4. Section 316.4 -- Prohibition Against Failure To Honor Opt-Out Requests Within Three Business Days of Receipt

a. Is three business days an appropriate deadline for effectuating an opt-out request? If not, what time frame would be more appropriate? Does the Commission's proposal that multiple advertisers in a single commercial email message may arrange to have only one of those advertisers be the "sender" affect what time frame would be appropriate? If so, how?

Three days is adequate time for addition of the address to a suppression list, but it is not clear that inclusion on such a list constitutes “effectuating an opt-out request.” There are at least two technological factors that may result in a message being delivered even after the address has suppressed:

1. Consider that the nature of SMTP e-mail delivery is a “store-and-forward” process. Delivery might be accomplished within seconds, but it also might be delayed for several days depending on the configurations of the various stages of transport, which may be under the control of neither the sender nor the ultimate recipient. In the event that an opt-out request is received after a message has been initiated but before it has been delivered, it would be onerous, and in some cases impossible, to require senders to suppress that message.
2. To compensate for web server capacity limitations, some senders restrict the sending rate to a relatively small number of messages per hour or per day. In one actual example of which I am aware, a list of more than 285,000 addresses is restricted to a sending rate of 5000 per hour, therefore requiring more than 2 days for all deliveries to complete. A similar limitation for a list several times as large is not out of the question. It is not uncommon for a sender to maintain the suppression list but to employ a third party to do the actual sending, thereby requiring that the suppression be performed once at the beginning of the process. It would significantly complicate the necessary data exchange between senders and their messaging service providers if an updated suppression list must be transmitted and re-applied during the course of a rate-limited deployment.

Note also that the `Date:` field of the message header may not be an accurate indicator of the actual time at which the message was initiated.

The original ten business-day provision allows adequate time for both intentionally and unintentionally delayed delivery to be completed. If the three-day provision is adopted, I would suggest that language be added to absolve senders of liability for delayed deliveries that ultimately arrive after the deadline has expired. It is **not** necessary to allow an *unlimited* number of such messages to be exempted; responsible senders rarely schedule delivery of more than one or two messages for the same recipient within that short a time span.

The proposed arrangement for multiple advertisers has no effect on this issue.

b. Are some commenters' concerns warranted that under the original ten business-day provision senders would be permitted to bombard a recipient with e-mail for ten business days following his or her opt-out request? Why or why not? Is this a commonly occurring practice? If so, what is the evidence supporting this? Providing as much detail as possible, explain whether recipients continue to receive commercial e-mail from a particular sender after submitting an opt-out to that sender. For example, are recipients who submit opt-out requests targeted for receipt of additional commercial e-mail? How likely are recipients to continue to receive additional commercial e-mail from a particular sender within ten business days after submission of an opt-out request? How likely after ten business days?

It has been demonstrated by the use of “honeypot” or “spamtrap” e-mailboxes that submitting opt-out requests does lead to targeting for receipt of additional commercial e-mail. However, such additional email rarely involves the original advertiser. Anecdotal evidence suggests that the opt-out mechanism of one advertiser is used to validate the address so that it can be more aggressively targeted by other advertisers (for whom no opt-out request has yet been submitted). The length of time that elapses following submission of the opt-out request has little bearing on this practice, which no responsible marketer would employ in any case.

Therefore I do not believe that concerns about the ten-day provision are warranted on these grounds.

c. Some commenters indicated that there are several software products on the market that can effectuate opt-out requests almost immediately. Are such products widely or currently used by email senders? Are these products affordable for small entities? What are the costs and benefits of using such products?

If opt-out management is closely integrated with the system that performs the sending of the e-mail, then it is possible to effectuate the requests almost instantly. Frequently this works *not* by adding the address to a suppression list, but by *removing* the address from a distribution list. I am not aware of any widely deployed and/or low-cost products that implement and apply a suppression list, although nearly all third-party messaging *services* do so.

On the other hand I am aware of a number of small commercial senders who manually maintain their own distribution lists, using the address book features of common e-mail client software such as Microsoft Outlook or Outlook Express. This is also common for community organizations such as parent-teacher associations, neighborhood associations, etc., whose messages only sometimes fit the definition of “commercial.”

E-mail list management tools of the sort that maintain only a distribution list are readily available for little or no expense. The costs of using such products are the human time required to install them and learn about their operation. There may also be a small amount of extra time required to initiate a new message, as compared to the time spent using the regular e-mail client software. The benefits are rapid automated processing of

opt-in and opt-out requests, but again the opt-out requests are usually handled by discarding addresses rather than actively suppressing them; and this is typically not integrated with ordinary e-mail client software, which has the drawback that the opted-out address may still appear in the e-mail client address book and therefore might accidentally be re-used in the future.

d. What specific technical procedures are required to suppress a person's email address from a sender's directory or distribution list? What are the specific time requirements and costs associated with those procedures? What, if any, manual procedures are required to suppress a person's e-mail address from a sender's directory or distribution list? What, if any, costs are associated with the manual suppression of e-mail addresses? How do such costs compare with costs associated with electronic processing? What, if any, circumstances would require manual processing of optout requests? How prevalent is the use of manual procedures to suppress people's e-mail addresses from a sender's directory or list? What are the characteristics of senders that use manual procedures to process opt-out requests? What are the characteristics of senders that use electronic procedures to process opt-out requests? Do small entities process opt-out requests manually or electronically?

For many very small businesses, opt-out requests are received, and commercial messages are sent, by individuals using ordinary e-mail client software. This means that a person must monitor the requests and manually maintain an address book, which is not time-consuming for any individual request but must be prioritized relative to other important business tasks. However, this can be managed by processing the opt-out requests immediately before initiating a new message to the distribution list, so the Act's timing provisions are not a big concern in this case.

If the commercial messages are sent using any of the various products that incorporate distribution list management, suppression (really, removal) is mostly automated and electronic. Some Internet service providers offer access to these products as part of their service. Whether a business uses such a product is often more often related to the technical competence of the staff than to the size of the business.

The technical procedures required when a third party e-mail messaging service is employed vary with the service. See the answer to (e) below. Typically the procedure is not more complex than uploading a file to a web server, but it sometimes involves integrating the advertiser's database system with that of the messaging service. Messaging services universally use electronic procedures because manual processing is too time-consuming for large numbers of addresses. However, there really isn't a “characteristic” sender who uses a messaging service. Services catering to senders of all sizes and levels of expertise are available.

The costs of manual processing are in human time, whereas the costs of electronic procedures are in computational power and network bandwidth.

e. In marketing agreements involving the use of third parties, what typically is the role of each third party in processing an opt-out request? For example, who typically receives the optout request and how? If the opt-out request must be transferred to a third party, how is that transfer accomplished, and how long does such a transfer typically take? Once an optout request is received by the third party, what procedures are involved in effectuating the opt-out request, and how long do such procedures typically take?

When one party is an advertiser and one is a messaging service, there may be several scenarios:

1. Advertiser receives opt-out requests and affirmative consents, and performs opt-out suppression before transmitting distribution list to messaging service.
2. Advertiser receives opt-out requests and affirmative consents, but transmits both suppression list and distribution list to messaging service. Messaging service performs suppression. Transmission is typically by network file transfer, and any significant time required is more often for assembling the file (*e.g.*, by doing a database pull) than for transmission.
3. Messaging service receives opt-out requests and maintains suppression list. Advertiser transmits distribution lists and affirmative consents to messaging service.
4. Messaging service receives opt-out requests and affirmative consents directly, and maintains suppression and distribution lists.

In actual practice a single advertiser is often operating under a combination of these scenarios; for example, #4 may be the intended arrangement, but the advertiser sometimes receives additional opt-out requests or affirmative consents by some alternate mechanism, such as by telephone or postal mail. These requests are transmitted separately to the messaging service, often by a manual process such as entry on a web form.

When both parties are advertisers, it's typical for one to manage the act of sending the messages, even when the other is the “sender” for CAN-SPAM purposes. The “manager” provides the distribution list, often without revealing it to the other party, and the “sender” provides the suppression list, which may be maintained by still another party. Several hours of effort may be required to coordinate all the transfers, and they may have to occur one or more business days before sending begins.

f. Should there be time limits on the duration of opt-out requests? Why or why not? Does the CAN–SPAM Act give the Commission authority to limit the time opt-out requests remain in effect? If so, how?

No, there should not be time limits. The only advertisers who would be concerned about this are those engaged in acquisition marketing (see (g) below).

g. Is an e-mail marketer's suppression list likely to have far fewer entries than the 84 million numbers on the National Do Not Call Registry? How many recipients receive an

e-mail marketer's messages in a typical e-mail marketing campaign? How many of those recipients submit opt-out requests?

The size of the suppression list is related to the size of the distribution list. New customer acquisition marketing lists are often much larger than lists used for communication with existing customers, and are often purchased from list brokers. An aggressive acquisition marketer might in fact need to maintain an extremely large suppression list.

I am not involved in acquisition email marketing and so do not have any direct data for that. However, the opt-out submission rates for customer communications average as little as 0.2% for responsibly managed distribution lists.