commission appears to have assumed in this proposal. Specifically, under Section 3(17)(B), the Commission may “expand or contract” the categories of messages within the “transaction or relationship” definition, but only “to the extent that such modification is necessary to accommodate changes in electronic mail technology or practices and accomplish the purposes of this Act.” *Id* (emphasis supplied).

The very limited delegated authority here is significant, particularly when applied to an issue like renewals. First, the language is in the “conjunctive,” meaning that the Congress intended that the FTC could make changes at such future times when changes in electronic mail technology or practice make it difficult, under the statutory definition, to achieve the purpose of the Act.<sup>1</sup> Second, I am not aware of anything in the record (or otherwise) applicable to expiration/renewal notices as to which it could be argued cogently that a change to the statutory definition is required at this time because of “changes in electronic mail or practices” that are needed to accomplish the purposes of the Act.

In that regard, the “purposes” of the Act are set out in detailed findings and statements of public policy in Section 2 of the Act. In the context of expiration and renewal notices, one is hard pressed to find *any* finding or public policy that served as a purpose for the Act that would justify taking expiration/renewal notices out of the category of “transactional or relationship messages.”

#### E. Conclusion

For the reasons stated above, a string of consistent policy reasons favors creating certainty for the category of email messages that involve information about expiration and renewal of subscriptions. The efficiency is high and the risk of injury to consumers is low and, as important, there is no legal barrier that prevents the Commission from adopting what is also the “common sense” approach on this issue.

To the contrary, leaving publishers and other vendors of subscriber services up in the air with vague or subjective standards for renewal notices risks increased exposure to legal liability, on the one hand, or the coerced adoption of alternative procedures that will not be as consumer-friendly as a routine electronic expiration/renewal notice. For all of these reasons, I respectfully request on behalf of clients that the Commission create a clear safe harbor for the treatment of renewal notices as “transactional or relationship” messages, even if its final Rule would not otherwise have that effect for renewal messages.

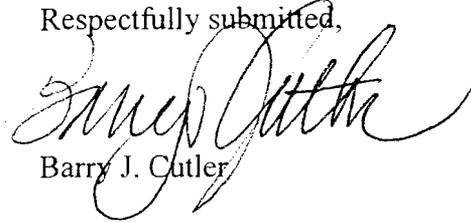
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<sup>1</sup> Indeed, were the statutory authority for “modification” to be read in the disjunctive, so that the Commission could change the definition anyway it saw fit to “accomplish the purposes of this Act,” the question of an unlawful Congressional delegation of authority would surely be raised.

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I would be please to respond to questions or otherwise to assist the Commission in the resolution of this issue in the Rulemaking proceeding.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Barry J. Cutler", written in a cursive style.

Barry J. Cutler