



Securities Industry Association

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June 27, 2005

Via Electronic Mail

Federal Trade Commission
Office of the Secretary
Room H-159
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

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

Ladies and Gentlemen:

The Securities Industry Association (“SIA”)¹ appreciates the opportunity to comment on the Federal Trade Commission’s (the “Commission”) notice of proposed rulemaking under the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the “CAN-SPAM Act”). 70 *Fed. Reg.* 25426 (May 12, 2005). The proposal requests public comment on proposed rules to implement the CAN-SPAM Act.

SIA supports the Act’s goal of providing consumers with the opportunity to control the receipt of unwanted commercial electronic mail messages. The securities industry has long recognized the importance of respecting the privacy of customers’ electronic mail facilities and our member-firms have worked diligently to effectively implement the requirements of the CAN-SPAM Act. However, we have significant concerns with several aspects of the proposed rules.

¹ The Securities Industry Association, established in 1972 through the merger of the Association of Stock Exchange Firms and the Investment Banker’s Association, brings together the shared interests of nearly 600 securities firms to accomplish common goals. SIA member-firms (including investment banks, broker-dealers and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. According to the Bureau of Labor Statistics, the U.S. securities industry employs nearly 800,000 individuals. Industry personnel manage the accounts of nearly 93-million investors directly and indirectly through corporate, thrift, and pension plans. In 2004, the industry generated an estimated \$227.5 billion in domestic revenue and an estimated \$305 billion in global revenues. (More information about SIA is available on its home page: www.sia.com.)

Our comments are focused on ensuring that the Act's provisions effectively deter spammers without interfering with the normal flow of legitimate business. To that end, SIA recommends that: 1) the Commission clarify the meaning of "control of a message" for purposes of defining the term "sender"; 2) the definition of "valid physical postal address" be adopted as proposed; 3) the time period for processing opt-out requests should remain at ten business days; 4) the duration of opt-out requests should be limited to five years; 5) certain types of e-mail should not be regarded as either commercial e-mail or transactional or relationship messages; and 6) e-mails from affiliated third parties acting on behalf of the entity with whom the recipient transacted business should be regarded as transactional or relationship messages.

DEFINITION OF SENDER

The CAN-SPAM Act defines the term "sender" as a person who initiates a commercial e-mail message and whose product, service or website is advertised or promoted by the message. The term "initiate" means to originate or transmit a commercial e-mail message or to procure the origination or transmission of a commercial e-mail message. The Commission proposes to treat as a sender each person whose products or services are advertised or promoted in a commercial e-mail unless only one person controls the content of the message, determines the e-mail addresses to which the e-mail messages are sent, or is the person identified in the e-mail "from" line as the sender.

SIA believes that the proposed definition does not provide appropriate guidance to determine who is the sender of a commercial e-mail when products and services of multiple companies are promoted or advertised in the message. The standard of determining which person controls the content of the message or which person determines e-mail addresses of recipients lacks clarity and does not provide the degree of specificity that is needed by businesses. For example, if Company A provides Company B with suggested text and e-mail addresses of prospective recipients, but Company B makes the final determination as to what text will be included in the e-mail message and whether or not e-mails will be sent to the recipients suggested by Company A, is Company A the sender? The Commission's proposed rule is unclear. We suggest that under the above circumstances, only Company B would be the sender because Company B makes the final determination as to what the message is and to whom it will be sent. Accordingly, the Commission should clarify that a person does not control the content of an e-mail simply by providing the sender with language that may be included in the commercial e-mail or with e-mail addresses to whom another person may or may not determine to send the e-mail message.

SIA is also concerned that the proposal does not take into account the unique needs of regulated industries such as the securities industry. Securities firms are frequently required by federal securities laws and regulations to provide certain disclosures to customers. To ensure compliance with such regulatory requirements, commercial e-mail messages that promote products and services of securities firms may be required to contain certain language such as "Member NASD/SIPC" or "This is not an offer or solicitation in any jurisdiction where we are not authorized to do business."

However, under the Commission's proposal, if more than one person controls the content of the message, then all parties whose products and services are advertised or promoted will be senders. As a result, if a securities firm requires that a commercial e-mail sent by another person contain certain language to meet regulatory requirements, then both parties will be senders. SIA believes that this is not the correct result where the securities firm must make the required disclosure and must require that the language be included in the e-mail message that advertises its products and services. SIA, therefore, recommends that the Commission modify the proposal to clarify that a person does not control the content of a commercial e-mail message if the person requires that a message promoting its products and services, which is sent by another person, contain language that is included to satisfy regulatory requirements.

List Providers

The Commission also asks whether the definition of sender should be extended to third parties who provide lists of e-mail addresses to a sender. SIA sees no reason why such persons should be considered senders because the role they play is similar to that of a telephone directory service. These third parties are not advertising or promoting their products and services in the e-mail message, nor are they initiating the e-mail. Accordingly, list providers do not come within the definition of sender under the CAN-SPAM Act and should not be treated as senders.

Safe Harbor

The Commission requests comment on whether it should adopt a safe harbor for companies whose products are advertised by affiliates or others. SIA supports the adoption of a safe harbor with respect to opt-out and other obligations for such companies. A company may have little control over a person who sends commercial e-mail messages which include material promoting the company's products and services. SIA believes that the Commission should adopt a rule that a company that has exercised reasonable diligence in selecting a third party to promote its products and services in a commercial e-mail does not have vicarious liability under the CAN-SPAM Act in the event the sender fails to comply with the requirements of the Act or the Commission's rules.

DEFINITION OF "VALID PHYSICAL POSTAL ADDRESS"

The CAN-SPAM Act requires a sender to include its valid physical postal address in commercial e-mails it initiates. The Commission proposes to amend its rule to clarify that post office boxes and private mailboxes established pursuant to U.S. Postal Service regulations are valid physical postal addresses. Treating post office boxes and private mailboxes as physical postal addresses effectively takes into consideration the needs of businesses and ensures that postal mail received from recipients of a sender's commercial e-mail will be directed to the proper area at the sender. Accordingly, SIA supports the Commission's proposed definition of valid physical postal address.

PERIOD FOR PROCESSING OPT-OUT REQUESTS

The Commission has proposed to reduce the time period senders have to process opt-out requests from ten business days to three business days after receipt of the request. SIA objects to the proposed reduction in the current ten business day processing standard. The CAN-SPAM Act provides that the Commission may modify the ten business day period if it determines that a different period would be more reasonable after taking into account several factors, including the purposes of the CAN-SPAM Act, the interests of recipients of commercial e-mail and the burdens imposed on senders of lawful e-mail. The Commission asserts that shortening the time period to three business days is “supported by the record that current technology allows for processing such opt-out requests more expeditiously than the current ten business day time frame.”

SIA believes that the Commission has very little support in the record for its proposal to reduce the opt-out processing period. The record cited by the notice indicates that the majority of businesses, including small businesses, supported at least a ten business day processing period. Nearly half the consumers who commented stated that ten business days is an appropriate time period for processing opt-out requests. Even commenters who indicated that they can process requests in fewer than ten business days supported the ten business day time frame.

As the Commission has been advised, processing opt-out requests involves synchronizing databases, forwarding opt-out requests to third party processors or senders, or manually processing requests. For many firms, these processes may take far longer than three business days to complete, as the technological sophistication and capability varies widely among companies. Testing protocols also adds additional time to processing requests. SIA recognizes that some sophisticated technology companies commenting to the Commission have the ability to process opt-out requests in a shorter time frame. However, numerous industry comments indicated that even the existing ten business day time frame presents a hardship for many companies. We believe that the Commission will impose a substantial increased burden on companies if it reduces the time period for processing opt-out requests, and will exacerbate the already considerable burden incurred by those companies, particularly smaller companies, who have urged the Commission to increase the length of the processing period.

Moreover, an overwhelming number of comments submitted by consumers suggests that the interests of recipients of commercial e-mail do not require a reduction in the ten business day processing period. No commenter presented any evidence that recipients who opt out are being targeted for receipt of multiple additional e-mail during the ten business day processing period. SIA believes that the additional burden imposed by reducing the ten business day processing period far outweighs any marginal gain to recipients. If the Commission is concerned that recipient targeting may develop, SIA believes that a more logical approach would be for the Commission to determine such a practice to be abusive. SIA does not believe it appropriate for the Commission to impose an additional burden on all companies simply to address a speculative concern that may be engaged in by a few senders. Accordingly, we oppose the proposal to shorten the ten business day processing period.

DURATION OF OPT-OUT REQUESTS

The FTC has also asked whether there should be a limit on the duration of opt-out requests. The SIA supports a five-year limit on the duration of opt-out requests. Maintenance of the opt-out lists for an indefinite duration will be increasingly costly for businesses and has the potential of clogging up databases and degrading system processing efficiency. Recipients often change e-mail addresses as they switch service providers or change employment. As a result, many e-mail addresses on an opt-out list will be outdated after five years. In order to reduce the regulatory burden on businesses and the expense associated with maintaining outdated e-mail addresses in perpetuity, SIA supports limiting the duration of a recipient's opt-out to five years. As the Commission indicated in its notice, such a limit would be consistent with the Commission's rule relating to the duration of a consumer's registration on the National Do Not Call Registry.

TRANSACTIONAL OR RELATIONSHIP MESSAGES

The Commission asks whether there are certain types of e-mail messages that are neither commercial e-mail nor transactional or relationship messages. SIA believes that e-mail messages such as those sent in connection with marketing or opinion research should not be regarded as commercial e-mail or transactional or relationship messages because they may not meet the definitions of those terms. Accordingly, the Commission should indicate in its final rule that there are types of e-mail messages that are neither commercial e-mail nor transactional or relationship messages, and that such messages are not subject to the CAN-SPAM Act.

The Commission asks whether messages from affiliated third parties that indicate they are acting on behalf of the party with whom the recipient transacted business should be considered transactional or relationship messages. SIA believes that such messages should be regarded as transactional or relationship messages. Given the complexity of organizational structures that exist in modern businesses, customers often find that affiliates or third parties may be retained to provide the products and services for which the recipient has contracted. SIA believes that treating messages from a third party acting on behalf of the sender facilitates the delivery of products and services the customer expects without compromising the objective of the CAN-SPAM Act to protect recipients from receiving unwanted commercial e-mail messages.

The Commission has also asked whether consideration should be required for a message to be a transactional or relationship message. SIA notes that the Commission has already acknowledged that consideration is not required for a message to be a transactional or relationship message in the context of its discussion of e-mail messages delivered pursuant to an electronic subscription. *70 Fed. Reg.* at 25437. Accordingly, we see no reason why consideration should be required in other contexts for a message to be a transactional or relationship message.

In addition, SIA supports the Commission's view that an e-mail message sent to negotiate a transaction that a recipient has previously agreed to enter into should be regarded as a transactional or relationship message.

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SIA appreciates the Commission's consideration of our views. If we can provide additional information, please contact the undersigned at (202) 216-2000.

Sincerely,

Alan E. Sorcher
Vice President and
Associate General Counsel