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COMMENTS OF THE NATIONAL RETAIL FEDERATION

CAN-SPAM Act Rulemaking
FTC Project No. R411008

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The National Retail Federation is the world's largest retail trade association, with membership that comprises all retail formats and channels of distribution including department, specialty, discount, catalog, Internet and independent stores as well as the industry's key trading partners of retail goods and services. NRF represents an industry with more than 1.4 million U.S. retail establishments, more than 20 million employees - about one in five American workers - and 2003 sales of $3.8 trillion. As the industry umbrella group, NRF also represents more than 100 state, national and international retail associations.

Multichannel retailers have spent the past seven years revolutionizing the way Americans shop by giving each and every consumer greater access to a wide variety of goods and services at highly competitive prices. E-commerce has brought millions of new customers to retailers' web sites. In fact, over 40 percent of online customers are new to the retailer's entire business.[1] The Internet has also served to increase new customer traffic in brick and mortar stores after browsing online. According to the Shop.org[2] annual study for 2002, online retail sales soared to $76 billion that year, up 48 percent over 2001. The study further predicted online sales to grow another 26 percent to reach $96 billion in 2003.

In addition to growth in revenue, figures from the *State of Online Retailing* study show that online retailers in the United States are continuing their march to profitability. In 2002, 70 percent of retailers reported positive operating margins, compared with 56 percent in 2001. Collectively, online retailers broke even in sales in 2002, up from a loss of 6 percent in 2001.

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[1] *The State of Retailing Online 6.0*,2003, a Shop.org annual study of more than 130 retailers conducted by Forrester Research. Shop.org's *State of Retailing Online* 7.0 for 2003 will be available in May 2004.
[2] Shop.org is the online retailing division of NRF.

The 2003 Shop.org/BizRate.com *Holiday Mood Study* further found that more than half (59 percent) of retailers reported revenue growth for the 2003 online holiday season of 25 percent or higher. Almost a third (30 percent) reported revenue increases of 50 percent or more.

As multichannel retailers continue to fine-tune their online selling and marketing strategies, consumers have become more comfortable shopping online – especially with retailers that they know and trust. Online sales were expected to reach 4.5 percent of total retail sales in 2003, up from 3.6 percent in 2002.[3] It took the catalog industry 100 years to represent 4.7 percent of retail sales. It took online retailers only six years to accomplish the same feat. What has made this retail industry revolution possible is the widespread access to the Internet and e-mail by American consumers. So, while the reach of "e-tailing" is quite broad, its existence as a technology is still rather new and its patterns of use are still developing.

Many multichannel retailers routinely communicate with their customers by e-mail. Whether it is to confirm a transaction, to notify the customer of the delivery status of their product, or to distribute news and promotions for the customer's convenience, retailers send out millions of e-mails each and every day. The sheer breadth and expectations of the online retail customer base virtually necessitates this practice and it has proven to be an effective tool for providing customer service and building customer loyalty.

As the Internet has emerged as a primary tool of communication and commerce, commercial e-mail has come to mean different things to different people. Unfortunately, Americans open in-boxes full of offensive pornographic e-mail, get-rich schemes, and promotions for diet aids every day. However, they also receive e-mails from legitimate

[3] *State of Online Retailing 6.0,*, Shop.org, 2003

retailers promoting their brands, notifying customers about sales, and, often, offering free shipping on purchases. Retailers have been at the leading edge of e-mail marketing best practices. In fact, many retailers only communicate with customers who have provided them with their e-mail address and, even before the Can Spam Act took effect, routinely included easy opt-outs in their marketing e-mail.

Unlike spammers, legitimate retailers have long understood that keeping their customers happy is the most essential part of building a positive long-term business relationship. That is why NRF was extensively involved in the formulation of the Federal Trade Commission' s ("the Commission") National Do Not Call list, supported the passage of legislation at the end of the 107th Congress that asked the FCC to do the same, and was actively involved in the formulation and passage of the Can Spam Act. If our customers do not want to be called, e-mailed, or even sent perfume samples in their monthly billing statements, retailers want to accommodate their wishes. A satisfied customer is a repeat customer.

Legitimate retailers send millions of pieces of e-mail every day. This is in direct correlation to the fact that they have *millions and millions* of customers who enjoy the benefits of hearing from them in this manner. In fact, e-mail was the most popular means for retailers to market to customers online during the 2003 Holiday season according to the Shop.org and BizRate.com *2003 Online Holiday Mood Study*. However, to many anti-spam activists and ISPs the sheer volume of communications sent out by any legitimate retailer may be deemed reason enough to label their e-mails as spam.

In fact, retailers are fielding more and more complaints from their customers that their e-mails are not getting through. Long-time customers want to know why they didn't get their sale notices while their neighbor down the street did. Often the answer is simple: their neighbor uses a different ISP. Even more troubling is the fact that blocking acts to deflect not only marketing emails, but also e-mail that retailers are required to send customers (e.g., delay notices under the FTC Mail and Phone Rule) and e-mail customers expect to receive (e.g., order confirmations). Recent statistics compiled by Assurance Systems in the fourth quarter of 2002 show that fully 15 percent of permission-based e-mail never gets through to subscribers of the largest ISPs.[4]

Despite this fervent blocking, it is clear that the average consumer views the e-mail that they receive from the retail industry very favorably. According to a survey conducted by Bigfoot Interactive and NOP World Research[5] in February of this year, 90 percent of consumers eighteen years and older who receive permission-based e-mail and 83 percent of consumers who receive unsolicited e-mail from retailers are very satisfied with the retailer. In fact, 91 percent of the participants who receive permission-based e-mail are more likely to buy products from the retailer. Eighty-three percent of those receiving unsolicited e-mail said the same thing. Finally, 81 percent (unsolicited) and 88 percent (permission-based) of the consumers surveyed are likely to recommend the retailer to others. These are very powerful numbers that show that consumers do not view permission-based and unsolicited e-mail from retailers in a negative light. In fact, it is quite the contrary.

The FTC should take this opportunity to draft a rule that complies with the spirit of the Can Spam Act which was created by Congress with the purpose to cut down on the amount of

[4] "Fourth Quarter 2002, E-mail Blocking and Filtering Report," Return Path Assurance Systems, February 2003.
[5] "Retailer's E-mail Achievements," *E-Marketer,* March 10, 2004.

unsolicited fraudulent and pornographic e-mail sent to consumers in-boxes every day. Congress clearly did not intend that the Act should be used to stifle legitimate commerce -- a purpose made clear by the fact that lawmakers declined to pick a winner between senders of consent-based and unsolicited e-mail even when under pressure to do so. The Can Spam Act takes a fair and balanced approach to e-mail, creating a clear benefit to consumers by requiring an easily administered opt-out from future commercial e-mail, while maintaining the ability of legitimate marketers to reach out new customers with their products and services in order to grow their businesses, and, in the process, create an even brighter future for e-commerce.

Mandatory "Primary Purpose" Rulemaking

Criteria for determining whether the "primary purpose" of an electronic message is commercial

The word "primary" is defined in Webster's Dictionary as, "First or highest in rank, quality, or importance; principal." NRF strongly believes that the term "primary purpose" should be interpreted to mean that the advertisement or promotion contained in the e-mail is more important than all the other purposes of the e-mail.

It is clear from the statute that Congress intended that the Commission should recognize only one primary purpose in any given e-mail – either an advertising/ promotional primary purpose *or* a transactional/relationship primary purpose. This means that a commercial e-mail should be deemed advertising/promotional if the sender's primary intention in sending the message is to promote a product or service even though the e-mail message may contain secondary transactional or relationship information. Thus, the criteria

developed by the Commission should take into account whether or not the e-mail is *primarily* a commercial advertisement or, conversely, if it is *primarily* a transactional or relationship message. One way to make this determination is for the Commission to develop a test to identify e-mail messages that would not have been sent "but for" the transactional or relationship component of the message.

A good example of a primarily transactional message is when a customer is notified that a sun umbrella they have reserved has been back-ordered, but in the body of the e-mail the retailer also offers the customer the opportunity to order a different sun umbrella if the customer prefers not to wait. This should sit in contrast with a promotional e-mail sent after the customer has been notified that the sun umbrella has been back-ordered that states, "While you are waiting for your sun umbrella, we thought you might be interested in our sale on sun block." In this type of subsequent message the advertisement is the primary purpose of the e-mail because the retailers intent is to promote a different product or service.

Adoption of this comparative standard should not mean that a retailer must avoid including pure advertising in the body of a transactional message. Customers receive great benefit from being informed of new products or given additional information about the retailer in customarily transactional messages. For instance, when a retailer sends an order confirmation to a customer who has ordered a new suit it may also include a helpful hint about purchasing a matching tie. Additionally, an electronics retailer may want to confirm the sale of an HDTV as well as offer the customer the ability to purchase an extended warranty or service plan. That same electronic retailer may also want to direct the customer to a compatible speaker system or DVD player. Again, it is quite clear from the statute that there

can be only one primary purpose per e-mail, and that any additional content, whether promotional or transactional, should be considered secondary information by the Commission

The FTC should not adopt a "net impression" standard that relies on the subjective assessment of the recipient of the e-mail as has been used in other marketing contexts. Further, "primary purpose" should be measured by the specific intent of the sender. It is clear from the Can Spam Act that Congress never intended a subjective standard to be used. In fact, to the contrary, the Act lays out an objective standard that makes clear that "the inclusion of a reference to a commercial entity ... does not ... cause such a message to be treated as ... commercial ... if the contents and circumstances of the message indicate a primary purpose other than commercial advertisement or promotion.[6]" So, according to the Act itself, it is the objective intention of the sender that should be used in determining the "primary purpose."

Clearly, the Commission will have to develop a set of criteria to gauge "primary purpose," but it is the position of the NRF that the identity of the "sender" should not effect whether the e-mail is considered a commercial advertisement or promotion. At present, retailers send out millions of transactional and relationship messages to their customers. These e-mail's include such services as order confirmation, shipping notification, back-order updates, club benefits, credit card information and the like. Often, these messages have no advertising or promotional purpose, or that purpose is secondary to the transactional or relationship message.

To require senders to include opt-out in these messages just because the sender is a retailer could be detrimental to an ongoing relationship or, ultimately, impede the completion

[6] PL 108-107, the "Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003," Sec. 3(2)(D).

of the agreed upon transaction. In fact, consumers may be genuinely confused whether they are being asked to opt-out of future commercial or transactional messages. More and more, businesses are using transactional messages for security reasons, to verify that the person who placed the order or initiated the transaction is, in fact, whom they say they are. Many Online merchants will not even complete a transaction without a valid e-mail address that can be used for verification, follow-up and customer service.

Subjects for Discretionary Rulemaking Under the Act

Modifying what is a transactional or relationship message

The Commission should consider that the terms "facilitate, complete or confirm,[7]" are very broad and encompass a wide variety of e-mail messages. Transactional messages covered by the statutory exemption and of great importance to retailers include order confirmation, delivery tracking services, shipping status, customer service messages and the like. They also include messages such as warranty promotions directly related to a purchase made by the consumer.

Other transactional messages clearly covered by the "transactional or relationship message" exemption include credit or account related messages and subscription or membership messages[8]. The Commission should note that retailers use many "club" or "club card" rewards programs aimed at marketing specific retail categories or benefits to their customers. Sometimes these benefits are related to a credit account, other times they are related to a membership in a program (the best example of this is a supermarket discount card) in exchange for which a consumer provides contact information. Retailers also

[7] PL 108-107, Section 3(17)(A)(i)
[8] PL 108-107 Section 3(17)(A)(iii)(III)

commonly e-mail couples that have enrolled in gift registry programs to inform them of gift purchases or update them on the merchandise they have selected (such as the item has been discontinued or is on sale). Further, retailers continue to e-mail couples for a specific duration of time after the wedding or event to remind them to purchase any items that they may still need. The Commission should include these types of messages when interpreting Section 3(17)(A)(iii)(III).

The Commission should also clarify the intent of Section 3(17)(A)(iv) to insure that it covers messages that are sent to employees to facilitate their enrollment in benefit programs. This may occur when a new employee joins a company and has not yet enrolled in any plan or when a company changes or modifies its benefit plans. Further, this exemption should be read to include e-mails related to retirement benefits even if the recipient is retired or no longer an employee of the sender. In all of the examples listed above, it could potentially be *more confusing* for the recipient to be offered an opt-out notice. Consumers (or employees in the case of employment plans) may not know what they are opting out of – future commercial e-mail or important transactional messages.

Modifying the 10-business-day time period for processing opt-outs

NRF believes that ten business days is not a sufficient amount of time for acting on an opt-out, especially when failing to meet such a short deadline can result in legal liability. One of the biggest misconceptions about e-mail marketing is that opt-outs are processed instantaneously. While many companies are able to process opt-out requests quickly (in a few days time), that is not by any means the whole story. Retailers and other marketers have many logistical and technological limitations to contend with, especially when faced with

scrubbing huge lists of customer information every time a marketing contact occurs. Often, list scrubbing can include time-consuming manual data entry and complicated "merge and purge" processes. Even under the telemarketing sales rule, the Commission gave marketers ninety days (recently reduced to a statutory thirty-one days) to comply.

National e-mail campaigns can be just as complex as telemarketing campaigns. Often, weeks of planning goes in to developing content, evaluating the targeted audience and sending e-mails to millions of recipients. While instant opt-outs are most desirable, the current ten-day deadline does not reflect the real complexities of processing opt-out requests for a multi-channel retailer. A retailer may have a brick and mortar business, an affiliated online retail site, as well as a marketing affiliate all operating under a single brand or division. This could be further complicated by the fact that retailers often outsource e-mail marketing to third-party e-mail service providers ("ESPs") or may be involved in a complex joint-marketing campaign. This type of structure creates many different data points where a customer's e-mail information may be housed and each point has to be checked and scrubbed before e-mail is sent. As a result, it may take several days or even weeks for a retailer and its marketing partner to completely scrub all of its lists of e-mail addresses.

Additionally, the current practice of many retailers involved in e-mail marketing campaigns is to "pull" the list of customers that they intend to contact several weeks in advance of an e-mail campaign, and the campaign itself can last for several days. Clearly, if a large company's suppression list contains, or grows to contain, several million names, the progress of the marketing campaign could be impeded by constant scrubbing. List scrubbing may also get in the way of very time-sensitive and reactive marketing such as holiday promotions, limited time offers, or price wars. As a result of this new ten-day requirement,

retailers will have to significantly alter the logistics of their e-mail campaigns and, in some instances, will not be able to present consumers with compelling offers within a short space of time in order to hedge against the likelihood that some opt-outs have not been processed.

Retailers depend on keeping their customers happy. However, complying with a ten-business day deadline for processing opt-outs may be very difficult for some retailers and expose them to liability under proposed legislation. NRF would prefer an opt-out that is at least comparable to that found in the Telemarketing Sales Rule -- the new regulations require thirty-one days for compliance. This is not to say that retailers will not process opt-outs in a timely fashion (retailers recognize, and customer service demands, that opt-outs should always be processed as fast as is reasonably possible), but an extended period will help mitigate liability when more complicated marketing campaigns are underway or several different parties are involved in scrubbing lists. The Can Spam Act was mean to prevent the pernicious acts of spammers, not to set liability traps for legitimate marketers.

Implementation of Provisions of the Can Spam Act Generally

Clarification of the term "sender"

The Commission should use its authority to issue regulations clarifying when a person is a "sender." The term "sender" is defined in the Act as "a person who initiates such a message and whose product, service or Internet website is promoted by the message.[9]" NRF strongly believes that when a third-party initiates a marketing campaign or promotional piece to send to its own list of customers, and only offers ancillary advertising or promotional space to a retailer, then the retailer should not be deemed a "sender" under the Act.

[9] PL 108-107, Section 3(16)(A)

A good example of this is when a shopping center developer sends out a promotional e-mail to its own list of customers to advertise the grand opening of a new mall and includes the names, logos or Internet links to the mall's featured retail stores. In this instance the "sender" should only be the development company because the developer initiated the e-mail *and* the product or service that is being promoted is the mall. Further, if a retailer purchases promotional space from a coupon service that e-mails hundreds of coupons and promotions to its own list of coupon customers, the participating retailers should not be considered "senders" (just as advertisers in a comparable conventionally-mailed circular would not considered a "senders"). Similarly, if a third party employer sends an e-mail out to its employees to promote the office "casual Friday" policy and includes in the e-mail a coupon for purchasing khaki pants at an unrelated retail store, the retailer should not be deemed a "sender." In all of these cases, the retailer did not initiate the contact with the consumer, but participated in an ancillary manner that only served to enhance the product offered by the sender – regardless of whether the retailer paid some type of advertising fee to the sender.

The Commission should also look at similar circumstances where an ISP sends a message to its own customers about its Internet shopping area with information about the multiple retailers featured there (e.g. Yahoo Shopping). In this case, the third party ISP is sending e-mail to its own customer list and is addressing a variety of offers. In these instances the participating retailers are not trying to use a third party to do what they cannot do (and avoid their obligations under the Act), but are helping to facilitate a promotion where another company wants to present some unique offers to its own customers. The same thing might happen, for example, on a content oriented website (e.g., a bridal website) that sends out a newsletter referencing other sites they think their customers may like. Finally, the

Commission should consider creating an exemption for advertisers in a newsletter or newspaper that e-mails its content in electronic form to its own subscriber list.

It is vitally important in all the above circumstances that retailer not be considered a "sender" because to do so will create complicated and difficult compliance issues that, if not administered correctly, may lead to substantial liability under the Act. Clearly, if a retailer actively initiates its own marketing campaign by procuring a third party to e-mail promotions to the retailer's list of customer (or a list that the retailer purchases from the third party), then the retailer should be considered a "sender." This type of relationship is definitely contemplated under the Act. Further, NRF understands that if a retailer actively procures the participation of other businesses to participate in a joint marketing campaign where the promotion of the joint marketers' products is the primary purpose of the e-mail, and they are sending to their own customers, the retailer and its partners should be all be considered "senders" and thus comply with all of the duties that status confers under the Act.

Forward –a-friend campaigns

The Commission has focused a great deal on how forward-a-friend e-mail campaigns should be treated under the Act. Forward-a-friend programs are highly successful programs that generate e-mails sent from the sender/friend's e-mail address to the recipient/friend's in-box. The companies that use this type of tool offer it as a courtesy to their customers and generally do not capture or collect the e-mail addresses for future solicitations. NRF strongly believes that if a retailer is not offering any inducement or consideration to the sender/friends using this system then retailer should not be considered a "sender" or "initiator" under the Act. Furthermore, the simple offer of a promotion (5 percent off the book being

recommended by the sender/friend) to the end recipient/friend of the e-mail should not be deemed to be an act of procurement by the Commission.

Clearly, the Commission does not want to create a loophole that will allow bad actors to use send-a-friend to create huge e-mail trees consisting of millions of e-mails. Retailers would not want that as well. But the Commission has to consider the fact that participant sender/friends in such a spam chain are probably receiving some type of payment or inducement for their services and thus would be covered under the Act. Again, the Can Spam Act was meant to catch spammers, not retailers who are offering popular services to their customers and their customers' friends.

Valid physical postal address

Section 5(a)(5)(A)(iii) of the Act requires the disclosure of "a valid physical postal address of the sender" in each electronic mail message. NRF believes that a P.O. Box should be considered a "valid postal address" under the act because it is a permissible means in many other effective consumer protection laws. Further, because the required disclosures may not be clear to consumers some, inevitably, will chose to opt out in writing instead of using the opt out mechanism included in the e-mail. This could create a stream of mail that, instead of going to a particular P.O. Box like normal business correspondence (for purposes of pre-sorting), may be lost or slowed down as a result.

Quite clearly, Congress wanted to include a "valid physical postal address" in the body of the e-mail so that bad-actor spammers could be tracked down. Additionally it is true that a creative spammer could just set up a dead P.O. Box to satisfy the Act's requirement. Therefore the Commission should consider an alternative position that allows for the

inclusion of a P.O Box for those companies who prominently identify themselves in the body of the e-mail. Currently, the Act only requires marketers to identify themselves through header information that includes a valid domain name and a valid originating electronic mail address. However a "from" line may not, on its face, sufficiently identify the sender because the domain name may be different that the businesses name. If a marketer supplies the consumer with more extensive identifying information (the valid name of the business sending the e-mail) within the body of the e-mail, and that marketer can be easily contacted through means that are readily available to the public such as its website or the phone book, a P.O. Box should suffice.

In an alternative position, the Commission could consider allowing companies to include a link in the body of the e-mail that would replace the inclusion of either an address or P.O. Box in the body of the e-mail. This link could direct the consumer to the retailer's privacy policy that supplies valid contact information and explains the retailer's opt-out policy or it could direct the consumer to other valid customer service contact information.

Studies and Plans Mandated by the Can Spam Act

System for rewarding those who supply information about Can Spam violations

The Commission should encourage consumers to report spammers to the appropriate enforcement agencies, whether it is the Commission, a State Attorney General or even their ISP. The Commission already has an excellent complaint compiling system set up that allows consumers to forward what they believe to be spam to a Commission e-mail address. Some ISPs offer a similar tool. These entities can then distill who truly are spammers in violation of the Act

It is not in the best interests of legitimate marketers for the Commission to set up any type of system that offers monetary incentives to individuals who can find commercial e-mail that is in violation of the Act. This type if incentive would ultimately become a "bounty hunter" system. Some retailers have already had experience with a similar system in Utah, where a state private right of action against spammers served as an incentive for individuals to set up e-mail accounts with the specific intent of "catching" legitimate marketers in technical violation of the Utah statute. As a result, several legitimate marketers were sued, primarily due to their status as "deep pocket" defendants. Ironically, this type of system offered little incentive for bounty hunters to go after true spammers who were violating the law because the plaintiffs knew they would win little in any suit.

The Can Spam Act was designed to create an opt-out regime for commercial electronic mail that would create liability for the pattern and practice of violating the Act. Congress specifically declined to create any private right of action for individuals in this legislation. The closest they came was to give some enforcement authority to ISPs. Further, the United States Congress specifically acted to preempt state law, rejecting the Utah statute and other similar state statutes. It would therefore be contrary to the spirit of the Act to allow for a financially incentivized "bounty-hunter" program.

Subject Line Labeling

Section 11(2) of the Act requires the Commission to submit a report that sets forth a plan for requiring commercial e-mail to be identifiable from its subject line. While NRF fully supports the current requirement under the Act that e-mails should be readily identifiable to

recipient consumers as an advertisement or solicitation, the National Retail Federation has serious reservations about subject line labeling.

As the Commission knows, several state laws that are now preempted under the Can Spam Act required labeling such as "ADV" in the subject line of commercial e-mail. Unfortunately, this requirement was primarily utilized by ISPs as a tool for identifying and blocking commercial e-mail that the *ISPs deemed to be* spam. Thus, the end-user consumer did not receive the benefit of choice from this system (as was the intent of state ADV laws) because messages from their favorite retailers were being blocked even before they arrived in the consumers' in boxes. To help curtail this problem, some state legislatures created an exception to the "ADV" requirement for businesses that have established business relationships ("EBRs") with their customers. Unfortunately, the Can Spam Act does not include criteria for the establishment of an EBR. Further, Congress explicitly rejected the EBR approach in favor of simply requiring an-opt out in all commercial advertising or promotional e-mail.

Conclusion

Section 2 of the Can Spam Act states that, "Electronic mail ... [is] extremely convenient and efficient, and offer[s] unique opportunities for the development and growth of frictionless commerce.[10]" NRF strongly believes that e-commerce has not even come close to realizing its potential for growth. Further, this exciting medium offers great convenience to consumers and creates a vital and competitive marketplace for goods and services that will only serve to further benefit our economy. With this in mind, the FTC should take care not to stifle legitimate communications that are vitally important to e-commerce -- and commerce

[10] PL 108-107, Section 2(a)(1)

generally. Congress clearly did not have this intent. In fact, lawmakers specifically declined to pick a "winner" between senders of consent-based and unsolicited e-mail even when under pressure from consumer groups to do so. NRF believes that the Can Spam Act takes a fair and balanced approach to e-mail that will, if administered prudently, create an even brighter future for the Internet and the retailers who make it such a popular place to shop.