

BEFORE THE FEDERAL TRADE COMMISSION

CAN-SPAM Act Rulemaking

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Project No. R411008

**Comments of American Business Media in Response to
Notice of Proposed Rulemaking**

The following comments are submitted on behalf of American Business Media in response to the May 12, 2005, Notice of Proposed Rulemaking (the “NOPR”) issued by the Federal Trade Commission (the “Commission” or the “FTC”) soliciting comments on regulations to be enacted pursuant to various provisions of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the “CAN-SPAM Act” or the “Act”), 16 C.F.R. § 315 et seq., 70 Fed. Reg. 25426.

American Business Media has participated actively in these and related proceedings, having submitted comments on March 31, 2004, on the undesirability of a Do-Not-E-mail registry and comments in response to the Advance Notice of Proposed Rulemaking on April 19, 2004. American Business Media appreciates the hard work and careful thought that are reflected in the May 5th NOPR, even though not all of its earlier suggestions were adopted by the Commission. We hope that the Commission is not offended by our attempt here, in a couple of instances, to revisit some of those issues, such as the time afforded for honoring opt-out requests and the categorization of e-mails sent by associations to members.

American Business Media is an association representing more than 200 business-to-business information providers such as publishers, producers of print and other publications and websites, and organizers of trade shows and similar events. For members of American Business Media, and the Association itself, e-mail continues to be a crucial means of communication with

members, existing and potential subscribers, advertisers and other customers. Although much of the e-mail sent by American Business Media and its members consists of transactional or relationship messages, such as reminders that free subscriptions to “requestor” publications are expiring,¹ which are exempt from nearly all provisions of the Act, some American Business Media members advertise their products and services via e-mail. These messages are targeted to those in the specific industries covered by the publication or other media of the sender. Although many of these messages fall within the definition of commercial e-mail, they are almost always welcome, and as a result, relatively few recipients routinely opt out of further e-mail communication from American Business Media Members.

Because e-mail is an integral aspect of the communication and advertising practices of its members, American Business Media encourages and supports the Commission’s efforts to develop rules aimed at eliminating unsolicited “spam” without unduly burdening businesses making legitimate use of e-mail communications. We recognize that this balance is not easy.

A. Honoring Opt-out Requests

The most important single issue arising from the NOPR for American Business Media and, we expect, for many others is the Commission’s proposal to reduce the timeframe within which an opt-out must be honored from the statutory ten days to three days. This proposed reduction appears to be supported by two findings: first (70 Fed. Reg. at 25442), that “current technology allows for processing . . .opt-out requests more expeditiously than the current ten-

¹ Most business-to-business periodicals do not charge a subscription fee but are provided at no charge to those who both request a subscription and whose demographics—typically field of employment—fit within the subject matter of the publication and are attractive to advertisers. The publications qualify for the relatively low Periodicals postal rates by demonstrating that at least 50% of the distribution is to those who have requested the publication (just as paid publications must show that at least 50% of the distribution is to those who have paid for the publication). U.S. Postal Service regulations require that “official” request expires after three years, so publishers typically contact those who are nearing expiration by communicating that fact and soliciting a new request. They do so by a variety of means, such as direct mail, cover wraps, faxes and e-mail.

business-day time frame,” and second (70 Fed. Reg. at 25444) that “many commenters already are able to process opt-out requests virtually instantaneously.”

American Business Media cannot quarrel with either of these findings, but we submit that they do not support the three-day result proposed by the NOPR. The existence of a certain technology does not mean that it is reasonably and economically available to all, just as the ability of “many” e-mailers to build and scrub lists instantaneously does not mean that all (or nearly all) can. American Business Media does not doubt that many commercial e-mail vendors can probably maintain opt-out lists and e-mail lists and match them effectively and promptly each time an email is to be sent. To do so, they will invest in the necessary technology. That is their business.

But American Business Media and its members that send e-mails are not in the e-mail business. American Business Media is a trade association, and its members are media companies that develop and distribute business information and data. Especially in the current economic climate as it affects media, they simply cannot afford to invest in the same level of technology as can commercial e-mail vendors. Nor can they always afford to retain such vendors for all of their e-mails. Rather, smaller American Business Media members often maintain and use their own e-mail lists and use personnel with other jobs to compile opt-out lists and run opt-out scrubs. That such activity can in theory and, for large vendors, in practice be accomplished in a short amount of time does not mean that smaller businesses can be updating opt-out lists and scrubbing e-mail lists hourly or daily.

Attached hereto is a memorandum prepared by an American Business Media member, Diversified Business Communications in Portland, Maine. As shown there, Diversified is trying to comply with the CAN-SPAM Act but would face serious timing problems and would incur a

substantial expense if it were required to scrub its e-mail lists to assure that opt-outs are honored in three business days.

It appears that the NOPR gives inadequate consideration to the timing involved especially when the “sender” of the e-mail contracts with another entity to transmit its e-mails. For example, as noted in the attached memo, a business may use vendor A to send out an e-mail to a list maintained by vendor A and then, a few days later, wish to use vendor B to send an e-mail to a list maintained by vendor B. The chain of events would be as follows: opt-outs from the first e-mail would have to be received by the sender, which would have to download or otherwise gather those opt-outs and transmit them to vendor B, and vendor B would then have to scrub its list before transmitting the sender’s second e-mail.

If these steps were all that the sender, vendor A and vendor B had to accomplish in the normal course of their businesses, a three-day opt-out time period may be feasible, if difficult. But, as described in the attachment, the sender, if a smaller business or a business for which the sending of e-mails is a small though important part of its activity does not have a person whose sole or even primary responsibility is to monitor e-mail opt-outs in order to assure that vendors are provided with them within hours, not days. And commercial e-mail vendors servicing numerous accounts cannot drop everything before launching an e-mail program to assure that opt-outs that made their way to them (from vendor A to the sender to vendor B) are honored almost immediately.

Diversified Business Communications has concluded that imposition of a three-day opt-out requirement would reduce the effectiveness of its marketing and increase its costs by a minimum of \$20,000 per year. On the other hand, the only burden on consumers from a more

reasonable opt-out time frame is that they may receive one or maybe even a few unwanted e-mails (added to the hundreds of pure SPAM e-mails that many people receive weekly).

In concluding recently that a requirement for “ADV” in the subject line of a commercial e-mail would inhibit legitimate marketing efforts while doing little to stem the tide of illegal e-mails, the Commission properly considered that illegal spammers do not comply in any event and that regulations should be developed with due consideration for the needs of legitimate e-mailers that will comply. Such legitimate e-mailers will honor opt-outs as soon as they reasonably can, and such legitimate e-mailers will not in a ten-day or even in a thirty-day period flood consumers with e-mails, whether or not they have opted out. If there is any harm to consumers from an opt-out period substantially longer than three days, it is not apparent and must be negligible; the harm to small businesses from the proposed three-day period will be real, substantial and wide-spread.

B. E-Mails from Associations to Members

American Business Media is one of the “[m]any membership associations” that the Commission recognizes have asked that it address e-mails—even commercial e-mails—sent by such associations to their members (70 Fed. Reg. at 25437). In the NOPR, the Commission concludes that no change to the statutory categories of “transactional or relationship” messages is justified, in large part because, it says (70 Fed. Reg. at 25433), those seeking expansion of the categories failed to note, much less comply with, the statutory criterion that any modification be necessary to accommodate changes in e-mail technology or practices.

As to the specific requests that messages sent by associations to members be considered “transactional or relationship” e-mails, the Commission (70 Fed. Reg. at 25438) concluded that there is no basis for different treatment of such messages when they are primarily commercial.

But American Business Media, at least, did not seek expansion or enlargement of the “transactional or relationship” e-mail categories. Rather, American Business Media sought a reasonable Commission interpretation of the current categories that would encompass such e-mails. Those comments stated (emphasis supplied):

As provided in the Act, transactional and relationship messages are excluded from the definition of commercial e-mail and, as a result, are exempt from all but one provision of the Act. Although the CAN-SPAM Act describes with relative particularity the specific types of e-mails that fall within this category, the Commission should clarify the definition to provide expressly that members of associations are entitled to receive information related to association products or services, even when there is a charge for such goods or services, and that such messages are transactional or relationship messages.

Currently, the following e-mail messages are among those considered to be transactional and relationship messages: “Email messages that deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender.” (*See* Section 3(17)). Because receipt of information about association products, services, events, or activities is a membership benefit that members intentionally pay for as component of their membership in an association such as American Business Media, e-mail messages that pertain to these topics should be specifically included within this definition of transactional or relationship e-mail. Members are “entitled” to receive this information under the terms of their “transaction” of joining the association. Indeed, members of an association would have legitimate objections if they did not receive announcements of an upcoming seminar or of the results of a survey offered for sale by their association.

Thus, American Business Media did not and does not ask that the Commission exercise the option granted to it by Congress of enlarging the categories of “transactional or relationship” e-mails. Rather, American Business Media asks only that the Commission clarify that an existing category—material to which the recipient is entitled by virtue of a past transaction—encompasses e-mails sent by associations to their members even when such e-mails contain “commercial” messages promoting goods or

services offered by the association.² These messages are “*per se* valuable to recipients” (see 70 Fed. Reg. at 25433) and should be classified as “transactional or relationship” e-mails. Surely, membership associations will not abuse any such definitional rule, since no association ever succeeded by offending its members with unwanted e-mails.

C. Does “Commercial” Require Consideration?

In the context of Section 7702(17) (A)(i), which lists messages facilitating, completing or confirming a previously agreed to commercial transaction as “transactional or relationship,” the Commission has called for comments on whether a “commercial transaction” must include consideration (70 Fed. Reg. at 25434).

This question has broader implications. As explained above, many business-to-business publications are sent at no charge to qualified recipients. For this reason, American Business Media submits that an e-mail offering to provide the publication at no charge does not involve consideration and therefore does not fall within the statutory definition of “commercial electronic mail message.” That definition includes the term “commercial advertisement or promotion of a commercial product or service” (emphasis added). The underlined words must mean something, and, American Business Media submits, their inclusion mandates that there be consideration associated with a proposed transaction before that transaction, or the message that proposes it, can be considered commercial.

² To this extent, we mildly disagree with the Commission’s assessment (70 Fed. Reg. at 25435) that the “categories delineated in the ‘transactional or relationship’ provision of the statute are clear. . . .” we expect that there will be disagreements over their scope. American Business Media seeks to eliminate one possible disagreement so that its can comply with the law.

American Business Media can cite no legislative history of the CAN-SPAM Act in support of this interpretation, but we can cite precedent. In addressing the scope of the term “advertisement” for application of the telemarketing rule exempting prerecorded messages that do not contain “advertising” from the prohibition applied to such messages, the Federal Communications Commission stated that if the “purpose of the message is merely to invite a consumer to listen to or view a broadcast,” it is not an advertisement because, like requester publications, there is no purchase being encouraged.³ By this entirely valid reasoning, neither a renewal notice nor even a solicitation for a request publication is a “commercial message” under the CAN-SPAM Act. The Commission should so find.

D. Duration of Opt-out Requests

The NOPR proposes no time limits for, but solicits comments on, the duration of opt-out requests, noting that the Act provides none (70 Fed. Reg. at 25444). American Business Media is not in a position to provide the type of technical data that would support a limit, but it does offer the common-sense notion that opt-outs that are perpetual ultimately will prove to be extremely burdensome but that a requirement that consumers renew opt-outs every five years, as

³ In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, 18 FCC Rcd 14014 (July 3, 2003).

they are required to do with respect to the do-not-call list, would impose only the mildest of burdens on consumers.

Respectfully submitted,

David R. Straus
Thompson Coburn LLP
1909 K Street, NW, Suite 600
Washington, DC 20006
Phone: 202-585-6921
Facsimile: 202-508-1027
E-mail: dstraus@thompsoncoburn.com

Counsel for American Business Media

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diversified

B U S I N E S S C O M M U N I C A T I O N S

121 Free Street, Portland, ME 041010

June 25, 2006

TO: Federal Trade Commission

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

We are a publishing and trade show company with four business-to-business publications and more than 40 trade shows world-wide. We rely on e-mail to market to our customers and prospects in a targeted, cost-effective manner. We carefully tailor our e-mail lists to assure that only those interested in the subjects we cover receive our messages.

We strongly believe in respecting our customers' privacy and understand that over use and misuse of e-mail only hurts our relationship with our customer and prospect base.

We are concerned that complying with the proposal that "opt out" requests be processed within three days will place a significant financial burden on our organization and may significantly limit our ability to use email.

Below are examples of situations that we could encounter:

(A) Third Party involvement

Our magazine subscriber file is managed through our fulfillment house but we send out promotions to our trade shows through another provider. If we send a subscription offer to a subscriber and he opts out of future email communication, the information is emailed to our fulfillment house. Prior to the passage of the CAN-SPAM Act, we downloaded this and other customer data on a monthly basis and made sure that any opt-out requests are suppressed from our trade show marketing offers. The lag time between the request and download could have been as much as 30 days. In theory, we can increase the frequency of the downloads to any frequency that is required, but in order to comply with the three-day turnaround we would have to download new customer information every few days and then transmit that information to our other vendor, which would then have to scrub its list. Just from our end, this task involves human intervention from a one-person department as well as increased vendor costs and is simply not practical. For the overall process, including the scrubbing by our second vendor, it's clear that the scrubbing simply cannot be done within three days of the time that someone opts out.

This process would add another 2 to 3 days to our marketing process. During peak marketing periods leading up to a trade show or audited magazine issue, this delay could impact our ability to achieve the marketing results we need to keep our products viable.

(B) Within our organization

We are diligent about eliminating e-mail addresses from our promotions when requested. Due to work flow processes, three days compliance is not always feasible. As a relatively small business, we have one person responsible for pulling our e-mail lists. One scenario: We send a promotion for a registration to a show on Monday with a plan to send a conference e-mail the following Monday. The recipient opens the email on Thursday afternoon and opts out. The data manager has already set up the email list for the Monday email and purged all opt outs, etc. (Let's say she has a doctor's appointment and is leaving at 3pm and then is off on Friday). The recipient would get the Monday email. We would be in conflict with the proposed regulation.

A three-day turnaround would place a significant burden on smaller organizations that don't work 24/7.

(C) E-mailbox management

In order to provide our customers optimal customer service, we not only have an opt out link (where data goes into a database) on our promotional e-mails, but we also provide e-mail addresses to which recipients can send opt-out requests. This means that someone has to check these e-mail boxes to see if someone has requested to opt out. Again, due to the size of our organization, it is not always practical to do this on a daily basis.

We estimate that in order to be in compliance with the proposed regulation we would have to hire an additional part time person in our Data Services department at an annual cost of \$20,000 to our organization.

We would encourage the FTC to extend the compliance time in capturing "opt outs" from 10 to 30 days and would strongly oppose a move in the opposite direction. A smaller turnaround burden places a significant financial burden on the companies such as Diversified Business Communications. On the other hand, the only "burden" on the recipient is the *possible* receipt of one or a few additional e-mails before the opt out takes effect.

Respectfully,

Vicki Hennin
VP Marcom
Diversified Business Communications