National Retail Federation
The Voice of Retail Worldwide

Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

COMMENTS OF THE NATIONAL RETAIL FEDERATION

National Do Not E-Mail Registry
CAN-Spam Act Rulemaking
FTC Project No. R411008

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Introduction

The National Retail Federation is the world's largest retail trade association, with membership that comprises all retail formats and channels of distribution including department, specialty, discount, catalog, Internet and independent stores as well as the industry's key trading partners of retail goods and services. NRF represents an industry with more than 1.4 million U.S. retail establishments, more than 23 million employees - about one in five American workers - and 2004 sales of $4.1 trillion. As the industry umbrella group, NRF also represents more than 100 state, national and international retail associations.

Multi-channel retailers have spent the past decade revolutionizing the way Americans shop by giving each and every consumer greater access to a wide variety of goods and services at highly competitive prices. However, in order to communicate with our customers in this medium, retailers must use e-mail. To demonstrate the strong growth of online retailing and its direct correlation to effective marketing tactics, including the use of e-mail advertising campaigns, NRF has included timely industry-specific statistics in each of its filings related to the CAN-Spam Act. In May 2005, Forrester Research published *The State of Retailing Online 8.0*, a Shop.org[1] annual study of 137 online retailers. According

[1] Shop.org is the online retailing division of NRF.

to Forrester, online sales soared to $141 billion in 2004, up 24 percent over the prior year. This figure now accounts for 6.5 percent of all retail sales. The study further predicted online sales should grow another 22 percent in 2005 to $172 billion.

In its May analysis, Forrester Research included a comprehensive study of the marketing practices of online retailers. According to the study, marketing costs per order have declined sharply from $8 in 2002 to just $5.70 in 2004. This is in comparison to store-based sales that typically cost $7 per purchase and catalog sales that cost $7.50 for each order placed. Clearly, online marketing is an efficient and cost effective means for e-tailers and their customers to connect. Further, much of this advertising continues to be done by e-mail; in fact 91 percent of the companies surveyed regularly e-mail their customers. Of those who marketed to house lists, 97 percent rated these campaigns as “effective” or “highly effective.” The next most effective medium (for 87 percent of online retailers) is paid search engine placement.

In fact, even with the implementation of the CAN-Spam Act, e-mail marketing held steady and strong in 2004. The average open rate retail e-mail has increased slightly to 32.8 percent (up from 32 percent in 2003); the average click-through rate is 11 percent; and the average order conversion rate is 4.3 percent. In 2004 the opt-out rate rose only slightly to 8.7 percent, up from 8.0 percent in 2003. Retailers attribute the success of e-mail marketing to better

segmentation and more customized offers that resonate better with individual customers.

It is clear that the average consumer views the e-mail that they receive from the retail industry very favorably. According to a survey conducted by Bigfoot Interactive and NOP World Research in February 2004, 90 percent of consumers eighteen years and older who receive permission-based e-mail and 83 percent of consumers who receive unsolicited e-mail from retailers are very satisfied with the retailer.[2] In fact, 91 percent of the consumers who receive permission-based e-mail are more likely to buy products from the retailer. Eighty-three percent of those receiving unsolicited e-mail say the same thing. Finally, 81 percent (unsolicited) and 88 percent (consent-based) of the consumers surveyed are likely to recommend the retailer to others. These are very powerful numbers that show that consumers do not view permission-based and unsolicited e-mail from retailers in a negative light. In fact, it is quite the contrary.

The Definition of "Sender" in a Multiple Advertiser Scenario

In Section 316.2(m) of the proposed rule, Commission's use of the term "sender" is the same as the definition of that term in the CAN-Spam Act. However, the FTC offers further guidance for who can be considered a "sender" in situations where you may have multiple parties involved in formulating a commercial e-mail. According to the clarified definition, only one person may be

[2] "Retailer's E-mail Achievements," *E-Marketer*, March 10, 2004

considered to be a “sender” if that person, and only that person: (1) controls the content of the message; (2) determines the electronic mail addresses to which such a message is sent; or (3) is identified in the “from” line as the sender. Clearly, the Commission has carefully studied the complicated issues that may arise when you have multiple advertisers involved in the sending of a single commercial e-mail. However, it is important for NRF to point out the perils of using a test that involves identifying the party or parties who are in “control” of the content without further refining or defining of the concept of control. This is especially important since a person will be deemed to se a “sender” if they meet even one of the criteria established by the Commission.[3]

In most advertising campaigns, whether in print, online or elsewhere, the person whose product is being promoted has, at the very least, the right to create or approve the portion of the content that relates to that product. This occurs for several reasons including to protect the integrity of any trademarks being used in the advertisement and to ensure that the content of the ad is accurate, not deceptive. However, under the test as currently written, an advertiser, in the normal course of business, may become a “sender” subject to the requirements of the Act. NRF believes strongly that this should not be the result, and that advertisers should have the latitude they need to retain oversight of their brands and message without being deemed a “sender.”

[3] The Commission may want to consider an alternative test that allows an advertiser to satisfy the “control” criteria, as long as they do not satisfy the additional criteria of determining the e-mail addresses and being identified as the sender in the “from” line.

Some examples may be helpful to the Commission in understanding the nuances of “control.” First, it is common for a bank to promote their own product (usually a credit card) by offering “points” or “rewards” that may be redeemed at retail establishments. American Express has a card, for example, that includes redeemable points good for retail gift cards. Often, reminders about these offers are sent to credit card customers or to prospective customers via e-mail. The retail establishment is not sending this e-mail to their customer list, nor is its name listed in the “from” line, but that retailer may have reviewed and approved the portion of the e-mail that contains its trademark or information about its product (the gift card). Clearly, the Commission should not penalize the retailer as a “sender” merely because it provided or approved the copy for the ad.

A second scenario is one in which a shopping center company sends an e-mail to its client list advertising special events, sales or new tenants in a particular mall location. In this scenario, the mall is advertising itself as the product, but using content from its tenants (retailers) as part of the promotion. Again, the retailer is not sending the e-mail to its customer list, is not listed in the “from” line, but, in the normal course of business, has had some input or approval over the content in a portion of the e-mail. Again, we believe that in these situations where no co-mingling of e-mail lists is occurring and little has been actively “procured” by the retailer, the retailer should not be considered a sender.

Clearly, the Commission recognizes the legitimate business need to structure the sending of a multiple advertiser e-mail so that there may be only

one “sender” for purposes of the CAN-Spam Act (see page 16 of the request for public comments). However, if the Commission finalizes the rule without any clarification of the term “control” it may force marketers, who merely create or approve content, to add each person that opts-out of a multiple advertiser e-mail to their own suppression list and, in turn, check its list against those of each of the other advertisers before sending out messages. Multiple suppression lists will only increase costs and time delays, while accruing no real benefit to consumers. We believe that the recipient’s reasonable expectations in the two scenarios presented above would be that the credit card company or the shopping center was the “sender” and not the incidentally involved retailer who merely approved the e-mail. Additionally, if the recipient decided to opt-out of any of the e-mails described above, NRF believes that the recipient’s reasonable expectation would be that they are not also opting out of news and promotions for their favorite retailer.

Transactional or Relationship Messages

Section 316.3(a)(2)(i) and (3)(ii) of the proposed rule states that the primary purpose of an e-mail *may* be deemed commercial if, “a recipient reasonably interpreting the subject line of the electronic mail message would likely conclude that the message contains the commercial advertisement or promotion of a commercial product or service.” NRF and our retail members are very concerned about the emphasis on the content of the subject line in determining the nature of an e-mail. Transactional messages commonly contain

secondary commercial content, and the subject line should be permitted to reflect this reality without exposing senders to potential liability under the Act. In fact, retailers often use commercial content in the subject line in order to entice customers to open important transactional messages that they may otherwise ignore. As we mentioned above, open rates for e-mail is approximately 33 percent[4].

In order to catch a customer's attention a retailer may send an order confirmation that includes a subject line that says, "confirmation of your order and free shipping on your next purchase," or an order update that states, "your item is still backordered, our apologies, 10 percent off your next purchase." Retailers who have credit card divisions may also send monthly billing statements via e-mail that include the subject line, "your monthly retail card statement is available, book travel on your retail card and get a free canvas tote." These eye-catching subject lines are tailored to alter consumer behavior by acting as an incentive for consumers to open otherwise nondescript messages in bulky in-boxes. In doing so, retailers create an important opportunity for customers to check the accuracy and status of an order and/or account. Accordingly, we believe that 316.3 (a)(2)(i) and (3)(ii) should be removed from the definition of primary purpose as it may cause retailers to alter their subject lines in a way that could materially decrease the open rate for important transactional messages.

In section 316.3(a)(3)(ii) the Commission establishes further criteria for determining the primary purpose of an e-mail by analyzing the commercial

[4] Shop.org 2005 *State of Retailing Online 8.0*

content in the body of the message. According to the NPR, factors to be considered include: the placement of the commercial content; its proportional size; and how color, graphics, type size and style are used to highlight commercial content. While NRF and its members agree that the body of a transactional message should not be dominated by commercial content, we are concerned by the Commission's use of color and graphics as a factor in determining whether an e-mail should be considered commercial or transactional. As the Commission is aware, the transactional portion of an e-mail message is often in black and white HTML text (most likely serving as a printable receipt for the consumer), but the advertisement, no matter how large or small, is generally presented using photo images or color graphics. That is just the nature of advertising. The relevant factors should simply be the *placement and proportion* of the commercial content, as those two factors speak volumes to the actual intent of the sender, while color and graphics speak only to the creativity of the ad design.

In section 316.3(c) the Commission establishes clear parameters for what may be considered pure transactional or relationship e-mails. While NRF is generally supportive of the categories, there is one area where we believe additional content may be considered without compromising the spirit of the Act. Currently, section 316.3(c)(4) of the NPR carves out, "information directly related to an employment relationship or related benefit plan in which the recipient is *currently,* involved, participating or enrolled." NRF has two concerns with this approach:

First, under ERISA employers are allowed to send e-mail to their employees regarding employment benefits. Further, employers generally send information about current benefits as well as information about new or expanded benefits. This is valuable information that is clearly part of the employer-employee relationship or contract.

Second, and more importantly, NRF believes that the most sensible approach to employer to employee e-mail is to treat all communications between employers and employees on equipment owned or controlled by the employer as "transactional or relationship" messages that are exempt from the Act. This is because the company provides the e-mail account to the employee primarily for the employer's benefit, and the employer should be free to utilize its own proprietary network to send information to its employees. Nothing in the words of the Act or its legislative history suggests that Congress intended to alter the relationship between employers and their employees –much less empower the FTC and state Attorneys General to interfere with employers that are using their own equipment to communicate with their employees.

The types of e-mail that can be considered to "provide information directly related to an employment relationship," vary widely. They can include information about health care, changes to the employee handbook, special employee promotions or discounts, and even the announcement of a company-wide picnic. An employer has little incentive to take up employees' valuable time with junk e-mail, so it doesn't make sense to impose arbitrary restrictions on their network. This exemption should apply broadly to all employer-sponsored e-mail,

even messages that may come from third-party benefits providers or third-party employee discount programs. The exemption should not apply if an employer is sending messages to the employee's home e-mail, unless the e-mail account is used or related to a work purpose.

Finally, this exemption should also apply to *former* employees who are currently enrolled in company sponsored benefits programs. Many employers now use e-mail to keep in touch with retirees, pensioners, former employees who receive worker's compensation and others. If former employees were given the opportunity to opt-out of these e-mails, communications could cease. This would be most unfortunate for individuals who did not understand what they were opting-out of. Further, the former employer would have to utilize alternative, more expensive, forms of communication in hopes of keeping in touch with and keeping track of program beneficiaries. For these reasons, NRF and its members hope that the Commission can use the flexibility granted by Congress in the CAN-Spam act, and include in its rulemaking a category for transactional messages sent to former employees as well.

In section 316.2 (o), the Commission asks if an email message contains only a mandated notice, should this message be considered a transactional or relationship message? Our belief is that mandated notices should always be considered a transactional or relationship message. Such messages could include yearly Gramm-Leach-Bliley statements that accompany credit accounts. Additionally, there may not be a *legal mandate* associated with these types of messages, but they could contain information that a company has previously

promised to provide to customers. An example is a notification of changes to a company's privacy policy that may or may not require the recipient to opt-in/opt-out of changes to how their information is used. Mandated notice doesn't appear to fit into any one of the five existing categories as these all deal with a transaction, an on-going membership, account, subscription, product or employment information. A sixth category should be created that deals specifically with either legal or company mandated communications such as the above example. Further such notifications could include a sale, merger, acquisition or dissolution of a company.

Forward-A-Friend

The proposed rule addresses the common retail practice of offering "forward a friend" e-mail options on a website by further discussing and refining the Act's definition of "sender." The CAN-Spam Act states that a "sender" is someone who "initiates a message and whose product, service or Internet web site is advertised or promoted by the message." The term "initiate" is further defined as, "to originate or transmit such message or to procure the origination or transmission of such message." In the NPR the Commission hones in on the concept of procurement and determines that, in situations where there is no payment of consideration or inducement offered for the forwarding of the e-mail, it should not be considered "procured" and, thus, not "initiated." Instead, the e-mail can be classified as a "routine conveyance" and not subject to the requirements of the Act.

While NRF believes that the Commission is correct in much of it's analysis of forward-a-friend programs, of concern is the Commission's broad interpretation of the term "procure" and the ramifications that overly broad categories of "intentional inducement" can have on the continued practicality of forward-a-friend programs. As the Commission explains, "an e-mail message likely satisfies the Act's definition of 'procure' when it includes text such as 'Tell-A-Friend – help spread the word by forwarding this message to friends!'"[5] NRF believes strongly that an online retailer should not be considered to have satisfied the Act's definition of "procure" by simply encouraging a consumer to forward information from their website. While we agree that offering consideration such as coupons, promotions and discounts directly to the forwarder of the e-mail does constitute the payment of consideration and should be considered "procurement," mere verbal encouragement should not. Advertisers should be able to direct attention to their forward-a-friend feature without being penalized for highlighting it. They should even be able to include a discount for the recipient (friend) of the forwarded message because, again, no direct benefit or consideration is being offered to the forwarder.

The Commission's broad interpretation of the concept of "intentional inducement" is especially worrisome because if "procurement" has taken place, the advertiser becomes a "sender" responsible for ensuing that messages contain the required opt-out mechanisms and disclosures. Further, the advertiser will have to ensure that opt-out requests are being honored -- even

[5] See footnote 178 of the NPR

before the forwarded message is sent. This is an overly burdensome and impracticable responsibility for an advertiser who, in many cases, may not even know to whom the e-mail is being forwarded. It is not a stretch to predict that this broad interpretation may lead to the reduction of popular forward-a-friend programs.

Finally, it is important that the Commission examine the issue of forward-a-friend e-mail that contains content that has been altered by the forwarder. NRF and its members would like for the Commission to stipulate that the advertiser is not liable for the content of the forwarded e-mail if the original content is changed, even if the advertiser qualifies as a "sender" under the Act. Situations may arise where a forwarded e-mail may be changed to promote a fake sale or discount. Further, e-mail could be altered to be patently offensive to the recipient. The altered e-mail may even violate the sexually explicit labeling rule. Again, we would like the Commission to consider this limitation of liability while formulating the final rule, as we believe the Act gives the Commission the discretion to do so.

The Number of Days Allowed to Process and Opt-Out

NRF and its member companies were surprised to see the addition of section 316.4 of the proposed rule that acts as a new prohibition against the failure to process an opt-out within three business days. As the Commission notes, the Act requires a ten business day opt-out, but gave the Commission the

flexibility to re-evaluate this time period if it "determines that a different time frame would be more appropriate after taking into account the purposes of section 7704(a); the interests of recipients of a commercial electronic mail; and the burdens imposed on the lawful senders of a lawful commercial electronic mail." In NRF's comments submitted for the April 20, 2004, ANPR, we noted the burden of a ten-day opt out requirement and argued that ten business days is *too short* an amount of time for acting on an opt-out, especially when failing to meet such a deadline can result in legal liability."[6]

One of the biggest misconceptions about e-mail marketing is that opt-outs are processed instantaneously. While many companies are able to process opt-out requests quickly (in a few days time), that is not by any means the whole story. Retailers and other marketers have many logistical and technological limitations to contend with, especially when faced with scrubbing huge lists of customer information every time a marketing contact occurs. NRF has not changed its position, but our members have overcome great hurdles to bring their systems and processes up to speed and are currently honoring the ten-day opt-out deadline.

It is now imperative that we argue that the new, three-day deadline creates an undue and unexpected burden on e-mail marketers, without accruing much additional benefit for consumers. The logistics of e-mail advertising campaigns are complex. The current practice of many retailers involved in e-mail marketing is to pull the list of customers that they intend to contact well in

[6] Comments of the National Retail Federation, April 20, 2004

advance of an e-mail campaign and the campaign itself can last for several days. In many cases, such campaigns must also be coordinated between several parties or divisions within a company and often include a third party e-mail service provider (ESP). Furthermore, a large company's suppression list may contain, or grow to contain, several million names that will have to be re-scrubbed each time a campaign is underway. As a result of this new three-day requirement, retailers will have to significantly re-alter the logistics of their e-mail campaigns and, in some instances, cross their fingers and hope that they have had enough time to execute their duties under the Act.

In its request for public comments, the Commission asked for more illustrative examples of the actual process involved in managing opt-outs. The following is a relatively standard procedure used by retailers who comply with the current 10-day standard. Once a week, a retailer creates a file of opt-outs that includes opt-outs processed within the last 24 hours. This file is then forwarded to the third party ESP and is set to scrub recent opt-outs. To make it to that weekly list, an email opt-out request has to be processed to a certain point. New opt-outs are scanned once a day, and there may be additional batch jobs to update the mainframe databases. However, if systems are backlogged in their batch processing, it may take more than a day for the opt-out flag on a particular email address to appear on the mainframe, then another day or more for that flag

to make it down to the database that a retailer may use for selecting customer segments for an e-mail campaign.[7]

NRF's main concern is that even minor delays in processing an opt-out will cause retailers to miss the three-business-day window, exposing them to liability under the Act. A medium to large size retailer is processing very large amounts of data every day, of which email preference codes are only a small portion. While the Commission cites several assertions by a firm called "Go-Daddy" to support its determination that three days is the appropriate amount of time to honor an opt-out, we believe that these real-time capabilities are not possessed by most e-mail marketers and, at the very least, the new opt-out deadline will create hardships and require substantial financial investments over the short term. The proposed three-day deadline could also mean significant liability exposure for legitimate e-mail marketers who want to honor opt-out requests in a timely manner and have successfully complied with the existing ten-day regime. Further, constant list scrubbing may also get in the way of highly time-sensitive marketing such as holiday promotions, limited time offers, or price wars.

Finally, as we have stated before, legitimate e-mailers do not use or abuse the ten- day opt-out period to send voluminous quantities of e-mail to their customers. On the contrary, retailers, and businesses of all types, know that the best customer is a happy customer. The Commission has noted concern for consumers' privacy as a rationale for shortening the opt-out period, and we

[7] Customers are often "segmented" to create targeted, more effective advertising campaigns.

acknowledge that e-mail may slip through during the current ten-day lag time. However, consumers are typically alerted to the number of days that it will take to process an opt-out and retailers report few if any complaints from customers in the interim. In fact, even with the shorter three-day standard, e-mails are going to slip through. This is most likely to happen during sales or the holidays when promotions are being pushed daily to consumers. We hope that the Commission will consider the increased costs and burden that three-day processing will place on legitimate business, while generating little real protection for consumers. As we have continuously maintained, only illegitimate spammers, not legitimate brand-name businesses, use abusive and deceptive practices when marketing to consumers.

The Duration of Time That a Sender Must Honor an Opt-Out

The Commission indicated that it has determined not to propose a time limit on the duration of an opt-out. NRF urges the Commission to reconsider this position because e-mail addresses “churn” regularly. Whether consumers change jobs, abandon Internet based accounts, or change ISPs, they are regularly changing their e-mail address. Over time, the list of e-mail opt-outs that a company maintains will grow and many of these e-mail addresses will become non-functional. However, due to perpetual nature of the current opt-out, companies will be required to carry the expense of scrubbing lists against thousands, possibly millions, of non-functional addresses.

As the Commission notes, unlike the phone numbers on national do not call list, there is no reliable source for churned or non-functional e-mail addresses. Limiting the duration to under two years or, preferably, eighteen months, would significantly reduce the expenses associated with scrubbing against inoperative e-mail addresses. This time limit will also insure that individuals who obtain reassigned e-mail addresses will not be opted-out of receiving commercial e-mail that they may wish to receive. Persons with functional e-mail addresses whose addresses re-enter sender lists after an eighteen month period has run can simply renew their opt-out requests as appropriate.

With this in mind, it would not be unreasonable for the Commission to exercise its rulemaking discretion in this area. We believe that it is within the spirit of the CAN Spam Act to make this necessary adjustment because, without it, suppression lists are going to become behemoths of inaccurate information that will become increasingly costly for businesses to manage. Further, for the millions of consumers with re-assigned e-mail accounts, CAN Spam will become a de facto opt-in regime – one that was not contemplated or endorsed by Congress.

Conclusion

The National Retail Federation appreciates the time and effort that the Commission has put into its CAN-Spam related studies and rulemakings. Overall, the Commission has done a good job in the current NPR; however we remain critically concerned about the reduction in the number of days allowed to

process an opt-out from ten business days to three. As the Commission is probably aware, NRF was highly involved in the lobbying efforts in favor of the CAN-Spam Act during the legislative process on Capitol Hill. At that time, the bill's authors assured us that by designating a base-line ten-day standard accompanied by flexibility for the Commission, we would be given the opportunity to extend the opt-out period during the rulemaking process. We did not foresee a shortening if this period. Indeed, as most businesses argued in their ANPR submissions, *more than* ten days is considered a more appropriate and less onerous standard for legitimate e-mail marketers.

Accordingly, NRF and its members were very surprised to see the new three-day opt-out requirement in the current NPR. We urge the Commission to take a second look at this requirement, and return the number of days, at the very least, to ten. Our members have worked extremely hard to streamline their opt-out processes over the last year and a half. This new three-day rule will pose an undue burden on businesses and require costly system changes and upgrades. It is our judgment that the CAN-Spam Act was not meant to discourage the legitimate use of marketing e-mail, only to make the senders more responsive to the wishes of their customers who may wish to opt-out. We believe the new deadline does not advance this goal, as we have seen few if any customer complaints about the current timeframe.