



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

CAN-SPAM ACT RULEMAKING, PROJECT NO. R411008

**Comments of
DOUBLECLICK INC.**

June 27, 2005

INTRODUCTION

As a leading provider of email delivery technology and an active participant in many industry groups, DoubleClick is well-positioned to discuss the implications of the CAN-SPAM Act for legitimate marketers. DoubleClick's email clients send consent-based promotional messages, transactional messages (such as account statements, airline confirmations, and purchase confirmations); email publications; affinity messages; and relational messages. We and our clients are eager to keep spam from filling consumers' Inboxes and obscuring our clients' emails, which are messages that consumers want to receive.

DoubleClick and our clients applaud the Commission's efforts in compiling thoughtful and comprehensive questions in its Notice of Proposed Rulemaking ("NPRM"), which are obviously designed to provoke considered responses. Except for a few key areas, we believe that the NPRM provides clear and appropriate guidance for legitimate marketers. Consequently, we are restricting our comments to those areas. We have actively solicited and received input from our clients and these comments also reflect their points of view.

OPT-OUT PROCESSING PERIOD

The NPRM proposes to reduce to three (3) business days from ten (10) the time period in which a sender must process a request from a consumer to stop receiving commercial messages from that sender. We have seen no evidence that legitimate marketers have abused the 10-day processing period to bombard recipients with unwanted commercial messages, and are at a loss to understand why the Commission thinks such a change is necessary.¹

We believe that 10 business days *is* a reasonable and appropriate time frame for processing such "unsubscribe" requests. We believe that marketers that cannot currently meet this deadline should invest in technologies to enable them to do so. Reducing the time period, however, would be problematic for legitimate email marketers that have multiple databases and function in a highly decentralized environment, because of the time, effort and risks associated with synchronizing several databases.

Our clients, who are committed to complying with consumer requests to stop receiving commercial emails, have provided us with significant feedback on the Commission's proposal and have unanimously stated that they support the 10-day opt-out requirement in the CAN-SPAM Act. However, they cautioned that a reduction in the time period for processing opt-out requests to three business days would result in significant logistical and financial burdens to businesses, and could expose consumer data to inadvertent security risks. We offer the following information for the Commission's consideration in support of our position that the reduction in processing time is unwarranted and would impose unreasonable burdens upon businesses.

¹ We note that such activities would be contrary to marketers' business interests as their goals are to keep their current customers happy, acquire new customers by offers of quality products, and lure former customers back by respectful treatment. It serves no logical purpose for legitimate marketers to annoy or frustrate people that no longer wish to buy from them.

Logistical Burden

From a logistical perspective, many companies have large suppression lists that can exceed a million names. These large suppression lists significantly increase the processing time for opt-out requests. In addition, many companies do not use real-time databases, therefore making compliance with the three business day opt-out processing period logistically impossible because of the time it takes to manually transfer suppression lists, synchronize several databases and scrub multiple suppression lists.

For example, one client indicated that every evening it receives the list of consumer opt-outs for that day. The data are then transferred to the client's marketing database vendor on a daily basis during the work week, and a query database is created every Sunday evening. Therefore, such a client would need at least 6-7 days to process an opt-out request. It would require a significant investment for the client to completely overhaul its infrastructure in order to comply with the proposed three business day rule.

Another client indicated that it performs multiple email marketing campaigns and therefore has to scrub every suppression list individually before emails are deployed. It currently takes the client at least 48 hours just to queue up and email. Consequently, it would be impossible for this client to scrub all of its lists the day before launch and then transfer the lists to the broadcast vendor for deployment within a three-business day period.

Financial Burden

Large companies that have multiple mailings would also have to incur significant additional expenses to ensure that the manual export/import of lists can occur multiple times in a week in order to comply with a three-business day opt-out time period. This would involve developing new processes and additional programming to ensure daily synchronization of their various systems and to incorporate a daily refresh in their data warehouse and marketing databases.

In addition, our clients are currently in compliance with the 10 business day opt-out processing period under the CAN-SPAM Act, but a large number of these companies presently do not have the resources to process opt-out requests within a three-business day period. These companies would have to hire additional full time staff solely to monitor "unsubscribe" requests and remove consumers' email addresses as they arrive so that they could meet the proposed three-business day time frame. As a result of these additional expenses, companies would have to charge more in order to meet the increasing costs of doing business.

Security Risks

Our clients have also indicated that they are extremely concerned about protecting consumer data and believe that a reduction in the opt-out processing period would result in increased security risks. For example, one client stated that it had adopted extensive security measures to safeguard consumer data, and had chosen not to automate opt-outs but to process "unsubscribe" requests manually instead. A decrease in the opt-out processing period to three days would result in such a company having to sidestep its stringent security procedures to ensure that opt-out requests were processed faster.

In addition, decreasing the opt-out processing period would result in an increase in the number of times a suppression file is transferred, which then increases the number of handling points and the chance for data leaks and security and privacy violations. Because of the effort involved in tracking and managing multiple opt-out lists, some marketers send their email lists to third party service bureaus where all the opt-out suppressions are carried out. If the opt-out processing period were decreased, the frequency of such transfers would increase, and so would the concomitant risks that the personal data of consumers could be lost or stolen during the list transfers.

Lastly, as previously noted, we have not come across any evidence that suggests that the 10 business day opt-out period has been abused and that companies are bombarding recipients with commercial emails during the 10 business days after a consumer opts out.

Therefore, we strongly urge the Commission *not to reduce the 10-business day opt-out processing period* currently prescribed under the CAN-SPAM Act.

DEFINITION OF “SENDER”

In the NPRM, the Commission seeks comment on whether the proposed definition of “sender” clarifies who will be responsible for complying with the CAN-SPAM Act when a single commercial email contains content from multiple advertisers. Additionally, the Commission asks whether the proposed definition should be modified.

The proposed definition identifies three criteria for determining the “sender” of a commercial email message in instances of multiple senders:

- (1) Control of the content of the message,
- (2) Determination of the email addresses to which the message is sent; or
- (3) Identification in the “from” line as the sender of the message.

Additionally, the proposal would require that the designated sender be the only entity that possesses *any* of these three characteristics.

For the reasons set forth below, we fully support criterion (3) and believe that criterion (2) requires further clarification. We believe that criterion (1) should be removed, or, at a minimum, clarified.

We submitted comments on the issue of “multiple senders” in response to the ANPR (69 Fed. Reg. 11776, March 11, 2004) and reiterate and expand on that position. Consistent with criterion (3), we believe that the entity whose “brand” appears in the “FROM” line of a commercial email message should be viewed as “the” sender in situations where there are multiple advertisers in a commercial email. Adopting this approach would make it easier to honor recipients’ requests not to receive any more commercial messages from that sender.

With respect to criterion (2), we believe that the proposed rule requires additional clarification. The rule and comments the Commission offers provide no guidance on what constitutes “*determination* of the email addresses to which the message is sent.” “Determination” could mean anything from performing routine list hygiene to asking a partner company in a co-branded email

offer to send the promotion to the partner’s “best” or “most responsive” customers, without knowing who those customers are or what their email addresses might be. “Determination” could also mean selecting the email addresses from among one’s own customers.

We believe that a more reliable criterion is to identify which of the various advertisers in the message “owns” the commercial relationship with the recipient. (In our earlier comments, we described it as the entity that “owns” the email address and the domain that deploys the email list.) The entity that has the relationship with the recipient should be responsible for fulfilling the obligations that CAN-SPAM imposes upon a sender (i.e., listing its postal address, providing a functioning mechanism for unsubscribing, processing requests to stop receiving commercial messages).²

We do not support criterion (1) because there has been no guidance provided as to what “control” means. It is arguable that every entity whose product is promoted in a commercial email could be considered to “control” the content (e.g., by requiring the use of its trademark, logo, etc.). Under the proposed criterion, if more than one advertiser could be said to “control” message content in any way, then none of the multiple advertisers would be eligible for single-sender status. As we stated in our response to the ANPR, if every entity whose product was promoted in a commercial email were to be treated as a “sender,” companies would have to exchange suppression lists, which would present a security nightmare. These lists would be coveted by spammers and any security breach during transmission or transfer among marketers would mean more spam to recipients that specifically expressed a desire to not receive more commercial emails. Each company would have to list its postal address in every message, cluttering the available message space. Not only would this be problematic aesthetically, but substantively, as the promotions would increase confusion as to which address belonged to which product. Confusion relating to unsubscribing would also increase. It would be difficult to make it clear to recipients which opt-out mechanism covered which advertiser. If a recipient sought to unsubscribe from future mailings of a marketer that did not already have the recipient’s email address on its list, the marketer would have to create and maintain separate suppression databases containing email addresses that were not associated with any other data.

If criterion (1) is not removed, we strongly recommend that the Commission provide further clarification regarding the meaning of “control,” and that it should require more involvement in the content of the message than mere approval of the particular advertiser’s part of the message.

In summary, we believe that it is the entity whose “brand” appears in the “FROM” line, which owns both the domain that deploys the email campaign and the email “relationship,” that should be considered “the” sender in a multiple advertiser email, and be responsible for complying with CAN-SPAM.

² Choosing the criteria should not be considered “determining” the email addresses to which the message is sent if the entity choosing the criteria does not “own” the relationship with the recipients.

FORWARD TO A FRIEND

The Commission relies on the structure of the definition in Section 7702(12)³ with regard to the word “induce” for its interpretation that the use of embellished marketing language can constitute an “induce[ment]” to a consumer-recipient to forward a commercial message to another consumer, and thereby cause the message that contained the embellished language to fall within the requirements of CAN-SPAM. (Compare the language cited as an example in footnote 178 of the NPRM with the language contained in footnote 180.) We respectfully submit that the Commission’s interpretation of the definition of “procure” as applied to the word “induce,” neither furthers the purposes of CAN-SPAM, nor offers sufficient guidance to industry or consumers.

The Commission cites Webster’s New International Dictionary 1269 (2nd ed. Unabridged 1938) in footnote 177 of the NPRM for the definition of “induce”: “to lead on to; to influence; to prevail on; to move by persuasion or influence.” The Commission then *broadens* the definition of “induce” to “encourag[ing] or prompt[ing] the initiation of a commercial email” and applies it to language that the Commission has determined would qualify as “inducing” or “procuring” a consumer to initiate a commercial message under CAN-SPAM. (See footnote 178: “For example, an email 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! To share this message with a friend or colleague, click the ‘Forward Email’ button.’”) We respectfully submit that such embellished marketing language does not rise to the level of “persuading or influencing” a consumer to forward the message. In fact, this embellished language actually gives a consumer a better idea of what her/his friend might receive if s/he forwarded the message than the example the Commission offered in footnote 180 of a link – either in an email or at a website – that simply says, “Email to a friend,” which the Commission cites as an example of language that would not satisfy the definition of “induce.”

The Commission’s position offers businesses no real guidance at all. What language constitutes *de minimis* persuasion, and what constitutes an inducement? We respectfully suggest that Congress did not have “Forward to a Friend” scenarios in mind when it drafted the definition of “procure” and did not intend that instances where consumers receive commercial emails that contain a mechanism for forwarding, but do not receive any benefit for forwarding the message, should be subject to CAN-SPAM. Although the original sender may have “prompted” or “encouraged” the original recipient to forward the message, we do not believe that this “prompting” should meet the definition of “procure” in this situation. If the Commission were to maintain its position as outlined in the NPRM, the original sender, who would have had no access to the email addresses of the additional recipients and could not “scrub” the email addresses against its suppression list under current circumstances would be required to collect and store more information about consumers – the additional recipients’ email addresses – than they currently do. We do not think that the purposes of the law would be served by this, as the senders could not send any subsequent messages to these recipients anyway (they would not have the email addresses, after all), and these situations, consequently, could not be the source of the unwanted email that instigated the passage of CAN-SPAM.

³ “The term ‘procure’, when used with respect to the initiation of a commercial electronic mail message, means intentionally to pay or provide other consideration to, or induce, another person to initiate such a message on one’s behalf.”

Requiring that consumers receive some sort of benefit for forwarding commercial emails in order for those forwarded messages to fall within the ambit of CAN-SPAM would provide clear guidance for both businesses and consumers. Accordingly, we respectfully urge the Commission to reconsider its position.

TRANSACTIONAL OR RELATIONSHIP MESSAGES

In the NPRM, the Commission poses several questions about clarifying the definition of a “transactional or relationship” message. We are restricting our comments to the three issues identified below.

Receipt of future newsletters or other electronically delivered content based on a transaction with a sender

The Commission has asked, “Where a recipient has entered into a transaction with a sender that entitles the recipient to receive future newsletters or other electronically delivered content, should email messages the primary purpose of which is to deliver such products or services be deemed transactional or relationship messages?”

We believe that the above question was previously answered in the Commission’s final Rule regarding the “primary purpose” of an email message. In its Statement of Basis and Purpose, the Commission concluded that the determining factor is whether such an email is sent “pursuant to a subscription, and if so, it will be a transactional content email, and therefore will not be covered by the CAN-SPAM Act even when the periodical contains advertisements.”⁴ We support this position and believe that it answers the Commission’s question, as any transaction that entitles a recipient to receive future newsletters is essentially a subscription.

Legally mandated notices

The Commission asks whether an email message that contains only a legally mandated notice should be considered a transactional or relationship message. We believe that such notices should be considered a transactional or relationship message. Indeed, a legally mandated notice is an example of an instance where the inclusion of an unsubscribe mechanism in the message might be deceptive – if it gave the consumer the incorrect impression that s/he could stop getting messages that s/he must continue to receive.

Legally mandated notices do not appear to fit any of the categories currently enumerated under the definition of transactional or relationship message. We believe that these types of notices do indeed have a transactional or relationship purpose and the fact that they do not currently fit a

⁴ “The starting point to analyze the impact of CAN-SPAM on a periodical is to consider whether it is sent pursuant to a subscription. When a recipient subscribes to a periodical delivered via e-mail, then transmission of that periodical to that recipient falls within one of the ‘transactional or relationship message’ categories. Specifically, it constitutes delivery of ‘goods or services * * * 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.’ This is true regardless of whether the periodical consists exclusively of informational content or combines informational and commercial content” [footnotes omitted]. 70 Federal Reg. 3118, January 19, 2005.

category enumerated within the Act should not mean that they should be exempt from regulation. Rather, we propose that the Commission exercise the authority granted to it under section 7702(17)(B) to expand the categories of messages that are treated as a transactional or relationship message.

Messages sent to employees

The Commission asks whether any messages, including all offers of employee discounts or similar messages, sent by an employer to an employee should qualify as transactional or relationship messages. The Commission states that it does not believe that email messages sent on behalf of third parties, even with the permission of the employer, qualify as transactional or relationship messages.

With respect, we disagree with the Commission's interpretation on this issue and support the view, also held by other industry groups, that an employee's email account is in reality the account of the employer. The employer in such instances is both the sender and the recipient of the email message. Most businesses are not set up to provide or honor opt-outs for the email messages that they send to their employees and requiring them to do so could create an administrative and significant financial burden. Furthermore, we are not aware of any record of any problem regarding email sent in this context. For these reasons, we urge the Commission to clarify that an employee does not have the ability to opt out of any email messages sent by an employer.

TIME LIMITS FOR OPT-OUTS

In the NPRM, the Commission poses questions regarding the effective duration of opt-out requests. The Commission asks both "Should there be time limits on the duration of opt-out requests?" and "Does the CAN-SPAM Act give the Commission authority to limit the time opt-out requests remain in effect?" We believe that the answers to these questions are "No," and "Yes," respectively.

We do not believe that a consumer's choice should have an expiration date. If a consumer asks to be removed from a commercial email list and subsequently changes her/his mind, s/he can re-subscribe to that mailing list. In those instances where new people succeed to existing email addresses where the original owners have opted out of a sender's commercial email list, we believe that the new owner of the email address should have to add her/his email address to the sender's mailing list before the marketer should be able to send commercial messages to that email address again.

We believe that Section 7711(a) gives the Commission the authority to regulate the duration of opt-out requests. The Commission can limit the duration of a consumer's choice to stop receiving commercial emails from a sender, or the Commission can promulgate a rule that provides that a consumer's choice to opt out from receiving commercial emails from particular senders does not expire.

COMMENTS ON PROPOSED SECTION 316.5

This proposed rule prohibits senders or any person acting on a sender's behalf from imposing any fee on a recipient for honoring the recipient's request to stop receiving commercial emails from the sender. We wholeheartedly agree with this concept, and admit that we have not encountered a situation where a sender attempted to charge a recipient a fee to honor the recipient's request to "unsubscribe" from the sender's commercial email campaigns.

With regard to this proposed rule, the Commission asks if its "proposal regulating how recipients submit opt-out requests [should] be changed in any way?" We believe that there is, in fact, no need for this rule unless the Commission has received complaints from consumers that a sender has attempted to impose a fee to honor a recipient's request to stop receiving commercial emails from the sender. As noted above, we have never encountered such a situation. If such situations exist, then we would strongly support that portion of the proposed rule. With respect to the rest of the proposed rule – that no sender or "any person acting on behalf of a sender may require that any recipient ... provide any information other than the recipient's electronic mail address and opt-out preferences, or take any other steps except sending a reply electronic mail message or visiting a single Internet Web page" in order to opt out – we would respectfully urge the Commission to omit this portion for the following reasons:

We believe that there are some instances where it is appropriate for a sender to require some authentication before processing an unsubscribe request. For example, some households share email addresses, and one member may sign up for mailings at a site that might be considered "sensitive." (A "sensitive" site could be one that offers information or products related to health or medical conditions, relationships, etc.) Friends know each other's email addresses, as well, and could also know some of the sites to which their friends have subscribed. Requiring only an email address to gain access to the menu of subscription options⁵ of a sensitive site could result in someone other than the subscriber learning to what lists or promotions the true recipient subscribed, because Web-based menus of subscription options usually need more than a single Web page to authenticate a subscriber (e.g., having subscribers enter a password in addition to their email address). In addition, Web-based menus of subscription options often contain more personal information than simply an email address and the subscriber's opt-out preferences. By restricting to an email address and opt-out preferences the information that a recipient must provide or that only a single Internet Web page can be visited, the Commission is overlooking situations where authentication is appropriate, and imposing too rigid a scheme.

There is also no definition of "Web page" in CAN-SPAM or in the Commission's proposed rules. Consequently, the proposal offers insufficient guidance on what processes may or may not violate CAN-SPAM.

For these reasons, we respectfully urge the Commission not to promulgate Section 316.5, or to do so only with respect to the charging of a fee.

⁵ See §7704(a)(3)(B) of CAN-SPAM.

VALID PHYSICAL POSTAL ADDRESS

We support the Commission’s proposal to define a “valid physical postal address” as the “sender’s current street address, a Post Office box the sender has registered with the United States Postal Service, or a private mailbox the sender has registered with a commercial mail receiving agency that is established pursuant to United States Postal Service regulations.” §316.2(p). As we noted in our earlier comments, legitimate marketers make use of P.O. Boxes or commercial mail drops to insure that responses to campaigns are directed to the appropriate location. (Individual advertising campaigns can have their own P.O. Boxes or mail drops assigned to them.) This makes processing more efficient.

The use of P.O. Boxes or commercial mail drops will *not* make it more difficult for law enforcement agencies to find the companies generating these commercial email messages. If the purpose of this provision in CAN-SPAM were to identify where companies could be served with legal process, then the law would have required the listing of a sender’s corporate headquarters or legal “place of doing business.” Law enforcement agencies will not have any difficulty in locating legitimate marketers, whether the address contained in the marketers’ commercial email messages is a P.O. Box or a commercial mail drop.

ADDITIONAL COMMENTS

We believe that a drafting error exists in CAN-SPAM and that the Commission should exercise its discretionary authority to correct it.

Section 7704(a)(3)(A)(i)⁶ provides that a sender must honor a request from a recipient to remove from the sender’s commercial email list the email address at which the recipient *received* the commercial message from the sender – not the email address to which the commercial message was *sent*. Many consumers maintain multiple email accounts and often sign up to receive messages at one account and have those messages automatically forwarded to another account. This means that the consumer will give a sender the email address for Account A, but the consumer will receive the sender’s commercial message in Account B. If CAN-SPAM were to be followed literally, this could establish a frustrating loop for both the consumer-recipient and the sender if the consumer wished to remove her/himself from the sender’s email list. If the recipient asks for removal of her/his Account B address from the sender’s list (i.e., the email address at which the message was received), the sender will, of course, suppress all commercial messages for Account B, even if the sender does not already have Account B on its email list. But the sender will still have listed as active the email address for Account A, the one that the consumer originally added to the sender’s commercial email list. So the sender will continue to send commercial email to Account A, which will then be automatically forwarded to Account B. The consumer will con-

⁶ “It is unlawful for any person to initiate the transmission to a protected computer of a commercial electronic mail message that does not contain a functioning return electronic mail address or other Internet-based mechanism, clearly and conspicuously displayed, that--

(i) a recipient may use to submit, in a manner specified in the message, a reply electronic mail message or other form of Internet-based communication requesting not to receive future commercial electronic mail messages from that sender at the electronic mail address *where the message was received*; [emphasis added]”

tinue to receive the sender's commercial messages at Account B, even though the consumer has requested that no more of the sender's commercial messages be sent to Account B and Account B has been suppressed from the sender's email list. Consequently, despite the fact that the sender has fully complied with the CAN-SPAM requirements for honoring requests to "unsubscribe," the consumer-recipient will continue to receive messages that s/he does not want.

This could not have been the result that Congress intended when it passed CAN-SPAM, and, we respectfully submit, the wording of §7704(a)(3)(A)(i) is, arguably, most likely a drafting error. We urge the Commission to clarify and correct this error pursuant to the authority granted to it in Section 7711(a) of the law.

We appreciate the opportunity to submit comments on behalf of our email technology customers.