

June 27, 2005

Via Electronic Filing

Mr. Donald S. Clark  
Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

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

Dear Secretary Clark:

The signatories to this letter include a wide range of trade associations and business coalitions (hereinafter “Associations”). These Associations collectively represent thousands of companies across a diverse cross-section of industries, all of which are seeking to create a vibrant and consumer-friendly electronic commerce marketplace. We commend the Commission on its efforts to clarify the sometimes confusing definitions in the CAN-SPAM Act (the “Act”) through this notice of proposed rulemaking.

The Associations strongly support efforts to combat spam, as well as preserve the health of e-mail as a medium for legitimate commerce and communication. Some of these Associations are submitting comments separately in this proceeding (70 Fed. Reg. 25426, May 12, 2005). The Associations also collectively submitted comments on the ANPRM (69 Fed. Reg. 11776, March 11, 2004) and the primary purpose NPRM (69 Fed. Reg. 50091, August 13, 2004). All agree on a set of common principles discussed in this letter. The Associations recommend that the Commission:

1. *Provide Further Clarification on the Criteria Designating the “Sender” of a Commercial E-Mail Message in Addition to that in the Proposed Rule.*
  - A. *Clarify that more than one entity can “control” the content of the message while still designating one sender.*

The Commission provides three criteria for designating the sender of a commercial e-mail message in instances of multiple senders—(1) control of the content of the message; (2) determination of the e-mail addresses to which the message is sent; or (3) identification in the “from” line as the sender of the message. Additionally, the Commission’s proposal would require that the designated sender be the only entity that possesses any of these three characteristics.

The Associations support the Commission's continued efforts to provide clear standards for advertisers and sellers and the ability to designate one sender of a commercial e-mail message to comply with the requirements of the CAN-SPAM Act. The Associations support the second and third criteria set forth by the Commission, but believe that the meaning of the first criterion regarding "control" of the content of a message either should be clarified or it should be removed from the criteria. Depending on what is meant by "control," it may be difficult for an advertiser to establish that only one of multiple advertisers controls the content of a message. If more than one advertiser controls message content, then under the proposed criteria the multiple advertisers would not be eligible for the single-sender criteria.

Control of the content of the message should be determined by characteristics including what entity has the ultimate power over content of the entire message or to determine whether the message is transmitted. One means of resolving this concern would be to restructure the framework to indicate that the entity with "control" of the content of the message could be designated as the sole sender of the message; the factors that could be used to demonstrate "control" of the content of the message would be the other two criteria set forth by the Commission—determination of the e-mail addresses to which the message is sent, or identification in the "from" line as the sender of the message. The requirement that none of the advertisers other than the entity designated as the sender could possess either of these two criteria would remain.

The Commission also could provide more clarity regarding "control" of the content of a message within its proposed framework; this could be accomplished in several ways. First, the Commission could clarify that "control" does not include companies' creating their individual advertisement or approving ad copy in a message. Multiple advertisers should not be disqualified from designating a single sender because they can approve ad copy in a message. These are important factors to help consumers and businesses ensure that senders are sending appropriate and non-deceptive content, and is the norm for the types of actions all advertisers undertake.

*B. Designate the entity that is the sender of e-mail sent pursuant to subscription that contains solely commercial content.*

The Associations request that the Commission clarify that there is one sender in e-mail sent pursuant to subscription—an ongoing agreement between the sender and recipient for the sender to send such e-mail—which consists entirely of advertisement or promotion. The sender in this situation should be the entity that provides the subscription.

The Commission indicated in its "primary purpose" rulemaking that messages sent pursuant to subscription that contain exclusively commercial content are "commercial" and not "transactional or relationship" messages. In such situations, the sole sender of the message should be the entity that provides the subscription. The term "sender" is defined in the Act as the

person who initiates the message and whose product or service is advertised or promoted in the message. The existence of the subscription itself as a service that is advertised or promoted in the message satisfies this definition. The result of this interpretation would be to prevent each advertiser in a subscription-based advertising e-mail service from becoming a sender, and resolve the same concerns that the Commission is addressing with the specific criteria set forth for designating a sender. In such situations, the e-mail messages would not need to be structured subject to the three criteria proposed by the Commission.

This position is consistent with the Commission staff opinion of March 8, 2005 to The Direct Marketing Association regarding who is a “sender” of a commercial e-mail message in a multiple-advertiser situation. The Associations strongly support the interpretation in this letter and believe that, in addition to any additional criteria proposed by the Commission, the interpretation in this staff opinion should be fully endorsed by the Commission.<sup>1</sup>

2. *Retain the Time to Honor Opt-Out Requests at 10 Business Days.*

The Commission proposes to decrease the amount of time in which to effectuate an opt-out from 10 business days to three business days. The Associations believe that this proposal is impractical and unworkable. The Commission should provide a minimum of 10 business days to effectuate such opt-outs. The experience of the Associations in implementing the Act demonstrates that 10 business days is difficult to achieve and is a barely sufficient amount of time to honor such requests.

The Commission indicates that three business days is sufficient because “current technology allows for processing such opt-out requests more expeditiously than the current ten-business-day time frame.” If correct, the mere fact that technology allows for three-business-day opt-outs does not take into consideration the operational realities of how opt-outs are effectuated.

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<sup>1</sup> The fact pattern that Commission staff responded to contained the following four elements: (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.

The staff indicated that there would be only one “sender” under the circumstances described by The DMA provided that certain conditions are met: (1) at least one of the sellers who contributes commercial content to the e-mail message must receive 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.” This opinion would not apply to scenarios where the party who receives affirmative consent to receive e-mail messages is not a “sender.”

In many instances, there are multiple parties involved in sending commercial e-mail; coordinating opt-outs among these parties takes time. The greater the number of parties involved in sending an e-mail, the longer the amount of time necessary to manage the logistics of the opt-outs. In many instances where there is more than one party, three business days will be an impractical amount of time in which to effectuate an opt-out. Similarly, in many instances, opt-outs are inputted manually, requiring more time to effectuate than using sophisticated automated technologies. Moreover, businesses have devoted considerable resources to configure their systems to comply with the 10-business-day requirement. They should not be forced again, with no real basis to adjust to three business days, to attempt to retool their systems.

Furthermore, there is no record that the 10-business-day opt-out period has been abused or is ineffective. Nor is there any record of consumers indicating that opt-outs were not effectuated in a timely manner. To change the opt-out from 10 business days would suggest that the legitimate businesses that offer and honor opt-outs are creating a major problem for recipients of such messages. There is no evidence in the record to support this suggestion. Moreover, spammers will not adhere to opt-outs irrespective of what time duration is set.

3. *Clarify that Advertisers in Forward-to-a-Friend E-mail Messages were Not Intended to be Senders Under the Act.*

The Commission indicates that in “forward-to-a-friend” e-mail messages, where consideration or payment is provided, or in some instances when there is other inducement, that the advertiser in such messages would be a sender under the Act. The Associations urge the Commission to reconsider this position, which would limit offerings and functionalities that consumers enjoy and that have no impact on true “spam.” There is no indication that Congress had forward-a-friend messages in mind when defining “sender” or “procure.” The term “procure” was included in the definition of “sender” to prevent entities from circumventing the requirements of the Act. Specifically, Congress did not want a situation whereby service providers would send the message for free and, thus, fall outside of the definition of “sender.” The “friend” in these instances is sending the message, not the advertiser, and the friend does not have a commercial purpose or consideration, payment, or inducement of the type contemplated in the Act. Nor does the advertiser have any actual control over the actions of the friend. Rather, the forwarding of the message is information, to tell their friend about something that might interest them.

Even if no payment or consideration is provided, the Commission indicates that if the entity whose product or service is advertised in a forward-to-a-friend message affirmatively acts or makes an explicit statement designed to urge another to forward the message, then that entity would be a sender for purposes of the Act. The Commission’s position would require either that businesses not encourage messages to be forwarded or that businesses attempt to honor opt-outs prior to messages being forwarded. It is ultimately impossible for businesses to control whether or not the recipient of an e-mail containing their advertisement or promotion forwards such message and to what e-mail addresses the message is forwarded.

The Commission's basis for its conclusion to treat as the sender an advertiser that encourages an e-mail message to be forwarded where no consideration is provided to the individual is to give meaning to the word "induce" in the definition of the word "procure" in the Act. The further confusion caused by this analysis and distinguishing between web-based forward-to-a-friend mechanisms and pure e-mail forwarding demonstrates that the Commission should adhere to the intent of the definitional framework rather than attempt to give meaning to each word in the definitions. For these reasons, the Commission should treat all forward-to-a-friend messages as outside of the scope of the Act.

4. *Set the Duration of Time to Maintain Opt-Out Requests to No More Than Five Years.*

The Commission indicated that it has determined not to propose a time limit on the duration of an opt-out. The Associations urge the Commission to reconsider this position because individuals change e-mail addresses regularly.

The Associations recommend a time frame of under five years. Over time, the list of e-mail opt-outs that a company would need to suppress will grow and many of these e-mail addresses will become non-functional, thus requiring the expense of scrubbing the list against non-functional addresses. As recognized by the Commission, there is no list of non-functional e-mail addresses 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 wish to receive. Persons with functional e-mail addresses whose addresses re-enter sender lists periodically can simply renew their opt-out requests as appropriate.

5. *Maintain Senders' Ability for Recipients to Take Other Steps in Addition to Sending a Reply E-Mail Message or Visiting a Single Internet Web Page to Submit a Valid Opt-Out Request for Verification Purposes.*

The Commission proposes that senders should not be able to require that recipients take steps other than sending a reply e-mail or visiting a single Internet web page to submit a valid opt-out request. The Associations support the policy rationale behind this proposal: that recipients should have a simple means to effectuate an opt-out. However, senders need flexibility in the means by which senders authenticate and verify the legitimacy of opt-outs. This has benefits for both the sender and the recipient. For example, the entry of an account number for current customers allows customers to clarify which types of commercial messages they may wish to continue to receive; entry of only an e-mail address would not permit this functionality. In addition, in many cases, visiting a single web page may not provide certainty required by

senders. For example, recipients may be required to enter their e-mail addresses on one web page and then provide confirming information sent back to that address on another web page.

Allowing sufficient flexibility to effectuate opt-outs enables enhanced protections to both businesses and consumers. Adoption of such a specific standard is not required by the CAN-SPAM Act. The Associations suggest that a more appropriate standard would be to offer a simple and efficient means to opt out over the Internet. If senders make the opt-out process complicated, such behavior would violate this provision.

6. *Indicate that Any Messages, Including All Offers of Employee Discounts or Similar Messages, Sent by an Employer to an Employee Are Not Subject to the Act's Requirements.*

The Commission declines to interpret the Act to allow any messages sent by an employer to an employee as not subject to the CAN-SPAM Act's requirements, including the ability to opt out of such messages. The Associations disagree with this interpretation. Whether included within the transactional or relationship messages or clarified through an interpretation that an employee is not a "recipient" for employer-owned e-mail accounts, the Commission should indicate that employees do not have a right under the Act to opt out of commercial messages sent by their employer or with permission from their employer to employer-owned e-mail accounts. As a general rule, an employee's e-mail account is in reality the account of the employer. The employer in such instances is both the sender and the recipient of the e-mail message. Businesses are not set up to provide or honor opt-outs for the e-mail messages that they send to their in-house accounts. Moreover, there is no record of any problem regarding e-mail sent in this context, nor does the statute contemplate such an interpretation. For these reasons, the Commission should clarify that an employee does not have the ability to opt out of commercial e-mail sent by an employer.

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The Associations appreciate the opportunity to comment on this proceeding and look forward to continuing to discuss these important issues with the Commission. For additional information, please contact Stuart Ingis, DLA Piper Rudnick Gray Cary US LLP, at 202/861-3900.

Sincerely,

American Advertising Federation  
American Association of Advertising Agencies  
American Bankers Association  
American Council of Life Insurers  
American Society of Association Executives

American Society of Travel Agents, Inc.  
—Cruise Lines International Association  
Association of National Advertisers  
Consumer Bankers Association  
Direct Marketing Association, Inc.  
Electronic Retailing Association  
Email Service Provider Coalition  
The Financial Services Roundtable  
Information Technology Association of America  
Interactive Travel Services Association  
Internet Alliance  
Internet Commerce Coalition  
Magazine Publishers of America  
National Business Coalition on E-Commerce and Privacy  
National Retail Federation  
NetCoalition  
Network Advertising Initiative  
Promotion Marketing Association  
U.S. Chamber of Commerce