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Introduction

The National Newspaper Association is the oldest and largest community newspaper association in the country. The NNA represents 2,500 community newspapers nationwide. Most are family-owned and operated, and have circulation under 10,000 copies in a typical issue. They specialize in local news and advertising, and they provide the mortar that holds small towns, suburbs and urban communities together. As in many industries, the use of computers and electronic mail has grown greatly in the recent years. Many newspapers now offer a website to go along with their physical publications. Some use e-mail to approve proofs of ads and notify existing and prospective customers of purchasing opportunities. Many also provide email alerts to subscribers—a few for a small subscription fee, but most for free to the subscribers, but with advertising attached to pay for the service.

However, many of NNA's smaller members are making these steps slowly, and are not in a position to operate with the same practices as the mass marketers who also take advantage of e-mail. NNA feels strongly that the needs of America's community newspapers must be incorporated as the Federal Trade Commission works to create rules to govern the use of

commercial electronic mail. In response to the FTC's request for comments regarding the rules to be determined governing commercial e-mail, NNA hereby submits these comments regarding the "primary purpose" of an e-mail, "transactional or relationship messages," the processing time for opt-out requests, and several other important issues.

Primary Purpose and Sender

The "primary purpose" of an e-mail should be defined as "the single most important aspect of an e-mail with respect to the sender." Attempting to compare the primary purpose to any additional purposes would not only be difficult for the FTC, it would be even more confusing to those trying to send e-mails. If a sender forwards a news item from a newspaper email news alert, for example, and the item happens to have a promotional message from the newspaper in the signature—or even the sender may have a promotional message in his or her own signature line—how is any evaluator tasked with ranking the message to assign the importance of all of them? Is this a message intended to convey news, to convey the sender's understanding of the recipient's interest in the news, to promote the ancillary promotion of the newspaper email, to promote the sender's own message or some complex algorithm of all of these? In this example, the message is clearly purposed to send news and the incidental commercial messages would be irrelevant. Individuals or companies will not be able to accurately, quantitatively, define the values of secondary purposes in e-mails, nor will the regulator, if the rules attempt to sweep in a host of possible secondary purposes,

Additionally, the primary purpose should be that of the "sender." The term "sender" as defined by the CAN-SPAM Act is "any person who initiates such a [commercial] message and whose product, service, or Internet website is advertised or promoted by the message." This should not be interpreted that there may be more than one sender. In the example of the

newsletter supported by advertisers, while the advertisers may choose to sponsor a newsletter which they know will reach a specific demographic, they do not have immediate control over individual recipients. Only the company which “sends” the newsletter has this type of control, and should therefore be the only liable entity. If an individual does not wish to receive the content of the e-mail including advertising, he/she has the right and ability to opt-out of receiving it.

In the event that the physical sender of an e-mail is a third party hired to distribute an advertisement to a list provided by the advertiser, the advertiser should be considered the sender because it does have immediate control over the list of recipients. This does not include e-mails forwarded on by individuals.

Similarly, companies cannot be held liable for e-mails that have been forwarded to friends. There is no way for companies to control a recipient’s subsequent actions. For example, many newspapers have websites that enable the readers to forward articles to their friends. In doing so, the newspaper is being advertised to the recipient of the forwarded article, especially since the forward might include a link to the newspapers website. However, the choice to forward the article was made by the individual reader who chose what to forward, and to whom. Since the newspaper did not specifically choose the content or the recipient, the newspaper cannot be held liable if the message is forwarded on to someone who has opted-out of receiving e-mails from the newspaper.

The identity of a sender of an e-mail should not inherently affect whether or not the purpose of the e-mail is a commercial advertisement. Even though a company is “for-profit,” it can still engage in activities that are not specifically advertising. For example, if a newspaper sends out an e-mail survey for information on a story it is running, the newspaper is not advertising itself. The primary purpose of this e-mail is to collect information for distribution to

the public, and not to advertise the availability of the newspaper for purchase. Similarly, a not for profit university advertising grandfather clocks to alumni probably is sending a commercial advertisement that should be covered by the regulations, regardless of the sender's not for profit status.

Companies must be able to determine the primary purpose of their own e-mails in order to abide by the law. If the "sender" were interpreted to include more than just the company from which the e-mail originated, companies would be forced to determine the benefit to everyone that could possibly gain from an e-mail they distributed. Simply mentioning the name of company could be interpreted as promotion. Companies would be forced to stop providing services the consumer wants for fear that one individual will find a company they have opted-out with somehow benefiting from an e-mail they receive. Determining that the "primary purpose" of an e-mail is only "the single most important aspect of the e-mail with respect to the sender" will allow companies to know whether what they are sending is in fact a commercial e-mail as well as who not to send it to.

Transactional or Relationship message

Transactional messages are an integral part of doing business in this electronic age. There are several different aspects to transactional messages, to which the definitions provided in the CAN-SPAM Act of 2003 provide sufficient explanation. The FTC regulations must maintain the intent of the bill to allow messages that "facilitate, complete, or confirm" commercial transactions that have been agreed to by the recipient, as well as allowing notifications regarding subscriptions and accounts held by the recipients. As newspapers begin to offer electronic sales, including selling subscriptions on-line, it is necessary for the newspaper to be able to communicate with the consumer regarding pricing, delivery, and other matters. This provides

both the newspaper and the customer with important information necessary to enable a complete transaction.

The FTC should expand the definition of a transactional or relationship message regarding subscription and account information to include renewal offers to subscriptions that have expired within the past 18 months. Some grace period is necessary in that not all subscribers are prompt with renewals, and need extra reminders that they need to renew, even after their subscription has expired. Often times subscribers or members cannot renew their subscriptions or memberships for a certain year, but do wish to continue in later years. Since most subscriptions and memberships run on a yearly basis, 18 months allows a customer to go one full cycle, and still return to the product or membership he/she desires.

10 Business Day Time Period

Ten business days is not an appropriate deadline for acting on an opt-out request. While large companies with complete IT departments that handle the mailing lists should be able to oblige an opt-out request in such a time-frame, many of the small community papers which NNA represents face a much heavier burden. Small businesses rarely have an IT department. Sometimes they are lucky to have one person in the office that can devote some of his time to IT issues while still maintaining his other job responsibilities. For a weekly paper, there are times each week when activity hits its peak, and e-mail might not get checked at all as stories are finished and editing is done in order to get the paper to print. If an e-mail were to come in at this time, it could quite possibly be set aside, or lost in the shuffle, and not seen for several days. The Commission should not penalize newspapers that intend to comply in good faith, but are unable to meet tight time constraints because of limited resources.

Along with limited staff, small businesses face other limitations. Many small businesses send things such as newsletters out through third parties. Up until two months ago, NNA used a third party server for its own e-newsletter. The process included setting up a list at a website, creating a message, and sending out the message. Having to maintain these multiple lists provides for greater room for error in losing track of opt-out requests. In addition, the company which actually sent out the e-mail set its servers to send the message until it was received or a period of several days expired. It is therefore possible that the actual e-mail would not be received until several days after it was sent, depending on the accessibility of servers and other factors. If someone were to send in an opt-out request during a small newspaper's peak time, causing a delay, and then an e-mail be sent out before the name was actually removed, which was delayed in delivery, the recipient could quite possibly receive an e-mail more than 10 days after he requested the opt-out.

Also, some e-mails never reach the desired recipient. Even if a customer submitted an opt-out request by e-mail, there is no guarantee that the company actually received the e-mail. A company cannot be held liable for a request it never received.

Thirty days would provide a company enough time to process an opt-out request, and make sure that the recipient no longer received any e-mails. This would also allow companies to streamline their management of lists in general. Companies are already required to check their telemarketing lists monthly with the Do-Not-Call List. Making the regulations congruent would greatly aid in training, as staffs would be able to create a monthly routine to update databases, and to organize work efficiently for their various "do-not-contact" files. Continuity among processes will allow companies to maintain more accurate lists and prevent individuals from receiving unwanted solicitation.

Rewards for supplying information on violators of CAN-SPAM

NNA is disappointed that Congress has included the provision regarding the rewards for those who supply information about CAN-SPAM violations. Providing rewards for turning in spammers could lead to many problems.

First, it is possible to fake originating e-mail addresses. Spammers could turn this to their advantage, by sending out spam through another company's server, and then turning in the company they abused. The potential for fraud, and the resources required by both the regulators and the defrauded to come to grips with it presents a looming threat to the credibility of the regulatory structure.

Secondly, NNA feels that it will lead to a large number of complaints against legitimate commercial e-mailers. Newspapers in particular must from time to time deal with unhappy readers who launch various campaigns to oppose a viewpoint or address a slight from the news columns. If the prospect of a bounty induces complaints that are based upon motives other than objection to spam—a very realistic possibility in our contentious political environment—this provision could be widely abused. It could cost legitimate companies significant damages as they defend the accusations of violating the CAN-SPAM Act.

Third, offering a bounty on the heads of spammers could swamp the commission's resources and deter enforcement of the most grievous violations. The legitimate violations could become lost in the huge number of invalid claims against legitimate marketers. Congress passed the CAN-SPAM Act because the public is tired of having their e-mail inboxes filled to capacity with spam. A spam-free inbox should be reason enough for anyone to provide information they may have on spammers to the FTC.

As it constructs the rules for dealing with bounty hunters, then, the Commission must take extra care to provide a significant due process to protect the rights of the accused in these

matters as well as provide a means of determining who is actually in violation of the CAN-SPAM Act without unduly penalizing those who are not. Among them would be a right of notification and response to the alleged spammer; the right to at least know, if not face, the accuser; a right of other claimants to be aware of a potential bounty and a rational means of determining which of various claimants might have a legitimate claim on a bounty. The prospect of all of this due process may be daunting, but it is the minimum needed to protect e-mailers from abuse under this unwise provision.

Additional Issues

Some of NNA's smaller papers are located on rural routes, which are designated as box numbers. For this reason, a Post Office Box should be considered a "valid physical postal address of the sender." The sender should provide a postal address at which it receives mail.

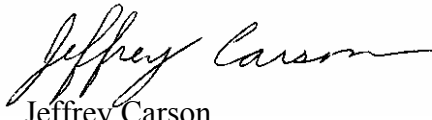
In its consideration of subject line labeling, the FTC should require that only e-mails with a "primary purpose" of commercial advertisement label the subject heading as such. Since any secondary purpose does not constitute the e-mail to be a commercial advertisement it should not be labeled as such.

Conclusion

While NNA supports Congress and the FTC in their efforts to cut down the amount of unwanted e-mail consumers receive everyday, it is important to recognize that not all e-mail is bad e-mail, and that careful distinctions must be made so that legitimate commercial e-mail, which benefits the consumers as well as the marketers, is protected. To do so, the FTC must provide rules which clarify that there may be only one primary purpose of an e-mail, relating to one sender. The FTC must also expand the role of transactional messages to include an 18

month grace period for requesting subscription renewals and expand the time period for processing opt-out requests to 30 days because 10 days is overly burdensome to many small businesses. Finally the FTC must also establish rules that protect companies from false claims of CAN-SPAM Act violations made by individuals trying to take advantage of the reward system, as well as due process for adjudication of all claims under the system.

Respectfully submitted,

A handwritten signature in black ink that reads "Jeffrey Carson". The signature is written in a cursive style with a long horizontal flourish at the end.

Jeffrey Carson
Assistant Manager of Government Relations