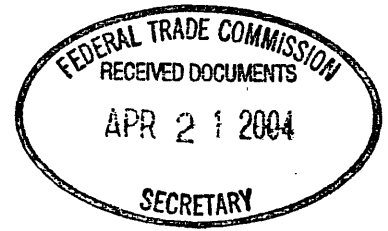


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ORIGINAL

**BEFORE THE
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580**



In the Matter of

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CAN-SPAM Act Rulemaking -
Comment

Project No. R411008

**COMMENTS OF THE
NEWSPAPER ASSOCIATION OF AMERICA**

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**COMMENTS OF THE
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The Newspaper Association of America (“NAA”) hereby submits its comments in response to the Federal Trade Commission’s (“Commission” or “FTC”) *Advanced Notice of Proposed Rulemaking* (“ANPRM”).¹ NAA is a non-profit organization representing more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily U.S. newspapers.

I. INTRODUCTION

The Internet has become a vital part of the newspaper business in recent years. Newspapers use the Internet to convey their news and other informational content, to reach their readership in new and timely ways, and to maintain mutually beneficial relationships with their subscribers and with their advertisers. Newspapers deliver content on the Internet both via sites on the World Wide Web and by means of electronic mail services, including e-newsletters and digital newspapers.

¹ *Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act, Advance Notice of Proposed Rulemaking*, 69 Fed. Reg. 11776 (March 11, 2004).

Reflecting the increasing importance of the Internet for accessing news in many local communities, nearly 1,500 North American daily newspapers had websites as of 2003.² Newspapers also use the Internet to deliver e-newsletters and digital newspapers to subscribers; to communicate with subscribers via email about their service; to notify subscribers of special offers, such as discounts on theater tickets; to send emails in response to search requests; and to communicate with existing and potential advertisers conveniently and efficiently. These types of emails transmit information that most recipients want to receive.

With the exception of a few newspapers with national readership, most newspapers focus their content and Internet services on providing service to the communities where they have physical presence. Newspapers attract more visitors than any other local media site in ninety-three percent of the top U.S. markets.³ Even newspapers whose websites attract a national readership like the *New York Times* and the *Washington Post* address a subscriber base in their local areas.

As local publishers, newspapers routinely engage in best electronic practices. Thus, for example, newspapers as a matter of course accurately identify themselves in the “sender” line in their electronic communications, provide accurate subject lines, and do not engage in the types of fraudulent and unsolicited communications that spurred Congress to enact the CAN-SPAM Act. Newspapers have no reason, and a strong disincentive, to displease their subscribers and other readers by engaging in deceptive practices that would alienate their customers. Instead, newspapers strive to establish reputations for integrity and responsibility among their readers, subscribers, and Internet consumers. And experience bears this out: eighty-three percent of

² *NAA's 2002 Online Consumer Study.*

³ *The Media Audit, NAA's Facts About Newspapers.*

visitors to newspapers' websites say those sites are the best resources to learn more about local news, events, and shopping.⁴

Newspaper emails are plainly not the genre that prompted Congress to enact the CAN-SPAM Act. In light of this record, there is no need to construe the CAN-SPAM Act in a way that regulates newspapers' use of the Internet via electronic mail. Like their print editions, newspapers' Internet content – and, for purposes of these comments, electronic e-newsletters specifically – are fully protected by the First Amendment. As such, any overbroad construction of the CAN-SPAM Act would be constitutionally infirm on its face. While newspapers recognize, and endorse, that the purpose of the CAN-SPAM Act is to reduce the scourge of unsolicited and fraudulent email that threatens the enduring value of the electronic medium, the Act should not be applied in a way that burdens newspapers' ability to maintain effective communications with consumers and advertisers who rely on electronic communication.

II. IN ADOPTING CRITERIA TO DEFINE “PRIMARY PURPOSE,” THE COMMISSION SHOULD ENSURE THAT NEWSPAPER EMAILS CONTAINING EDITORIAL CONTENT ARE NOT MADE SUBJECT TO THE ACT

The primary regulatory burdens of the CAN-SPAM Act apply to a “commercial electronic mail message,” which the Act defines as an email whose “primary purpose” is the “commercial advertisement or promotion of a commercial product or service.”⁵ The Act directs the FTC to issue regulations defining criteria for determining an email’s “primary purpose,” which the Commission will do in this rulemaking.⁶ The criteria used to define “primary purpose” will determine whether an email is a “commercial electronic mail message” and thus

⁴ *NAA's 2002 Online Consumer Study*.

⁵ CAN-SPAM Act § 3(A)(2)(A).

⁶ *Id.*, at § 3(A)(2)(C).

subject to the Act's prohibitions and requirements. In establishing these criteria, the FTC should do so in a way that ensures that the primary purpose of newspapers' emails containing editorial content is not "commercial." Such action is necessary to (1) avoid infringing upon constitutionally protected content and (2) implement the Act in a manner consistent with congressional intent.

A. The Act Cannot Apply To Newspaper Email Content That Is Protected By The First Amendment To The Same Extent As Print Newspapers

It is a fundamental tenet of American constitutional law that newspaper content is fully protected by the First Amendment.⁷ This constitutional protection applies to newspaper content on the Internet as well.⁸ The First Amendment protects the freedoms of speech and of the press; it does not distinguish on the basis of whether the content appears on newsprint or computer screens. Newspapers' e-newsletters and digital newspapers contain the same editorial content – often the identical content – as their printed counterparts and are entitled to the same First Amendment protections.

The free discussion of public affairs is a cornerstone of the First Amendment.⁹ This protection of editorial speech reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."¹⁰ The FTC should uphold these principles by defining "primary purpose" in a way that does not include newspaper emails with editorial content.

⁷ *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

⁸ *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997).

⁹ See, e.g., *Mills v. Alabama*, *supra* note 7, at 219.

¹⁰ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

It is important to note that the inclusion of paid advertising that provides financial support for the distribution of electronic content by newspapers does not change the legal analysis. That newspaper emails may carry some advertising does not diminish their value, change their nature, or alter the First Amendment protection afforded newspaper emails' editorial content.¹¹ Indeed, it is this financial support that enables newspapers to make e-newsletters available for free or at relatively low subscription rates.

Interpreting "primary purpose" to include e-newsletters and digital newspapers within the scope of the CAN-SPAM Act would directly implicate the First Amendment. Such a limitation on the distribution of constitutionally protected editorial speech would be inconsistent with the First Amendment protection afforded the freedom of the press and could impose a chilling effect on constitutionally protected editorial speech.¹² For these reasons, including digital newspapers and e-newsletters in the Act's scope would render the CAN-SPAM Act facially unconstitutional as an unreasonable restraint on the distribution of editorial speech.

B. Congress Did Not Intend For The Act To Apply To Editorial Emails

The criteria adopted to define "primary purpose" should make plain that newspaper emails with editorial content are not subject to the CAN-SPAM Act. This interpretation of the Act is consistent with traditional tools of statutory construction, with the Act's legislative intent, and with sound policy.

Beginning the analysis with the statutory text, the CAN-SPAM Act defines a "commercial electronic mail message" as an email whose primary purpose is the "commercial

¹¹ *Id.*

¹² See, e.g., *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988).

advertisement or promotion of a commercial product or service.”¹³ The “primary purpose” of newspaper e-newsletters and digital newspapers is to provide news content to consumers, not to advertise or promote a product. This fact is unaffected by the inclusion of advertising that helps to support and sustain the collection and dissemination of the news information. The commercial advertisements are ancillary to the emails’ primary purpose of distributing news. Therefore, a plain reading of the Act excludes newspaper emails with editorial content.¹⁴

Legislative history confirms that Congress did not intend for the Act to reach emails with editorial content. For example, while the House of Representatives was considering the Senate CAN-SPAM Act, Representative James Sensenbrenner (R-Wisc.) noted that “the legislation concerns only commercial and sexually explicit email and is not intended to intrude on the burgeoning use of email to communicate for political, news, personal, and charitable purposes.”¹⁵ The Commission should adopt criteria for defining “primary purpose” in a manner consistent with Congress’ wishes for administering the Act.

Sound public policy also favors a cautious delineation of the Act’s scope. Editorial newspaper emails serve the important function of distributing information about news and community affairs. As such, they should be encouraged, not discouraged. The CAN-SPAM Act should not hinder this valuable, legitimate means of distributing news while doing little to promote the Act’s goals.

For these reasons, the FTC should establish the criteria for defining “primary purpose” in a manner that will exclude digital newspapers and e-newsletters that contain editorial content

¹³ § 3(2)(A).

¹⁴ The Commission has recently acknowledged that the CAN-SPAM Act “applies only to commercial email messages” that propose commercial transactions. *Label for Email Messages Containing Sexually Oriented Material, Final Rule*, 69 *Fed. Reg.* 21024, 21026 (April 19, 2004).

¹⁵ 149 Cong. Rec. H12186,12193 (daily ed. Nov. 21, 2003) (House consideration of S. 877).

from commercial emails. These emails are not commercial electronic mail messages in the sense meant by Congress and should not be subject to the CAN-SPAM Act's requirements.

III. THE FTC SHOULD ENSURE THAT "TRANSACTIONAL OR RELATIONSHIP MESSAGES" INCLUDE (A) EMAIL MESSAGES THAT CONSUMERS HAVE EXPRESSLY ASKED TO RECEIVE AND (B) EMAIL COMMUNICATIONS AMONG ENTITIES WHERE AN ESTABLISHED BUSINESS RELATIONSHIP EXISTS

The CAN-SPAM Act lists five categories of "transactional or relationship" messages.¹⁶

In addition, however, Congress also expressly authorized the Commission to modify the definition of "transactional or relationship" messages to accommodate contemporary business practices. While NAA respectfully believes that, for the reasons stated above, the majority of emails sent by newspapers are entirely outside of the scope of the CAN-SPAM Act, we submit that other emails sent by newspapers properly should be regarded as "transactional or relationship" messages under the law. In particular, these include emails (1) sent in response to a specific request of the recipient, and (2) sent to entities with which the newspaper has an established business relationship.

A. The Definition Of "Transactional Or Relationship Messages" Should Include Email Messages That Consumers Ask To Receive

The fifth category of "transactional or relationship" messages defined in the CAN-SPAM Act are those sent to "deliver goods or services that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender." The

¹⁶ These categories include email messages that: (1) facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender; (2) provide warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient; (3) provide specified types of information with respect to a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender; (4) provide information directly related to an employment relationship in which the recipient is currently involved; or (5) deliver goods or services that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender. CAN-SPAM Act § 3(2)(B).

Commission should construe this category to include emails that fulfill consumers' requests for those emails.

Two types of emails that newspapers send at the request of customers illustrate this point: search engine emails and "special offer" emails. Some newspaper Websites offer a search engine feature that enables site visitors to look for classified advertisements they would like to receive via email. The consumer uses a search tool on the website to request automated email alerts when, for example, a newspaper adds a classified listing, job opportunity, or other specified type of advertisement to its database. Although the newspaper technically sends a commercial email to the consumer in these cases, it does so only as a service in response to that consumer's request. The newspaper does not select the email's content (the advertiser does so) or destination (the recipient does so). Rather, it merely acts as a conduit for forwarding information that a consumer is, in effect, sending to his or herself.

In the second case, newspapers on occasion will provide readers, upon their request, with electronic notifications about special offers. These emails, which are sent by the newspaper, notify readers of special deals advertised by local businesses, such as a discount on tickets to local events or restaurants. These are sent only to recipients who have requested these emails because they want to be aware of these offers. In terms of the Act, these emails are being sent to recipients who asked newspapers to send them and who are entitled to receive them according to the terms of their requests.

The fifth category of "transactional and relationship messages" on its face appears to include requested emails of these natures. These are emails that the recipient "is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into" by signing up for the emails. They are not the "unwanted" emails that clutter inboxes and

“unsolicited” commercial emails that account for over half of all email traffic which Congress enacted the CAN-SPAM Act to address.¹⁷ The Act’s legislative history repeatedly touts the Act’s role in counteracting unwanted “spam” emails – not requested emails.¹⁸ Accordingly, the fifth category of “transactional and relationship messages” was appropriately meant to exclude the requested emails newspapers send that are described above. To the extent that this is not already clear, the Commission should affirm that the fifth category of transactional or relationship messages includes emails that consumers have expressly asked to receive.

B. The Definition Of “Transactional Or Relationship Messages” Should Include Contact Between Entities With An Established Business Relationship (“EBR”)

Like many other businesses, newspapers today often maintain ongoing commercial relationships¹⁹ with their advertisers and other customers through email. They include many forms of routine communication between the newspaper advertising staff and the advertisers themselves.

For example, newspaper salespersons may use email to facilitate advertising transactions, asking advertisers if they would like to repeat their advertisements, notifying advertisers of special offers, and showing advertisers their advertising proofs. Newspapers may also communicate with small businesses that have previously advertised in a special issue, such as the College Football Preview or the Mother’s Day editions, but are not currently running advertisements, to see if they wish to repeat an advertisement in the current yearly edition.

¹⁷ CAN-SPAM Act § 2(a).

¹⁸ See, e.g., 149 Cong. Rec. H12186, *supra* note 15, at 12195 (statement of Rep. Markey).

¹⁹ See the third category of transactional or relationship messages, which includes emails that provide specified types of information with respect to a subscription, membership, account, loan, or comparable *ongoing commercial relationship* involving the ongoing purchase or use by the recipient of products or services offered by the sender. CAN-SPAM Act § 3(2)(B) (emphasis added).

Email communication with established business contacts is a convenient, efficient, and important way for newspapers to stay in touch with their customers. In fact, advertisers often prefer receiving advertising information via email rather than over the telephone or in person because it is a quicker and easier way to communicate. It is common for local businesses to inform newspapers that they prefer to communicate through email about advertising arrangements.

Newspapers also communicate with subscribers to confirm that they are satisfied with their subscription or service and to verify account information. Like emails to advertisers, this is an easier and less obtrusive way to contact subscribers than other channels of communication, such as the telephone. In addition, email contact with subscribers helps foster the newspaper-subscriber relationship.

Because the term “ongoing” is not defined in the statute, there could be an ambiguity whether these types of messages may in all cases satisfy the terms of the third category of “transactional or relationship” messages. Despite that ambiguity, such email communications are plainly legitimate, reflect common and sound business practices, and are far removed from the type of fraudulent messages that the CAN-SPAM Act was enacted to deter. The FTC should recognize the value and importance of these communications, as it has in its Telemarketing Sales Rule, by modifying the definition of transactional or relationship messages to include emails between entities with an established business relationship (“EBR”).²⁰

²⁰ The FTC should also treat as messages within an EBR relationship those commercial emails, such as special offer emails, that consumers ask newspapers to send them. This latter interpretation of the EBR exception is not necessary, however, if as recommended in Section III.A, above, the Commission recognizes “requested” emails as being within in the third category of transactional and relationship messages.

IV. THE FTC SHOULD CLARIFY THAT THERE IS ONLY ONE “SENDER” OF COMMERCIAL ELECTRONIC MAIL MESSAGES THAT CONTAIN MULTIPLE ADVERTISEMENTS

The FTC seeks comments on whether to exercise its discretionary authority to implement provisions of the Act²¹ to establish whether several entities – *e.g.*, multiple advertisers – could simultaneously be considered an email’s “sender” under the Act.²² The definition of sender in these cases has significant consequences because senders are responsible for processing opt-out requests by deleting requesters from their email lists.

Although, for the reasons stated above, most newspaper emails should not properly be deemed “commercial,” newspapers on occasion will send some commercial emails that are covered by the Act. These commercial emails may contain advertisements from more than one advertiser. NAA encourages the FTC to exercise its discretionary rulemaking authority by clarifying that, in the case of an email containing promotions for multiple advertisers, a commercial email’s “sender,” and the entity responsible for honoring opt-out requests, is the entity that actually sends the email and is identified in the sender’s “from” line domain.

The alternative view, which would regard each advertiser as a “sender,” would be highly impractical given the Act’s opt-out requirements and could imperil the use of email for legitimate marketing. For example, if each advertiser were deemed a “sender,” a newspaper would have to: (1) purge each email against the do-not-send list of that advertiser and (2) forward newly-received opt-out requests to each business with an advertisement in the commercial email. The work involved would increase as the number of distinct advertisers in the email increases. Each advertiser would then independently process opt-out requests,

²¹ CAN-SPAM Act § 13(a).

²² *Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act, Advance Notice of Proposed Rulemaking*, *supra* note 1, at 11781.

presumably after having had them relayed by the newspaper. These burdens would make it difficult for newspapers to continue distributing commercial emails.

Both ease of compliance and adherence to the purpose of the CAN-SPAM Act counsel in favor of treating an email as having only one “sender” and that such “sender” is the entity from whose domain the email is sent. This would have the added benefit of conforming to legitimate recipient expectations. Receivers of newspaper emails have a direct relationship with the newspaper sender, not the advertising companies. Accordingly, they expect that they are asking the newspaper sender, not each advertiser, to expunge their names from its distribution list when opting-out of emails.

For these reasons, the FTC should exercise its authority to issue regulations clarifying that when an email has multiple advertisements, each advertiser is not a sender. Instead, an email’s sender is the entity identified in the domain of the “from” line. This would prevent the CAN-SPAM Act from needlessly hindering electronic distribution of news information.

V. THE FTC SHOULD EXERCISE ITS DISCRETIONARY AUTHORITY TO AMEND THE TEN DAY DEADLINE FOR PROCESSING OPT-OUT REQUESTS TO AT LEAST 30 DAYS

The CAN-SPAM Act provides the FTC with discretionary authority to amend the Act’s current ten day deadline for processing opt-out requests.²³ The Commission seeks comments on whether the ten day deadline is an appropriate time frame for deleting requesters’ email addresses from senders’ email directories.²⁴ Like many other businesses, newspapers will need more than ten days to process opt out requests given their complex electronic distribution systems.

²³ § 5(c)(1)

²⁴ *Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act, Advance Notice of Proposed Rulemaking*, *supra* note 1, at 11780.

It is simply not the case that a newspaper company possesses a single master email list. Rather, newspapers have many lists because they send different types of emails to different groups of consumers. For instance, newspapers have separate mailing lists for separate email services of e-newsletter subscribers and special offer subscribers. They are likely to have entirely separate email lists (and possibly even systems) for their circulation and marketing departments. Honoring opt-outs will require newspapers and other businesses to process opt-out requests for each list against all other lists to ensure that they do not send any type of commercial email to opt-out requestors. Moreover, if the Commission does not provide, as discussed immediately above, that there is only one sender of an email containing multiple advertisements, even longer time will be needed for newspapers to process opt-out requests.

For these reasons, NAA recommends the FTC change the opt-out processing deadline from ten to at least 30 days. This timeframe is a realistic deadline for newspapers and other businesses to comply with opt-out requests, given the practical complexities of currently installed technology. It also would require newspapers and other businesses to remove requestors' names from distribution lists at a pace corresponding to the 31 day update requirement now applicable to processing do-not-call requests, thus promoting consistent consumer expectations across different technologies.

VI. THE FTC SHOULD CLARIFY THAT "FORWARD-TO-A-FRIEND" EMAILS ARE NOT COMMERCIAL

Many newspaper websites provide "forward-to-a-friend" email tools that permit website visitors to forward items that might otherwise qualify as commercial emails to another person. In its ANPRM, the FTC seeks comments on whether to exercise its discretionary authority to implement the Act's provisions generally to clarify who the "sender" is in "forward-to-a-friend" marketing campaigns. NAA believes that where a website visitor chooses to forward material

without any incentive from the newspaper, that visitor is determining the email's content and destination, not the newspaper.

In these "forward-to-a-friend" scenarios, the website visitor directs the site to email a particular content item to a recipient whose email address the visitor supplies. Although the website processes the email, only by coincidence would the recipient be someone with whom the newspaper had ever had any prior contact. And plainly the "primary purpose" of such an email is the desire of the site visitor to share that particular content with the recipient, which, as the Commission recently acknowledged, "result[s] from a recipient's affirmative step."²⁵ Under the statutory framework, if the forwarded content contains an advertisement, the advertiser could not fairly be deemed to have "procured" the transmission, and the visitor who "initiates" the transmission has no financial interest in the ad. As such, the email falls outside the scope of the Act.

Nor is the website subject to the Act in this scenario. Even assuming that the email were commercial in nature, the website would be engaging in "routine conveyance" and therefore outside of the regulatory scope of the CAN-SPAM Act. This is because another person supplied the address to which the email was sent. Any other result would impose highly unfair burdens on the websites and would most likely lead to a substantial reduction in the availability of "forward-to-a-friend" functionalities.

VII. THE FTC SHOULD NOT PROSECUTE *DE MINIMIS* VIOLATIONS OF THE ACT

The FTC should issue a statement of enforcement policy to the effect that it will not prosecute *de minimis* violations. Despite the best efforts of businesses striving to comply with the Act, it is not difficult to imagine violations may occur.

²⁵ *Label for Email Messages Containing Sexually Oriented Material*, *supra* note 14, at 21029.

For example, there may be incidents in which a single employee sends a few commercial emails that did not comply with the Act's requirements. Entities that send only a few emails violating the Act surely are not spam marketers seeking to evade the Act's requirements entirely. Even businesses with the best of intentions may have difficulty integrating the variety of email systems and processes into their business operations. These, too, are not the targets of the CAN-SPAM Act. Prosecuting *de minimis* violations would place an undue burden on legitimate businesses while doing little to enhance the Act's effectiveness.

VIII. CONCLUSION

For the reasons outlined above, NAA believes that the CAN-SPAM Act simply does not apply to the majority of emails sent by newspapers. By adopting NAA's recommended approach, the Commission will focus enforcement of the Act on unwanted spam emails without hampering newspapers' ability to send valuable emails.

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