

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

**COMMENTS  
of the  
DIRECT MARKETING ASSOCIATION, INC.**

**Responding to the Discretionary Rulemaking Request for Public Comment**

**CAN-SPAM Act Rulemaking, Project No. R411008**

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## **I. Introduction, Background and Summary**

The Direct Marketing Association (“The DMA”) is pleased to submit these comments in response to the Federal Trade Commission’s (“FTC” or “Commission”) request for public comment on its discretionary rulemaking under the CAN-SPAM Act (“the Act”), 16 C.F.R. Part 316; 70 Fed. Reg. 25426, May 12, 2005. The DMA also submitted comments on the primary purpose notice of proposed rulemaking, 69 Fed. Reg. 50091, Aug. 13, 2004, and the advance notice of proposed rulemaking, 69 Fed. Reg. 11776, March 11, 2004.

The DMA is the largest trade association for businesses interested in direct, database, and interactive marketing and electronic commerce. The DMA represents more than 4,000 companies in the United States and 53 other nations. Founded in 1917, its members include direct mailers and direct marketers from 50 different industry segments, as well as the non-profit sector. Included are catalogers, financial services, book and magazine publishers, retail stores, industrial manufacturers, Internet-based businesses, and a host of other segments, as well as the service industries that support them.

DMA member companies have a major stake in the success of electronic commerce, and are among those benefiting from its growth. The DMA’s leadership extends to the Internet and electronic commerce through its subsidiaries the Internet Alliance and the Association for Interactive Marketing.

The DMA appreciates the Commission’s continued efforts in implementing the Act in a manner that provides a means for businesses to understand their obligations under the Act and the ability to structure e-mail to satisfy the Act’s requirements. The DMA has comments in several areas that it believes can provide further clarification and means of satisfying the Act’s

requirements. Specifically, The DMA recommends that the Commission, in implementing its final rule should:

- ▶ Maintain the time a sender has to honor an opt-out request at 10 business days;
- ▶ Clarify what constitutes “control” of the content of a message under its proposed criteria for designating a single sender in an e-mail with advertisements from multiple senders;
- ▶ Determine the entity that is the sender for two specific factual scenarios with advertisements from multiple sellers:
  - Where the recipient has provided permission to receive the e-mail, and
  - E-mail sent pursuant to a subscription with purely commercial content;
- ▶ Allow flexibility as to the means of providing opt-outs;
- ▶ Not treat sellers as senders in forward-to-a-friend messages;
- ▶ Provide a five-year duration to maintain opt-out requests; and
- ▶ Not subject debt collection e-mail to the opt-out requirements of the Act.

Set forth below in more detail is an analysis of each of these items.

## **II. The Commission Should Maintain the Time that a Sender has to Honor a Recipient’s Opt-Out Request at 10 Business Days**

The Commission proposes to shorten the time for effectuating an opt-out from 10 business days to three business days. The Commission’s basis for this proposal is twofold—that “many commenters are already able to process opt-out requests virtually instantaneously” and that the purpose of the opt-out is to protect recipients from unwanted commercial e-mail. 70 Fed. Reg. at 25444. The DMA submits that, even though some entities may be able to process opt-outs instantaneously, many entities are simply incapable of meeting a three-business-day opt

out—especially when using an outside e-mail vendor. Moreover, a time period of three business days would not protect recipients from unwanted commercial e-mail any better than the current 10-business-day period. Thus, to shorten the timeline to less than 10 business days would place a significant burden on large organizations with multiple business units without any countervailing benefit to the public.

As indicated in The DMA’s comments filed in response to the advance notice of proposed rulemaking, businesses often contract with third parties to conduct their e-mail campaigns. Coordinating the sender’s current suppression list and recipient list in a campaign can be a complicated process involving multiple parties. For instance, even before a file can be sent to a vendor, senders must determine the files to be used (including the population to be marketed), run suppressions to clean that file, and perform quality checks to ensure that the opt-outs have been captured. Vendors, with their own set of quality control procedures, typically require a clean list from the sender at least five business days prior to the first distribution in order to upload and process the database and perform quality checks of populated test messages.

A similar challenge exists when there are multiple senders of an e-mail message. Under a three-business-day opt-out process, it would be impossible to scrub a single list against each company’s master opt-out files. In working to meet the existing 10-business-day requirement for multiple sender e-mail, companies have, in some cases, used a process where third parties scrub the targeted list. Once the e-mail addresses are suppressed, the list is then transferred to the firm that will transmit the message. Three business days would not allow enough time to set up, test, and execute such campaigns.

Other operational challenges favor a 10-business-day period. For example, the distribution of e-mail in a particular campaign may occur over several days to ease the strain on

fulfillment sites and customer relations departments. A three-business-day opt-out would effectively prevent this “rolling” distribution of e-mails because opt-outs could not be processed once the master file has been delivered to the vendors.

Illustrating the complexity of honoring opt-outs is the chart and accompanying description in Attachment 1, which details the opt-out processes of a DMA member. This chart reflects three primary procedures: (1) capturing and processing the consumer opt-out by the sender; (2) preparing an e-mail file whereby the potential recipients for a commercial e-mail message are identified and run against the company’s opt-out suppression list; and (3) preparing the scrubbed e-mail file for distribution by uploading, testing, and distributing test messages, then sending the final message. As reflected in the chart, it may take more than one week just to properly upload, process, and test a campaign once a scrubbed list is provided to a vendor.

As this chart shows, a leading reason that the opt-out execution process takes as long as it does is the presence of multiple quality checks along the way. These quality checks, which take time, are a good thing because they reinforce the robustness of compliance and, hence, the policy goals of the proposed rule, in that they serve the interest of consumers in having their opt-out preferences accurately captured. Consequently, retaining the existing 10-business-day period for executing opt-out requests, because it permits more thorough quality control, is an affirmative benefit to consumers.

Beyond the operational impracticality of a three-business-day time frame, The DMA believes that there is no basis for the Commission’s conclusion that the time frame needs to be reduced in order for recipients to be protected from unwanted e-mail. There is no record of abuse nor any indication that 10 business days is not sufficient to consumers. The Commission itself indicates that there is no evidence in the record to demonstrate that “fears of ‘mail-

bombing’ . . . are well-founded.” 70 Fed. Reg. at 25444. In fact, in most cases, the amount of time between sending commercial e-mail messages is greater than 10 days, so such e-mail would not be sent to the recipient irrespective of the opt-out time frame. Advertisers do not desire to send any messages to individuals who have indicated they do not wish to receive them; rather, their concern is an operational concern, to ensure that organizations are not liable in the event an e-mail is sent in less than the time duration.

For these reasons, The DMA recommends that the Commission maintain the number of days at 10 to provide a workable time frame to allow for suppression.

### **III. The Commission Should Clarify What Constitutes Control of the Content of a Message Under the Proposed Criteria for Determining the Sender of a Message**

The DMA believes that, with further refinement, the criteria proposed to designate the sender of a message will provide meaningful guidance for advertisers to structure their messages. The Commission enumerates three elements, any one or more of which can determine the sender of a commercial e-mail message in situations when more than one person’s products or services are advertised or promoted in a single message: (1) the entity controls the content of the message; (2) the entity determines the e-mail addresses to which such message is sent; or (3) the entity is identified in the “from” lines as the sender of the message. The DMA believes that these criteria to designate one advertiser as a sender have the potential to be very useful in providing predictability to advertisers.

The Commission, however, also would impose an additional limitation on designating a single sender: if one entity is a sender based on any of these categories, it may be the sole sender only if the other potential senders do not meet any of these categories. This additional requirement raises concerns with respect to “control.” Depending on what constitutes “control,”

in many instances, more than one entity could have some control over the content of the e-mail message. This would limit the designation of a single sender, and would result in continued problems associated with multiple senders in such messages.

In order to avoid this unnecessary result, The DMA suggests that the Commission allow the designation of one sender of a message even in instances where more than one advertiser may have control of the content of the message. Under such a framework, the advertisers other than the one designated as the sender would neither determine the e-mail addresses to which the message is sent nor be identified in the “from” line as the sender of the message. In such situations, the advertisers not designated as the sender would obtain appropriate assurances that the designated advertiser will comply with the sender obligations of the CAN-SPAM Act.

The Commission also should provide guidance as to what is meant by “control” of the content of a message. Control of the content of a message should rest with the entity that has the ultimate authority over the entire contents of a message. The Commission should clarify that control does not include sellers’ provision of advertisement copy or editorial control over the content of a message. In a large portion of commercial e-mail, the advertisers determine the content of their advertisement, as well as the specific placement of an advertisement within a message. Such advertisers, however, do not control the content of other sellers’ advertisements or placements and, therefore, should not be deemed to have control over the content of the e-mail message.

#### **IV. The Commission Should Clarify the Sender of the Message in Two Unique Factual Situations**

In addition to specific criteria for designating the sender of a commercial e-mail message, the Commission should indicate that the seller that is the sender of a message in two specific

scenarios: (1) commercial e-mail sent pursuant to permission from the recipient, and (2) commercial e-mail sent pursuant to subscription. Commission guidance in these specific areas would provide sellers with certainty regarding the structure for these prevalent types of messages.

A. *The Commission Should Adopt the Criteria Providing Clarity as to the Sender of a Commercial E-Mail Message Set Forth in a Staff Opinion Responding to a Specific Factual Scenario*

On March 8, 2005, Commission staff responded to a request for clarification pursuant to a request of The DMA to provide guidance as to the “sender” under the Act for e-mail messages when a single message consists of one or more advertisements from different companies and the recipient had provided permission to receive the e-mail message. The DMA requests that the Commission formally adopt the interpretation set forth in the staff opinion.

Specifically, The DMA requested guidance “indicating that each advertiser in single commercial e-mail message is not a ‘sender’ under the following circumstances:

1. the recipient has provided permission to receive the e-mail;
2. the e-mail message contains one or more advertisements from a company other than the one to which the recipient provided consent to send the e-mail;
3. the entity receiving permission follows the requirements of the CAN-SPAM Act for the e-mail, including offering and honoring a request to unsubscribe from further commercial e-mail; and
4. the advertiser does not know who specifically will receive the e-mail, but the advertiser does know its advertisements will be included in e-mail to recipients who have provided general interest in receiving such e-mail.

In such circumstances the sender of the message would be the entity that received permission from the recipient to transmit the message.”

The Commission indicated with respect to this hypothetical that each seller in such e-mail should not be considered a “sender” for purposes of CAN-SPAM compliance and enforcement if:

- (1) At least one of the sellers who contributes commercial content to the e-mail message receives the recipient’s affirmative consent, after clear and conspicuous disclosure that additional sellers may contribute advertising content to subsequent messages arriving from that consent; and
- (2) the seller that has received the recipient’s affirmative consent must satisfy the Act’s definition of “sender”—“a person who initiates such a message and whose product, service, or Internet web site is advertised or promoted by the message.” The staff was clear in its letter that its opinion does not apply to scenarios where the party who receives affirmative consent to receive e-mail messages is not a “sender.”

The DMA believes that, in addition to whatever specific criteria the Commission adopts based on its proposal, the Commission also should specifically adopt the criteria for the specific factual scenario set forth in the staff letter. This would ensure that there are no situations with this specific factual scenario that would result in multiple senders. This factual scenario is an extremely important and widely used business practice used by legitimate e-mail marketers and met with very favorable response by consumers. The DMA does not believe that Congress intended for advertisers and other legitimate actors that are not attempting to avoid the law and who honor consumer opt-outs to become senders for every e-mail where the advertiser’s product or service is advertised or promoted. This is particularly the case when the e-mail is sent pursuant to affirmative consent following clear and conspicuous disclosure.

*B. The Commission Should Provide that There Is Only One Sender in E-mail Sent Pursuant to Subscription with Content that is Purely Commercial*

In addition to the criteria set forth for determining who is the sender in the context of a multiple-advertiser message, the Commission should clarify that there is only one sender in e-

mail sent pursuant to subscription that is purely commercial. The Commission indicated in both the “primary purpose” rule and in this proposed rule that a message sent pursuant to subscription with exclusively commercial content is a “commercial” message. In contrast, the Commission indicated that if the message does not contain purely commercial content, the message is transactional. Thus, in the many instances where there is solely commercial content, there still could be multiple senders of such an e-mail, and the corresponding difficulties that result from such a scenario.

In messages sent pursuant to subscription, the Commission should allow the entity with the subscription relationship with the recipient to be designated as the sender. The definition of “sender” is defined in the Act as a person who initiates the message and whose product or service is advertised or promoted in the message. The Commission should affirm that one of the services advertised or promoted in a subscription-based e-mail message is inherently the subscription itself. The result of such an approach would be to prevent each of the advertisers in a subscription-based e-mail with purely commercial content from being treated as a sender under the Act. This is consistent with the intent of the Act, and would allow consumers to receive e-mail that they have asked for. Otherwise, the complication that surrounds having multiple senders could continue to exist in this scenario.

The Commission should allow such a designation in the subscription context irrespective of the three criteria proposed by the Commission. Otherwise, there may be instances when the entity that has the subscription relationship sends the messages but would not be able to be designated as the sole sender under the proposed criteria. For example, it could be that the e-mail addresses are provided by the subscription service and the content is provided by and controlled by a different advertiser. Under the Commission’s proposed criteria, either there

would be multiple senders or the sole sender would be the entity that selects the e-mail addresses. The entity that possesses the subscription should have the ability to be designated as the sender in such situations.

**V. Senders Should Have Flexibility to Provide Means of Opting Out as Long as it is Simple for the Recipient**

The Commission proposes that senders may not require recipients to pay a fee, provide information other than their e-mail addresses and opt-out preferences, or take any steps other than sending a reply e-mail message or visiting a single Internet Web page to submit a valid opt-out request. The DMA supports the intent of the Commission to require that the means of recipient opt-out be simple, require minimal effort, and not require payment of a fee. However, within these confines, The DMA believes that senders should be allowed some flexibility in processing the opt-out.

In many instances, entry of an e-mail address may not provide the certainty and accuracy needed by both senders and recipients. For example, one DMA member collects the customer's account type and account number in order to opt out. The reason for collecting this information is that the suppression system is driven by account numbers rather than e-mail addresses, a structure that creates clarity around the customer's request and ensures greater accuracy in honoring opt-outs. Tracking opt-outs by account also makes it possible for companies to honor opt-out requests as customers change their e-mail addresses—without requiring them to re-submit an opt-out request.

Similarly, some financial institutions, in order to provide customers with complete control of e-mail communications associated with their accounts, require customers to log in to a secure area of a Web site from which they can easily manage their e-mail communications

choices. These authentication measures ensure not only accuracy in opt-outs, but allow recipients to confirm that they still wish to receive transactional messages such as account statements.

## **VI. All Forward-to-a-Friend Messages Should Not be Treated As Commercial E-Mail**

The Commission indicates that sellers in certain “forward-to-a-friend” messages are “senders” under the Act. The Commission reaches this conclusion based on the definition of the term “procure.” The DMA believes that such an interpretation was not intended by Congress. The term “procure” was in the definition of “sender” to prevent allowing what otherwise would be prohibited by the Act. Congress did not want a situation whereby service providers would send the message where an advertiser had received an opt-out and, thus, fall outside the definition of “sender.” There is no indication that Congress had forward-to-a-friend messages in mind when defining “procure.” The “friend” who is sending the message does not have a purpose that is “commercial,” *i.e.*, sent for the primary purpose for that sender to advertise or promote that sender’s good or service, if there is no consideration. Rather, the forwarding of the message is information, to tell their friend about something that might interest them. In addition, unlike spam, when a friend forwards a message, there is a personal connection between the sender and recipient. The Act is not intended to address such transmissions. For this reason, the Commission should indicate that all forward-to-a-friend messages are not commercial e-mail.

Even under the Commission’s interpretation of “procure” that would treat some sellers as senders in forward-to-a-friend messages, the Commission’s analysis produces unnecessary and inconsistent results in distinguishing between Web-based forward-to-a-friend mechanisms and pure e-mail forwarding.

A. *E-mail messages with an explicit statement urging another to forward messages should not be treated as commercial e-mail*

The Commission indicates that in forward-to-a-friend e-mail, even in instances where there is no consideration, the recipient may have been “induced” to forward the message where the sender or initiator would be responsible to provide an opt-out and appropriate disclosures. The Commission’s basis for this conclusion is that every word of the definition of “procure” has to be read to give meaning to the phrase “intentionally to pay or provide other consideration to, or induce,” and that “induce” must mean something beyond consideration.

The DMA disagrees with this conclusion, and believes that all forward-to-a-friend e-mail where there is no consideration or value proposition should not be treated as commercial e-mail. The Commission’s conclusion would require either: (1) that businesses do not encourage that a message be forwarded; or (2) that a business attempt to honor opt-outs prior to the message being forwarded. It is ultimately impossible for businesses to control whether or not a recipient of an e-mail containing the business’ advertisement or promotion forwards such message and to what e-mail addresses the message is forwarded. This result leaves businesses with no choice but to not encourage the forwarding of e-mail with their advertisement or promotion. We believe this is not a result that is in consumers’ interest. Forwarding messages and business encouragement is a primary new form of word-of-mouth advertising in the electronic marketplace and should not be restricted through this rulemaking.

B. *The DMA Supports the Commission’s Conclusion that When a Seller Offers a Mechanism on a Web Site for Forwarding Advertising, the Seller is Engaging in “Routine Conveyance” When Someone Other than the Seller Identifies the Recipients or Provides Their Addresses*

In situations where a Web-based “click-here-to-forward” mechanism is used, the Commission indicates that such conduct would be “routine conveyance” under the CAN-SPAM

Act and, therefore, the seller providing the Web mechanism would not be a sender for purposes of the Act. The DMA supports this conclusion. This is a function that consumers desire. Consumers have embraced this functionality, and there is no record that would support a contrary conclusion. The same policy reasons that the Commission sets forth for this type of message should be followed when e-mail messages are forwarded.

## **VII. The Commission Should Provide a Five-Year Duration to Maintain Opt-Out Requests**

The DMA reiterates its request in comments in response to the ANPRM that the Commission should create a time limit for maintaining opt-out requests. Over time, the list of e-mail addresses of those who have requested not to receive further commercial e-mail will grow to include a large percentage of e-mail addresses that are no longer functional. Suppression of e-mail addresses has operational and monetary costs that increase with the size of the list. E-mail addresses are retired very frequently or recycled and reactivated to other users.

The Commission has determined not to propose such a time limit, and indicated that it is interested in receiving data that would be useful in implementing this provision of the Act. The Commission, in comparing such a duration with the duration that exists under the Telemarketing Sales Rule, cited as the basis for its determination that e-mail marketers' opt-out lists would be far smaller than the 91 million entries on the National Do Not Call Registry and, thus, scrubbing of lists would be less difficult, as well as the fact that Congress chose not to impose a limit or specifically authorize the Commission to impose such a limit.

As recognized by the Commission, there is no list of non-functional e-mail addresses available from e-mail providers to use to remove such addresses from opt-out lists. A time duration would help solve this problem. Similarly, there are common e-mail addresses that are reassigned in a manner similar to the way phone numbers are reassigned. Limiting the duration

to under five years would reduce expenses associated with scrubbing against inoperative e-mail addresses, as well as ensure that individuals who obtain reassigned e-mail addresses will not be unknowingly opted out of receiving commercial e-mail that they may desire. Persons with functional e-mail addresses whose addresses re-enter sender lists periodically can simply renew their opt-out requests as appropriate.

### **VIII. Valid Physical Postal Address**

The Commission proposes to clarify that senders can comply with the CAN-SPAM Act requirement that commercial e-mail include “a valid physical postal address of the sender” by using (1) the sender’s current street address; (2) a post office box the sender has registered with a commercial mail receiving agency (“CMRA”); or (3) a private mailbox the sender has registered with a commercial mail receiving agency established pursuant to U.S. Postal Service regulations. The DMA supports the Commission’s proposal. These alternatives will provide businesses with flexibility as to the physical address that is listed while providing specific contact information with which to locate and contact an entity.

### **IX. Debt Collection E-Mail Should Not be Subject to the Opt-Out Requirements of the Act**

The Commission should indicate that e-mail messages sent to collect unpaid debts are not subject to the Act’s opt-out and other requirements. Such e-mail should not be construed as “commercial” as it does not advertise or promote a commercial product or service. Likewise, such messages also are “transactional or relationship” because implicit in any agreement that a recipient has agreed to enter into with a sender is the duty of the recipient to honor such an agreement. Just as recipients cannot opt-out of a bill, the recipient should not be able to opt-out of messages sent for failure to pay bills.

Similarly, the analysis should be the same for entities that send debt collection e-mail messages on behalf of the entity that has the relationship with the recipient. As communication that was once delivered through mail to an individual's house, such as debt collection notices continue to migrate to e-mail; the Commission's regulations should not provide a means for individuals to evade their obligations.

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The DMA appreciates this opportunity to comment on the important issues raised in the NPRM. We look forward to continuing to work with the Commission in this rulemaking.

## **Attachment 1**

### **Chart and Description of the Opt-Out Process**

To assist the Commission, The DMA provides the following chart and description of the process by which one of our members prepares an e-mail campaign using a third-party e-mail vendor to demonstrate why a 10-business-day time period for honoring opt-out requests is necessary. For most entities, this process is not instantaneous; it requires preparation and particular attention to quality assurance. Indeed, when partnering with third parties, 10 business days is essential to ensure that opt-out requests are properly captured and honored.

#### *Step 1: The Opt-Out*

The advertiser may receive an opt-out requests from a variety of sources, including on-line opt outs, e-mail requests, and written correspondence. The advertiser will load the requests into a temporary database, then, once each day, upload that file to a central database of customer privacy information. The privacy database is maintained separately from other databases to ensure accuracy and to protect the information from theft, hackers, viruses, and other risks to data integrity.

#### *Step 2: Preparing the E-mail Campaign List*

The advertiser may prepare an e-mail campaign by selecting a group of its current customers based on characteristics of the customers' accounts. The prospective recipients, selected by account number, are then electronically compared to the privacy database to suppress any customers who have requested not to receive solicitations from the advertiser. The

suppressed list is then reviewed for quality and accuracy to ensure that all opt-out requests received to that date are honored. Once the suppression process is complete, the e-mail addresses of the remaining accounts are downloaded to a single file and shipped to the e-mail vendor either electronically or via an encrypted disc sent by overnight courier. The suppression and testing process may take two days to complete. If the file is shipped by overnight courier, an additional day is needed.

*Step 3: Third-Party Process*

The vendor uploads the file and then evaluates and processes the e-mail addresses to ensure that the proposed layout is appropriate to the type of capabilities of the particular e-mail address (such as HTML). Test e-mails are then sent to and reviewed by the advertiser. If corrections are necessary, the vendor make the corrections, tests again, and repeats the process until all of the messages are properly formatted. Once properly formatted, the messages are dispatched by the vendor. Depending on the number of revisions, the preparation and revision process can take four to seven days.

*See chart on next page.*

**E-MAIL OPT OUT AND SOLICITATION PROCESS FOR CURRENT CUSTOMERS**

