

BEFORE THE FEDERAL TRADE COMMISSION

CAN-SPAM Act Rulemaking

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Project No. R411008

**Comments of American Business Media
on the Do Not E-Mail Registry**

These comments are submitted in response to the Advance Notice of Proposed Rulemaking (the "ANPR") issued by the Federal Trade Commission on March 11, 2004, 69 Fed. Reg. 11776-82, proposing regulations and soliciting comments on various provisions of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the "CAN-SPAM Act" or the "Act"). The ANPR specifically called for comments at this time on issues associated with implementation of a "nationwide marketing Do-Not-E-Mail registry," including commentary on a plan and timetable for the registry, an explanation of practical, technical, security, privacy or enforceability concerns, and an assessment of its costs and benefits.

While a national Do Not E-Mail registry may appear to be a significant step toward the elimination of unsolicited spam, it is unlikely to effectively reduce unsolicited, undesired commercial e-mail. It will impose significant cost burdens on legitimate senders of commercial e-mail who are already complying with the CAN-SPAM Act, but is unlikely to have any impact on spammers. For these reasons, a national Do Not E-Mail registry should be an enforcement mechanism of last resort. If a combination of CAN-SPAM Act enforcement and advances in technology prove to be ineffective at reducing the quantity of unsolicited spam e-mail, only then should Congress and the Federal Trade Commission consider implementing such a registry.

American Business Media

American Business Media is an association representing more than 200 business-to-business information providers, including publishers, producers of print publications and websites, and organizers of trade shows and similar events. American Business Media members routinely advertise their products and services and communicate with their subscribers, advertisers, and other customers via e-mail. A substantial amount of the e-mail sent by American Business Media members consists of transactional or relationship messages that are exempt from most provisions of the Act. Some American Business Media members send e-mail messages advertising products or services such as seminars or trade shows, but these messages are targeted to those in the specific industries covered by the publication or other media of the sender. These messages are arguably within the Act's definition of commercial e-mail, but, because they are almost always welcome, relatively few recipients routinely opt out further e-mail advertisements or other communications from American Business Media members.

Concerns Associated with the Do Not E-Mail Registry

Implementation of a Do Not E-Mail registry will prevent organizations and businesses from sending legitimate advertising material to recipients who do not object to these e-mails. At the same time, the Do Not E-Mail registry is unlikely to have any appreciable impact on spammers who will continue to send unsolicited e-mail of the type the CAN-SPAM Act is attempting to eliminate. American Business Media members are primarily concerned about losing access to individuals who want to receive e-mail about their products and services, but who will also include their e-mail addresses on the registry in an effort to reduce unsolicited spam. Because American Business Media members are engaged almost exclusively in business-

to-business communications, rather than to residences, our concern in this regard is heightened, since it is likely that many employers will insist on placing all company-registered e-mail addresses on a registry.

Given the pervasiveness of spam, many people who want to receive e-mail from American Business Media members will nonetheless place their names (or have their names placed by their employer) on a Do Not E-Mail registry. The purpose of a broad-brush registry is to eliminate all commercial e-mail messages to registered recipients, and, by definition, commercial e-mail messages that recipients might want to receive will be eliminated. The registry will therefore have a chilling effect on legitimate advertising e-mail as frustrated recipients of large amounts of spam may be willing to forego commercial e-mail of potential interest in an effort to reduce the overall quantity of commercial e-mail inundating their e-mail accounts.

The irony, of course, will be that legitimate businesses sending legitimate commercial messages will comply with the registry, while the spammers, who are today violating the CAN-SPAM Act with billions of e-mails, will continue to violate the Act. There is no reason to believe that spammers will care whether their e-mails violate four, rather than three, provisions of the law. It is important to note that legitimate businesses have amended their practices to comply with the present requirements of the CAN-SPAM Act, including honoring customers' opt-out requests within ten business days.

The Do Not E-Mail registry will be confusing for businesses to administer. Recipients whose e-mail addresses are listed on the registry may place their names on mailing lists, or request notification of events such as product sales, meetings, or seminars. As a result, subsequent e-mails from the sender, even if apparently requested by the recipient, might violate the registry requirements, and a welcome exchange of information will be prevented, especially

if the sending company takes all possible steps to comply with the registry. American Business Media urges the Commission to consider seriously the dilemma faced by legitimate businesses attempting to comply with the Act if there is a Do Not E-Mail registry. Use of e-mail for commercial purposes is not restricted to mass-advertising campaigns. Commercial e-mail is often sent in response to a single request for information. A company representative, for example at a trade show display, might be asked by a potential customer to send (or even to e-mail) some information on a new product. It would be impractical for that representative to initiate a costly matching of the recipient's e-mail address with a registry containing tens of millions of e-mail addresses simply to comply with that request, yet failure to do so could violate the law if a registry is created.

To minimize the damage that a Do Not E-Mail registry would do to legitimate businesses and organizations with legitimate commercial messages, it will be necessary to clearly exclude from prohibitions associated with that registry e-mails sent at the request of the recipient, e-mails sent where there is an established business relationship, and e-mails meeting the definition of transactional or relationship messages. Furthermore, these exclusions should be sufficiently broad to permit associations and membership organizations to communicate with members without fear of violating Do Not E-Mail registry regulations.

Apart from the impact of a registry on legitimate commerce, creating, maintaining and implementing a Do Not E-Mail registry presents unique security and privacy issues. The e-mail addresses on the list must be publicly available to ensure that individuals, businesses and organizations can frequently compare their e-mailing lists against the registry. Yet it is also important to take steps to prevent use of the list by spammers who will regard it as a readily available source of valid e-mail addresses. As stated above, e-mails from these spammers continue to break the law. Spammers will be unconcerned about breaking an additional

provision in the future. Making the list publicly available will ensure that registrants will continue to receive spam e-mail, perhaps in increasing quantities.

Unlike telephone numbers, individuals can obtain numerous e-mail addresses at low or no cost. Individuals can use these e-mail addresses periodically, or for limited purposes, or not at all. Absent monitoring of the registry to ensure that all addresses on the list are active, the registry will quickly become large and unwieldy.

Plan and Timetable for Implementation of the Registry

The costs associated with the Do Not E-Mail registry would be high, while the likelihood that the registry will effectively deter spammers is low. Given that the registry is most likely to impact legitimate senders of commercial e-mail who already comply with the CAN-SPAM Act, Congress, the Federal Trade Commission, private businesses and organizations, and e-mail recipients should not insist on immediate implementation of the registry. Instead, consideration of a Do Not E-Mail registry should be deferred while enforcement of the CAN-SPAM Act is stepped up and while more effective technology for eliminating spam is developed, since it is legitimate businesses that are complying with the law and honoring their customers' requests. Even if it is concluded that the benefits of a registry outweigh its substantial burdens, a registry should be an enforcement mechanism of last resort, implemented only if enforcement of the Act and developments in technology fail to stem the flow of spam.

Costs and Benefits of Creating and Maintaining the Do Not E-mail Registry

The Do Not E-Mail registry will undoubtedly capture the attention of the public as a potentially effective means of preventing unwanted spam. As a practical matter, such a registry will impose a heavy burden of compliance on senders of legitimate commercial e-mail. It will impose no burden on spammers who are unconcerned about complying with the terms of the

CAN-SPAM Act, and will achieve very little in the way of eliminating the types of e-mail that recipients actually want the registry to prevent.

Developing the necessary systems and procedures to ensure that no commercial e-mail is ever sent to an address on the registry will be costly for businesses and organizations. There are also significant costs associated with developing procedures to ensure compliance on an ongoing basis. Once the procedures are in place, a business or organization must continue to pay the cost of regularly obtaining and monitoring updates to the registry against its e-mail list.

Businesses are already required to provide an opt-out mechanism. The additional step of pre-screening e-mail lists against the registry will result in increased administrative costs. The size of the registry list is potentially very large, and certainly greater than the e-mailing lists maintained by most businesses and organizations, particularly smaller businesses and organizations that send commercial e-mail to relatively few recipients. To these direct compliance costs must be added the even greater costs on businesses that must use other media to advertise for fear of sending e-mail. Legitimate advertising is essential to American business, not an evil to be stamped out. If, for example, the publisher of a magazine covering the plastics industry wishes to advise its publication's 50,000 readers of an upcoming industry event, and if the publisher can no longer use e-mail to reach that willing audience, the alternatives – such as direct mail – will cost thousands of dollars more. Industry will suffer, and the American economy will suffer.

Finally, creation of a Do Not E-mail registry will result in a substantial regulatory trap for legitimate businesses that seek but fail to comply. Businesses seeking to comply will inevitably fail in at least minor ways. These failures will result in potential and actual liabilities for non-compliance, even if noncompliance is sporadic and inadvertent. The likelihood that actions will be brought by those offended by true spam, but who cannot locate the sender,

against one or more legitimate companies that are seeking yet failing in their efforts to comply seems inevitable. Legitimate businesses seeking to comply in good faith will likely bear the brunt of consumer and regulator frustration over spam that will continue unabated by the Do Not E-mail registry.

While political pressure for a Do Not E-Mail registry may be significant, the Commission's should withstand that pressure and prevent a cure that is worse than the disease.

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