

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

**COMMENTS
of the
CONSUMER BANKERS ASSOCIATION**

Responding to the Discretionary Rulemaking Request for Public Comment

CAN-SPAM Act Rulemaking, Project No. R411008

Marcia Sullivan
Vice President and Director, Government Relations
Consumer Bankers Association
1000 Wilson Boulevard
Suite 2500
Arlington, VA 22201
(703) 276-1750

Counsel:
Stuart Ingis
Michael Signorelli
DLA Piper Rudnick Gray Cary US LLP
1200 19th Street NW
Washington, DC 20036
(202) 861-3900

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I. Introduction, Background, and Summary

The Consumer Bankers Association (“CBA”) appreciates the opportunity to submit 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, 16 C.F.R. Part 316, 70 Fed. Reg. 25426, May 12, 2005. CBA also submitted comments on the Commission’s primary purpose notice of proposed rulemaking (69 Fed. Reg. 50091, Aug. 13, 2004) and on the advance notice of proposed rulemaking (69 Fed. Reg. 11776, March 11, 2004).

CBA is the recognized voice on retail banking issues in the nation’s capital. Member institutions are the leaders in consumer financial services, including auto finance, home equity lending, card products, education loans, small business services, community development, investments, and deposits. CBA was founded in 1919, and provides leadership, education, research, and federal representation on retail banking issues such as privacy, fair lending, and consumer protection legislation/regulation. CBA members include most of the nation’s largest bank holding companies, as well as regional and super community banks that collectively hold two-thirds of the industry’s total assets.

In enacting the CAN-SPAM Act, Pub. L. No. 108-187 (Dec. 16, 2003), 15 U.S.C. §§ 7702 *et seq.* (“the Act”), Congress recognized that e-mail has become an extremely popular and important means for Americans to communicate for both personal and commercial purposes, but that an avalanche of unwanted spam threatens the reliability and usefulness of this channel of communications. CBA wholeheartedly agrees. Our members, in particular, often use e-mail to communicate with corporate clients as well as customers in order to exchange messages regarding interest rates, market research, mortgage costs, and other financial information that is critical to the proper functioning of our capital and other markets.

In response to the request for comments, CBA recommends the Commission revise its proposed rule to:

- Provide clarity regarding what is meant by “control of the content” of a message for designating a single sender in commercial e-mail with advertisements from multiple sellers;
- Maintain the amount of time to honor opt-outs at 10 business days;
- Clarify that advertisers are not “senders” in forward-to-a-friend messages where no consideration is provided;
- Set a two- to three-year duration to maintain opt-outs;
- Allow senders flexibility in the means provided to recipients to opt out; and
- Provide further clarification regarding the types of messages treated as “transactional or relationship” messages.

II. The Commission Should Further Clarify the Means of Designating a Single Sender in Commercial E-Mail Containing Multiple Advertisements

CBA appreciates the Commission’s efforts to set forth criteria to designate one advertiser as the “sender” in commercial e-mail messages with multiple advertisers. CBA believes that, with further refinement, such criteria will be useful for advertisers to structure e-mail in a manner that will clearly define their obligations under the Act. The Commission proposes that in a multiple-advertiser message, one of the advertisers can be designated as the “sender” if (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 Commission’s proposal will only allow designation of a single sender if the other potential senders do not meet any of these three criteria. These criteria still leave ambiguity with respect to designating a single sender because it is not, on its face, clear what the Commission considers to be “control” of the content of a message.

To remove this ambiguity, CBA believes that the Commission should provide criteria that clarify what constitutes “control” of the content of an e-mail message. The advertiser with control over the content of the message should be the advertiser that has the ultimate ability to determine all of the content of the message and whether and when the message is transmitted. Control of the content of a message should not include editorial control over the text in the message. In joint marketing campaigns, advertisers maintain the ability to monitor their content. For example, when a financial institution advertises a separate entity’s fund, the separate entity has obligations to review the content to ensure its product or service is not misrepresented. Such oversight, however, should not be construed as control of the message’s overall content for CAN-SPAM purposes. Similarly, control over the placement of one advertisement in an e-mail message, without the ability to control the placement of all advertisements in a message, should not be deemed as having control of the content of a message.

The Commission also could provide certainty for the structuring of e-mail by allowing more than one advertiser to control the content of a message while still allowing one of the advertisers to be designated as the sender. Whatever means the Commission elects to provide clarity, the critical factor will be to allow for a simple method of designating one sender in a multiple-advertiser e-mail.

III. The Commission Should Maintain the Time Frame to Honor Opt-Outs at 10 Business Days

CBA urges the Commission to reconsider its proposal to decrease the time period for a sender to effectuate an opt-out from 10 business days to three business days. Any duration of less than 10 business days will be wholly insufficient for senders in many instances. In addition, the record on this issue does not support a need to reduce this time period.

The Act requires the sender and others who act on behalf of the sender to cease future e-mail not later than 10 business days after receiving the recipient's message. The Commission has the authority to adjust this time frame. In prior proceedings, CBA and a broad cross-section of entities provided comments to the Commission that the opt-out process in many instances can involve multiple parties and takes time to effectuate. CBA continues to believe that the Commission should maintain the time frame to honor opt-outs at 10 business days.

Shorter time frames may sometimes be possible if the financial institution is the only entity involved in sending e-mail messages. However, in instances where multiple parties are involved in e-mail programs that have opt-out lists, the entire 10-business-day time period is used. The three-business-day proposal fails to account for the operational models involved in effectuating an opt-out request. Complex systems are required to support e-mail marketing. *See* chart attached at the end of this document. Parties must synchronize mailing lists, databases containing customer preferences and databases used to transmit messages. It takes time for senders to scrub an opt-out request against a list of addresses to which a commercial e-mail message is going to be sent.

Often, commercial e-mail campaigns are in progress with the e-mail addresses selected more than 10 business days prior to the sending. Compliance with a 10-business-day opt-out is very difficult in these situations. This is particularly true when the sender uses the services of a third party to transmit the message on its behalf. For example, before an independent agent can transmit a message, the agent must verify that e-mail addresses do not appear on the business's opt-out list. This will be burdensome for agents that do not work out of a centralized location. Without constant access to the opt-out lists, agents could violate the Act. Businesses will have difficulty in practically ensuring that their agents are complying. CBA members have

undertaken significant steps and allocated significant resources to put in place systems to meet the 10-business-day requirement, and should not have to attempt again to reconfigure their systems and processes. For these reasons, CBA urges the Commission to leave this time frame at 10 business days.

IV. The Commission Should Clarify that Advertisers are not Senders in any Forward-to-a-Friend Messages Where No Consideration is Provided to the Recipient

The Commission indicates that when a seller/advertiser encourages a person to forward, or use a Web-based mechanism to transmit, a commercial e-mail message to another and provides “money, coupons, discounts, awards, additional entries in a sweepstakes, or the like in exchange for doing so,” the seller/advertiser would be the “sender” of the message. 70 Fed. Reg. at 25441. The Commission also indicates that when no payment or consideration is provided in a web-based “click-here-to-forward” mechanism, the advertiser/seller providing the web-based mechanism would not be a sender because they would be engaging in “routine conveyance” when an entity other than the seller identifies or provides their e-mail addresses. *Id.* at 25441-25442.

The Commission, however, indicates that when the e-mail message is forwarded, rather than sent via a web-based mechanism, the seller could be the sender even if no payment or consideration is provided. The Commission bases this conclusion on the inclusion of the word “induce” in the definition of “procure” in the Act. The Commission should not treat the seller as a sender in such messages where there is encouragement to forward and no consideration. The message is being forwarded by the friend, who does not have a primary purpose that is commercial in nature. While the Commission’s basis for its interpretation is that it is trying to give meaning to every word in the definition of “procure,” there is no indication that Congress intended to subject forward-to-a-friend type messages to the requirements of the Act. These are

messages that consumers desire, as is indicated by their success. Congress' goal was to control spam, not limit such messages forwarded by friends.

V. The Commission Should Set a Two- to Three-Year Duration to Maintain Opt-Outs

The Commission has declined to set a time duration on sender's maintaining opt-outs and asks for further comment on this issue. CBA, in its comments on the ANPRM, recommended that the Commission set a two- to three-year cap on the length of time to honor an opt-out, and continues to believe that this is the appropriate framework. CBA reiterates this request. Setting such a cap will reduce the scrubbing of lists of nonfunctional e-mail addresses, give businesses an opportunity to attempt to contact new recipients with offers, and provide businesses with a manageable time frame to maintain such information.

Unless there is a time cap on the duration that opt-outs are preserved, these lists will continue to grow with no limit. A large percentage of e-mail addresses change annually. For this reason, over time, many of the addresses on an opt-out list will not be functional. Putting a time limit on the opt-outs would reduce the need to suppress e-mail addresses that are no longer operational. For example, recipients who opt out of a sender's commercial e-mail messages may still, of course, receive non-commercial transactional and relationship messages from that sender. In the course of transmitting these transactional and relationship messages, senders may receive e-mail "bounced back," indicating that the e-mail address is no longer functional. In such occurrences, a sender may remove the nonfunctioning address from its distribution list. A sender should have the same ability to remove the nonfunctioning address from its commercial suppression lists. Without this ability, the lists will unnecessarily grow without limitation.

VI. Business Should Maintain Flexibility in Providing a Non-Burdensome Ability for Consumers to Opt Out

CBA agrees with the Commission that senders should be prohibited from charging a fee for the ability to opt out. CBA also agrees with the Commission's view that the process to effectuate an opt-out request should be simple and easy. However, CBA does not believe that the level of specificity set forth by the Commission in its proposal is necessary to achieve this desired result. The Commission would prohibit a sender from imposing any requirements other than sending a reply message or visiting a single website to effectuate opt-outs.

CBA requests that the Commission reconsider its position and provide a more general standard that ensures that recipients are afforded a simple means to opt out while providing businesses flexibility to properly authenticate and verify an opt-out request. Such flexibility is particularly relevant in the financial services industry where e-mail messages relate to accounts containing sensitive financial information. Due to the nature of the information communicated, financial institutions take additional measures to verify changes of e-mail addresses and e-mail opt-out preferences. For example, a recipient may be required to provide an account number or password that generates an e-mail to an address on file confirming the change in preferences. In addition, through a flexible framework, parties can provide consumers with the ability to accurately express their preferences. For instance, rather than requiring a single all-or-nothing opt-out, the rules should afford consumers the option to customize their preferences by selecting content targeted to their interests. Consumers will still have the option to opt out of all messages, but this approach will not foreclose potential consumer benefit. For these reasons, CBA recommends that the Commission adopt a rule that requires senders to provide an opt-out procedure that is not burdensome to consumers, but that leaves the specifics concerning the method used to the sender.

In addition to providing flexibility in creating an opt-out process, the Commission should allow senders the ability to ensure that an opt-out request is valid. Senders should not be required to accept opt-outs that do not appear to come directly from the recipient. In the Do Not Call Registry, the Commission recognized the value of requiring consumers to opt out personally, rather than through private companies or third parties. Just as the Commission protected consumers there, such a protection will protect consumers under the CAN-SPAM Act.

VII. The Commission Should Expand and Further Interpret the Act’s Categories of Transactional and Relationship Messages

A. The Commission Should Expand the Transactional or Relationship Category to Include Individual Business Relationship Messages

The Commission asks questions with respect to creating a category of “business relationship” messages: “those that are individualized and sent from one employee of a company to an individual recipient (or small number of recipients).” *Id.* at 25438 n.137. CBA indicated in its comments to the ANPRM, and reiterates here, its concern that one-to-one e-mail that is sent by employees in the business-to-business context should not be treated as “commercial” e-mail. As previously expressed, both large and small businesses engage in corporate-to-corporate e-mail exchanges that involve complex transactions with a lot of e-mail flowing both ways. For example, in the commercial real estate business, e-mail messages are sent to brokers by individual representatives of lenders to inform them of current mortgage rates. In addition, in the context of the equipment leasing industry, it is typical for lenders to e-mail equipment vendors a rate sheet that describes the amount of interest a lender would charge on a given piece of equipment. One interpretation of the Act could require that such e-mail contain an opt-out mechanism and be run against the business’s suppression list prior to transmission. CBA

believes that such a result would be very difficult for businesses to administer and was not intended by Congress.

Business e-mail systems are not designed to scrub each e-mail sent by an employee against the business's suppression list. Such a requirement would result in the need to redesign numerous businesses' e-mail systems and would be extraordinarily burdensome and expensive. In addition, such a requirement would interfere with legitimate practices that are critical to business relationships and operations, as well as e-mail that provides information critical to developing the financial marketplace. Moreover, regulating this type of e-mail would restrict legitimate e-mail without addressing the spam problem.

B. The Commission Should Expand the “Transactional and Relationship” Categories to Include Legally Required Messages

The Commission declined to include legally required messages under any of the “transactional and relationship” message categories. CBA disagrees with this position, and recommends that legally required notifications be included as “transactional or relationship” messages. Legally required notifications would appropriately lie in the same category as notifications regarding changes in terms or features of accounts or loans. It is critical that these notifications be included under “transactional and relationship” messages. Financial institutions often are required to issue legal notifications, and they rely on e-mail to efficiently notify consumers. Business will incur great costs if such messages are treated as commercial messages, and such a classification would impede financial institutions' efforts to provide required legal notices.

In addition to messages that are legally required, Congress, the Commission, and the banking agencies often have provided exceptions for financial institutions in consumer protection laws for a broad array of reasons that relate to safety and soundness of the industry.

For example, the Gramm-Leach-Bliley Act provides exceptions from disclosure prohibitions in the following cases, among others:

- (i) to effect, administer, or enforce a transaction requested or authorized by the consumer in connection with financial servicing or processing, maintaining or servicing his account, or securitization or sale;
- (ii) consumer consent;
- (iii) protecting confidentiality or security of records;
- (iv) protecting against actual or potential fraud, unauthorized transactions, claims or other liability; and
- (v) risk control or resolving customer disputes.

The FTC should add the following purposes to the list of “transactional and relationship” purposes for sending an e-mail: “if the content is legally required or relates to a recipient’s financial accounts or transactions, including, without limitation, billing (whether or not at a regular periodic interval), protecting the confidentiality or security of records, protecting against fraud, unauthorized transaction claims or other liability, risk control, or resolving recipient disputes.”

C. E-Mail Sent to an Employee’s Firm-Owned E-Mail Account

In its proposal, the Commission declines to allow any messages sent by an employer to an employee to be considered “transactional or relationship” messages. CBA requests that the Commission reconsider this conclusion. The Commission could indicate that the employee is not a “recipient” as defined under the statute for employer-provided e-mail accounts or include all e-mail sent to such accounts as transactional or relationship messages. The conclusion must be that an employer can send whatever message it desires to an e-mail account that the employer owns and assigns the employee. In addition, because of the way modern companies in the financial services industry are structured, the final rule should recognize that such companies traverse legal vehicles, given that the concept of “company” often means a commonly managed group of companies for purposes of determining employer-owned e-mail accounts. As indicated

by the lack of evidence in the record, transmissions by employers to employees was not the basis for regulation of commercial e-mail. This restriction only makes communication between employers and employees more complex and burdensome.

D. E-Mail Messages Regarding Service Updates and Upgrades Should Be Included with Product Updates and Upgrades Under “Transactional or Relationship” Messages

The Commission indicated that it is not inclined to expand section 7702(17)(A)(v) of the Act to include *service* updates and upgrades. CBA requests that the Commission reconsider this position and include service updates and upgrades under the “transactional and relationship” categories.

CBA is an association comprised of financial services institutions such as banks, credit card companies, and brokerage firms. As members of the financial services market, CBA members, as an industry practice, rely heavily on e-mail messages to communicate with their current and potential customers. Excluding service updates and upgrades from this category would impose an undue burden on the financial services industry. CBA asserts that service offerings should be treated equally with product updates and upgrades. The Commission has the authority to expand or contract the categories of transactional or relationship messages; addition of service updates or upgrades would thus fall within that category. Therefore, CBA recommends that service updates and upgrades be included under the “transactional and relationship” message categories.

E. CBA Supports Certain Interpretations Regarding Transactional or Relationship Messages

1. Standard of Reasonableness to Determine the Appropriate Number of Confirmation E-mails

CBA supports the Commission’s use of a reasonable standard to determine the appropriate number of confirmation e-mails sent by a sender to a recipient in a single transaction. Senders and consumers require flexibility to properly manage transactional relationships. Some transactions, due to timing, complexity of the subject, or other events, require more communications than others. For example, a single transaction where a recipient requests market research with deliverables due on different dates would require more e-mail transmissions than a single, simple transaction such as ordering movie tickets online. It is unrealistic to cap communications at an arbitrary level. The characteristics of the transaction will dictate the amount of communications required. Therefore, CBA supports the Commission’s flexible reasonableness standard.

2. Third Parties Sending Messages on Behalf of an Entity

CBA asserts that when third parties are used to facilitate a transactional relationship on behalf an entity, such messages are “transactional or relationship” messages. Specifically, when an entity uses a third party to send e-mail messages to facilitate, complete, or confirm a transaction for that entity, those e-mails do not lose their status as “transactional or relationship” messages. CBA is concerned that the third party may be considered a “sender” and transform the message from a “transactional or relationship” message to a commercial message. Such messages should be treated as “transactional or relationship” messages regardless of whether the message was transmitted by the entity or on the entity’s behalf by a third party.

3. *Messages Sent as Part of a Negotiation*

CBA agrees that messages sent as part of a negotiation should be treated as “transactional or relationship” messages. It is appropriate that when a recipient participates in a negotiation with a sender, subsequent e-mail communications regarding that subject matter are treated as a “transactional or relationship” message. If the Commission were to categorize such e-mails as commercial, it would seriously limit a sender’s ability to conduct business. Requiring such e-mail to comply with the Act would provide no consumer benefit, especially considering that the recipient invited such communications by entering into a negotiation with the sender.

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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.

Enterprise “Do Not Email” Collection Process



<p>Business Days 0-4*</p> <ul style="list-style-type: none"> • Do Not Email requests collected at point of campaign execution • File of opt outs created • Points A, B & C: different lines of business within firm • Point D: outside service provider • Point E: partner program 	<p>Business Day 5:</p> <p>Transmit opt outs to the firm's System of Record</p>	<p>Business Days 6& 7**:</p> <p>System of record consolidates information and distributes back to the various points of email campaign</p>	<p>Business Day 8:</p> <p>Points of campaign execution apply opt outs to their suppression database</p>	<p>Business Day 9:</p> <p>Suppressions available for email marketing campaigns</p>
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* Some points of collection can not submit opt outs to the firm on a daily basis.

** Needs at least two business days for this processing.