

June 27, 2005

**Mr. Donald S. Clark**  
**Secretary**  
**Federal Trade Commission**  
**Room H-159**  
**600 Pennsylvania Avenue, N.W.**  
**Washington, D.C. 20580**

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

Dear Secretary Clark:

The Online Publishers Association (“OPA”) is pleased to submit these Comments in response to the Federal Trade Commission’s (“FTC” or “Commission”) Notice of Proposed Rulemaking; request for public comment (“NPRM”) published in the Federal Register, 16 C.F.R. pt. 316, on May 12, 2005, with respect to “Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act.” The Commission’s NPRM raises important questions concerning the proper interpretation and application of this federal legislation.

## **I. Introduction**

OPA is an industry trade organization of online content publishers whose purpose is to represent its members on issues of importance with the press, government, public, and advertising community. OPA members are some of the most trusted and well-respected content brands on the Internet.<sup>1</sup> As a general matter, OPA members operate websites through which consumers can access editorial content and information via the Internet at no or minimal cost to users. Often, online publishers require or encourage users to register on their websites.

In connection with providing online editorial content and related services to registered subscribers, OPA members regularly send their subscribers electronic mail

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<sup>1</sup> Current members of OPA are: ABCNews.com, About, Bankrate.com, Belo Interactive, BusinessWeek, CBSNews.com, CNET Networks, CNN.com, CondéNet, Consumer Reports, Cox Enterprises, Edmunds.com, ESPN.com, Forbes.com, Hearst Corporation, Internet Broadcasting Systems, iVillage, Jupitermedia, Knight Ridder Digital, LifeTimeTV.com, MarketWatch, Meredith Corporation, MSNBC.com, MTV.com, Nascar.com, The New York Times Company, Reuters.com, Scripps Networks, Slate, SportingNews.com, Time Inc. Interactive, Tribune Interactive, USATODAY.com, The Wall Street Journal Online, Washingtonpost.Newsweek Interactive, Weatherbug and weather.com.

("email") messages. Many of the emails sent by OPA members contain advertisements from other parties. Also, many of our members provide a mechanism with which subscribers or registered users to OPA members' websites can forward, at no charge, messages from our members to the user's friends, colleagues and family.

OPA supports the FTC's efforts to strike the appropriate balance between protecting consumers from "spam" while taking care not to stifle e-commerce. Accordingly, OPA submits these Comments addressing issues implicated by the proposed Rules, which directly affect the everyday practices of many of its members.

## **II. The Proposed Definition of Sender Should Be Modified to Exclude Individual Parties Advertising in a Publisher's E-mail**

The Commission has proposed a modified definition of the statutory term "sender" that is unduly burdensome and may lead to consumer confusion. The proposed Rule would confer "sender" status upon a party to the email that initiates the email, as defined by the Act itself, and meets any of the following three criteria: (1) the person controls the content of the message; (2) the person determines the email addresses to which the message is sent; or (3) the person is identified in the "from" line as the sender of the message.<sup>2</sup>

One of the goals of the proposed definition is to avoid placing "undue compliance burdens on businesses and endangering the privacy of consumers' personal information."<sup>3</sup> OPA wholeheartedly supports this goal and proposes two modifications to the proposed definition of "sender" that OPA believes will further effectuate the intent of the Act and Rule.

First, OPA believes that the Final Rule in this matter should make clear that advertisers that contribute their own content to an email, do not "control the content" of the entire email and therefore do not meet the first prong of the sender test. Second, OPA recommends that the Rule be clarified to ensure advertisers can review the content and placement of their advertisements without triggering sender responsibilities.

### *A. Individual Advertisers Should Not Be Deemed to "Control the Content" of Email*

Many OPA members routinely send emails that contain advertisements from one or more companies. As initiators of such email that meet one or more of the criteria proposed by the Rule, these members expect to be deemed "senders" for purposes of compliance with opt-out obligations imposed by the Act. And consumer expectations are

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<sup>2</sup> See Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act, 70 Fed. Reg. 25,426, 25,428 (proposed May 12, 2005) (to be codified at 16 C.F.R. pt. 316), available at <http://www.ftc.gov/os/2005/05/05canspamregformfrn.pdf> [hereinafter *NPRM*].

<sup>3</sup> *Id.* at 24,530.

no different. Typically, the consumer's relationship is with the publisher with whom the consumer has consented to receive such email, not the advertiser. Under the Rule as proposed, however, the "controls the content" prong can reasonably be interpreted to be triggered by each of the advertisers in such an email. The OPA believes that the term "controls the content" should be limited to the party that controls the overall content of the email, and not the content of the individual advertisement included in that email.

Without this clarification, the Rule could be read to apply to one or more individual advertisers within a multi-party email.<sup>4</sup> This interpretation would not benefit consumers since they would be faced with multiple opt-outs and no understanding of how best to stop future commercial emails. In the experience of OPA members, consumers expect that the entity that physically sends the email and that is identified in the "from" line is the sender and thus responsible for responding to any opt-out requests. Indeed, consumers typically have established a relationship with the website publisher identified in the email, not the advertiser(s) contained in the email. Accordingly, the Rule, as proposed, would require consumers to share personally identifiable information with an entity with which it has no relationship and has never shared information before.<sup>5</sup> Moreover, without the OPA's proposed change, the Rule would require advertisers to develop their own opt-out process in an environment where there is no consumer expectation that they do so. Absent real consumer benefit, there is no reason to create this regulatory burden on advertisers or to create a privacy risk to consumers.

#### *B. Companies that Review and Approve the Content of Their Advertisements Should Not Be Deemed Senders*

Advertisers often reserve the right to approve advertisements before they are sent and retain control over the use of certain intellectual property. These ordinary business activities should not serve as the basis for sender liability under the Act. Companies must be able to protect their brands without creating a regulatory burden that, as discussed above, does not benefit consumers and in fact may be counter to consumer expectations.

Advertisers in OPA member publications routinely reserve a right of final approval to ensure that logos or other intellectual property are properly displayed and protected. Similarly, advertisers may require approval rights in order to comply with contractual obligations to third parties or other legal and ethical obligations. For example, a book publisher wishing to include an advertisement for a popular children's book in a multiparty email may be required contractually to get approval from the author of the book for any use of her name or image. Similarly, that publisher may be required by law

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<sup>4</sup> While the proposed Rule is most burdensome when there are multiple advertisers, OPA members believe that even when there is only one advertiser, that advertiser should not be deemed a sender unless it controls the content of the entire email and not just its own advertisement.

<sup>5</sup> Any requirement that the consumer share personally identifiable information including email address with an advertiser with which the consumer has no previous relationship raises privacy concerns and is similar to the argument raised in Part III.B. regarding "Forward-to-a-Friend" mechanisms that do not collect personally identifiable information of the forwarding email's recipient.

or by its own policies to ensure that an advertisement for the children's book is not included in an email that also advertises alcoholic beverages or other age-inappropriate products. These routine rights of approval are vital to compliance with contractual, legal, and policy obligations of OPA members and their advertisers.

OPA believes that it is not the intent of the proposed Rule to include within its ambit the routine, but nevertheless important, advertising approval rights frequently required of OPA members by such advertisers. Accordingly, OPA asks that the Commission further clarify the definition of "controls the content" to specifically exclude such standard advertiser approvals.

### **III. "Forward-to-a-Friend" Requirements Should Be Clarified**

Online publishers, including many OPA members, often provide subscribers and registered users an opportunity to forward an email from that publisher to a friend, colleague or family member. As noted in the Commission's guidance in this draft Rule, and supported by the OPA, these "Forward-to-a-Friend" emails do not generally trigger the Act's opt-out obligations because the provision of this mechanism falls into the exception for "routine conveyances" as defined by the Act.<sup>6</sup> Where forwarding to a friend is procured by the provision of consideration, however, "Forward-to-a-Friend" services qualify as commercial email and not "routine conveyances."

#### *A. Mere Encouraging Words Do Not "Procure" Transmission of an Email*

The Commission has indicated, however, that a publisher may "procure" transmission of an email simply by including an encouraging message such as "Tell-A-Friend – Help spread the word by forwarding this message to friends!"<sup>7</sup> The FTC reaches this conclusion by employing an overly broad definition of "induce." OPA urges the Commission to rethink this interpretation.

"Induce" under CAN-SPAM should be consistent with its common legal definition. Black's Law Dictionary defines inducement, for the purposes of contract law, as "the benefit or advantage which the promisor is to receive from the contract."<sup>8</sup> OPA believes that mere encouragement falls short of a benefit or advantage. Thus, OPA urges the Commission to reconsider the proposed guidance that a "Forward-to-a-Friend" email coupled with words of encouragement constitutes a commercial email initiated by the original sender for purposes of the Act. If such guidance is re-affirmed in the Final Rule, OPA member companies may need to revise significantly and perhaps terminate their

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<sup>6</sup> To the extent that websites provide "consideration" to users such as additional sweepstakes entries or discounts on items, OPA agrees with the Commission that those emails should properly be considered "commercial email" under CAN-SPAM.

<sup>7</sup> See *NPRM*, 70 Fed. Reg. 25,426, 25,441 n.178.

<sup>8</sup> See Black's Law Dictionary 775 (6th ed. 1990).

“Forward-to-a-Friend” functionality to avoid being considered a “sender” of commercial email by virtue of encouraging words only. Such a result does not benefit nor protect consumers.

B. *“Forward-to-a-Friend” Services That Merely Forward to, but Do Not Collect the Email Address of, the Recipient-“Friend” Are “Routine Conveyances.”*

Regardless of how and if the forwarded email was procured, the mechanism employed by many OPA members offering the “Forward-to-a-Friend” function does not capture or retain any personally identifiable information regarding the forwarding or receiving “friend.” Accordingly, the OPA member would not know whether it ever had either email address in its database or on its suppression list. Thus, such functionality should be subsumed under the definition of “routine conveyance.” To do otherwise would require the original sender to collect and maintain data bases including email addresses to which it would otherwise have no access, and compare this new database to its own databases, creating a greater risk to consumer privacy and a higher burden to the email’s initiator with no corresponding benefit to consumers.

#### **IV. The Ten-Day Opt-Out Should Not Be Reduced**

The FTC’s proposal to reduce the time period allowed to effectuate an opt-out from ten days to three is contrary to congressional intent, harmful to e-commerce, and provides little if any additional protection to consumers.

The FTC should remain faithful to congressional intent as evidenced by the legislative history.<sup>9</sup> By allowing for a ten-day opt-out period under the plain language of the statute and specifically including a ten-day opt-out period in the Committee report, Congress conveyed that, in its judgment, ten days provides the appropriate level of consumer protection without creating unnecessary burdens on e-commerce. As the Commission itself notes, this approach is widely supported and “[n]early half of consumers who commented” supported a ten-day opt-out.<sup>10</sup> In fact, sixty-one percent or 2,323 responders supported a period of ten days or longer (1,700 in favor of ten days, 623 in favor of extending it). Only thirty-eight percent favored shortening the period (1,449 responders).<sup>11</sup>

Since the passage of the Act, OPA members have expended considerable time and resources to comply with the ten-day rule.<sup>12</sup> The proposed changes will exact substantial

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<sup>9</sup> See S. REP. NO. 108-102, at 18 (2003) *reprinted in* 2004 U.S.C.C.A.N. 2348, 2362.

<sup>10</sup> *NPRM*, 70 Fed. Reg. 25,426, 25,442.

<sup>11</sup> See *NPRM*, 70 Fed. Reg. 25,426, 25,442 n.189.

<sup>12</sup> An illustrative example of the process (and time) a Company may take in order to create a mailing list to target consumers and be CAN-SPAM compliant is as follows: (1) Company determines the need to pull a list from the database for a mailing; (2) company email operations then would create the appropriate query

additional burdens on OPA members and other e-commerce entities that have complied in good faith with the Act and implementing regulations. Indeed, OPA members strive to comply as quickly as possible with opt-out requests. However, OPA believes the ten-day period is an acceptable regulatory ceiling and allows companies a reasonable amount of time to effectuate more complicated opt-out requests. In fact, a three-day regime often would not allow an entity enough time to complete the opt-out process when faced with unforeseen delays due to system issues and other technical problems that extend processing time.<sup>13</sup> Indeed, OPA believes that a three-day time period is so short that any technical problem likely would result in a violation of the Rule.<sup>14</sup>

Furthermore, designed, formatted, and addressed commercial email may already be in the queue when an opt-out is received under a three-day regime.<sup>15</sup> Email advertising campaigns, like advertising in other media, require time to plan, design, and implement. A three-day regime is too short of a period to ensure that the sender has time to cull its list of opted-out consumers before that email is placed in the queue. Imposing liability in such situations does little to protect consumers, yet exposes businesses to substantial potential liability.

In sum, the possible benefits to be derived from shortening the opt-out compliance period appear to be in little demand by consumers, yet would impose a great burden on companies where compliance is possible at all.

## V. Conclusion

OPA appreciates the considerable effort put forth by the FTC formulating rules to

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and run that against the Company database (approximately one business day); (3) the list is loaded into an email service provider system and scrubbed for duplicates, malformed email addresses, etc. (approximately one business day); (4) the list is then segmented, the campaign flights scheduled, and all creative completed, loaded, and tested (approximately one business day.); and finally (5) the email campaign is delivered (depending on the size of the mailing, could take up to 12 or more hours). This thorough process protects consumers by confirming the process and addresses selected, and can easily take up to four days after the decision has been made to mail an email campaign. If the opt out period was truncated to three business days, this detailed procedure would be in jeopardy because the Company would have to constantly update the opt-out lists. If the ten-day opt-out period remains, the Company could continue their best practices for identifying a receptive email audience.

<sup>13</sup> These technical hurdles greatly increase if the Final Rule allows for multiple advertisers on a single email to qualify for “sender” status, thus requiring an OPA member to scrub its list (see n. 11 for a detailed description of such a process) with the suppression lists of multiple advertisers whose lists are often maintained in different formats – all in a three-day period. Acquiring and processing this list may take up to 48 hours, leaving only a day to scrub the master list.

<sup>14</sup> Admittedly, a company is not generally liable under the Act for some unforeseeable technical issues. See S. REP. NO. 108-102, at 17 (2003) *reprinted in* 2004 U.S.C.C.A.N. 2348, 2362. However, a three-day rule would create unrealistic expectations among consumers that do not properly account for inevitable processing complications that arise through no fault of conscientious companies. For example, if a company faces technical difficulties under the three-day rule, a consumer, cognizant of the three-day requirement, may believe that it is a victim of improper email communications when in fact the company has made every effort to meet the consumer’s demands.

<sup>15</sup> See n.12, *supra*.

implement the CAN-SPAM Act. OPA particularly supports changes that would allow multi-party emails to be structured in such a way as to confer the sender obligations on a single party. However, OPA believes small but significant changes are necessary to best achieve the intended goals of the Act. In summary, OPA requests that the FTC include the following modifications in the Final Rule:

1. Clarify that “controls the content” prong in “sender” definition refers to controlling the content of the entire email and not to the content of individual advertisements within the email;
2. Clarify that standard approvals by advertisers necessary to protect intellectual property rights or to comply with contractual, legal, and policy obligations also do not constitute “control of content,” thus triggering “sender” obligations;
3. Clarify that mere words of encouragement to utilize a “Forward-to-a-Friend” mechanism do not constitute procuring the transmission of a commercial email; and
4. Decline to adopt the proposed change that would reduce the opt-out compliance period from ten to three days.

Thank you for the opportunity to submit these Comments on the proposed Rule.

Sincerely,

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