

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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In the Matter of Advance Notice of : CAN-SPAM Act Rulemaking  
Proposed Rulemaking and Request for : Project No. R411008  
Comment Relating to the CAN-Spam Act :  
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**COMMENTS OF THE MAGAZINE PUBLISHERS OF AMERICA**

**Introduction**

On behalf of the membership of the Magazine Publishers of America, Inc. (“MPA”) we appreciate the opportunity to provide comments to the Commission for consideration in advance of its promulgation of regulations pursuant to the CAN-SPAM Act. (the “Act”). MPA is the national trade association for consumer magazine publishers. Its membership includes approximately 240 domestic magazine publishing companies that publish more than 1,400 individual magazine titles, more than 100 international magazine publishers, and more than 120 associate members who are suppliers to the magazine publishing industry. Our member magazines range from well-known, nationally distributed publications to smaller-circulation and local publications.

MPA and its members fully support the efforts of Congress and the Commission to limit unwanted commercial email messages and, in particular, to stamp out the proliferation of fraudulent and deceptive spam messages. We look forward to working with the Commission throughout this rulemaking process to craft rules that will provide industry with clearer standards for complying with the Act consistent with its intended purpose. Since the implementation of the Act, the industry has identified and struggled with certain ambiguities and practical

considerations that have rendered compliance difficult. With these comments, we hope to provide the Commission with constructive commentary designed to identify these ambiguities and offer suggestions for clarification so as to provide clearer guidance for industry and consumers and to avoid imposing unintentional burdens on senders of legitimate commercial email messages.

In addition to filing these comments, MPA has also endorsed a letter signed by a coalition of trade associations that shares a common interest in the issues being considered by the Commission in this rulemaking process.

As set forth in greater detail below, among the issues of greatest concern to the MPA are the following:

- A. The Primary Purpose Standard - The criteria used to determine the primary purpose of the email message is of critical importance because the primary purpose standard is ultimately determinative of the Act's applicability to an email communication. MPA believes that a primary purpose standard by definition is focused on the intent of the sender rather than on the perception of the recipient. Accordingly, MPA would respectfully suggest that a "net impression" standard may not be the appropriate standard to effectuate Congress' clear stated intent to limit the applicability of most provisions of the CAN SPAM Act to email messages that are primarily commercial in nature. Rather, MPA believes that the Commission should consider criteria which focus more directly on the intent of the sender. In particular, newsletters containing bone fide editorial content should not be considered commercial emails.
- B. Definition of Transactional and Relationship Messages - The definition of transactional and relationship messages should be expanded to encompass additional

types of communications which result from a relationship or transaction between the sender and the recipient of the email communication, such as a response to consumer inquiries, correspondence with consumers relating to the transaction or to the goods or services that formed the basis of the relationship with the consumer, to consumers that have opted-in to receive such email messages, and to business-to-business emails that are necessary for day-to-day business operations and directed to a limited number of recipients.

- C. Multiple Senders - The Commission should clarify the obligations of the various parties in instances where a single commercial email message contains advertisements or promotions from multiple parties. In particular, imposing the obligation to include a physical address and to honor opt-out requests on every entity whose products or services may be promoted in an email communication is administratively difficult, unduly burdensome to comply with, and not consistent with Congress' intent. Accordingly, MPA believes that the FTC should establish objective criteria, which will help clarify who is the "sender" in situations where there are multiple marketers. While there may be some situations in which there may legitimately be "multiple senders," the mere inclusion of one's advertising or marketing message in an email communication should not by itself render that entity a "sender" subject to the obligations imposed upon senders under the Act.
- D. The Commission should not recommend requiring the inclusion of the designation ADV in the subject line of commercial email messages. Rather, the Commission should enforce the statutory requirement of "clear and conspicuous" disclosure of the fact that the email is an advertising solicitation under established Commission

principles – i.e., in a manner that is easily recognizable and understandable to the reasonable consumer.

- E. Forward-to-a-friend emails sent by consumers to their friends should not be considered commercial email messages. These emails are inherently non-commercial and it is not practical to impose the burdens of compliance with the Act on individual consumers who lack the resources, infrastructure and technology to comply with the various provisions of the Act.
- F. The current ten (10) day period for honoring opt-out requests should be extended to thirty-one (31) days in light of the burden imposed on senders in attempting to comply with the current ten day standard.
- G. The Commission should establish a time limit of no more than three years for maintaining opt-out requests.

## **Comments**

### 1. Primary Purpose and Definition of Commercial Email Message

As Congress noted in enacting the CAN-SPAM Act (the “Act”), email has become an extremely important and popular means of communication relied upon by millions of Americans on a daily basis for personal, educational, informational, entertainment and commercial purposes. Its low cost and wide reach make it a particularly efficient and convenient tool for disseminating informational and editorial, as well as advertising and commercial, content.

In enacting the CAN-SPAM Act, Congress required that the Commission apply a “primary purpose” test in determining whether a particular email communication constitutes a commercial email message subject to the provisions of the Act. MPA respectfully submits that

this statutorily imposed standard differs fundamentally from the net impression test typically employed by the Commission to evaluate advertising messages. The net impression test evaluates an advertising message from the perspective of the recipient. By definition, however, the primary purpose standard focuses on the intent of the sender in transmitting the email message, not on the impression that message communicates to the recipient. As such, MPA believes that “net impression” may not be the appropriate standard to be considered in ascertaining the primary purpose of an email message. Rather, we believe the Commission should focus on criteria that evaluate the primary intent of the party responsible for sending the email message.

MPA also notes that many of its members utilize email as a media channel to distribute editorial content. As is the case with print publications, such editorial content may also contain or be supported by third party advertisements. MPA believes it is critically important for the FTC to clarify that the mere inclusion in such editorial content of third party advertising will not render such communications “commercial email solicitations.”

More specifically, MPA believes that the Commission should adopt objective criteria to be used to determine the “primary purpose” of an email communication and which focus on the intent of the sender. In this regard, MPA respectfully suggests that the FTC consider adopting a “but for” analysis when determining the primary purpose of an email message. Under this standard, an email message would be deemed to be primarily commercial in nature if it would not have been sent but for the dissemination of the commercial advertisement or promotion contained therein. Conversely, an email communication that may contain advertising content, but would have been sent irrespective of the inclusion of any particular advertisements would not be deemed a “commercial email message” simply because advertising has been included. Under

this analysis, for example, communications which are primarily transactional or relationship in nature, or contain bona fide editorial content would not be deemed to be primarily commercial in nature simply because the communication also contains advertising messages. MPA members are particularly concerned about the future status of publications which have significant editorial content, yet, as is the case with traditional print publications, contain embedded third party advertisements. Given the growing interest of consumers towards receiving editorial content online, it is extremely important that the Commission not unduly restrict or burden the transmission of such content to consumers. Accordingly, MPA would propose that in addition to the “but for” standard articulated above, the Commission include an express provision in the Rules clarifying that an email communication that contains bona fide editorial content will not be deemed to be primarily of a commercial nature irrespective of the inclusion of advertising and promotional messages in such communication.

We believe this standard provides a bright line test that would allow publishers to reasonably continue to disseminate this valuable editorial content to consumers without being subject to provisions designed to rid inboxes of unwanted spam.

## 2. Expand the Definition of Transactional or Relationship Messages

In enacting the CAN-SPAM Act, Congress recognized that certain types of email communications relate to prior transactions or established and ongoing relationships between the parties thereto (so-called “transactional or relationship messages”). These messages fall outside the scope of a commercial email message and are thereby excluded from the majority of the substantive requirements of the Act. While MPA agrees with the five categories of transactional or relationship messages identified in the Act, we believe that the list is under-inclusive and fails to encompass other types of messages relating to previously established relationships or

transactions which should likewise be excluded from the definition of a commercial email message.

For example, we believe that the definition should encompass email sent in response to a consumer inquiry. If a consumer contacts a publisher via telephone, mail or email seeking information regarding a particular magazine, article, or featured product, the publisher should be able to contact that consumer regarding his or her inquiry via email without being subject to the substantive provisions of the Act. Indeed, the Act was clearly not intended to apply to such emails as they are neither unwanted nor unsolicited. Magazines are in constant contact with their readers, encouraging readers to submit Letters to the Editor via email. As a general rule, editors respond to all such letters. These emails clearly belong in the transactional or relationship category.

Likewise, the definition of transactional and relationship email currently includes the provision of “specified” information with respect to an ongoing commercial relationship with the recipient. This specified information includes notification concerning a change in terms or features, notification of a change in the recipient’s standing or status, or regular periodic account statement or balance information. CAN-SPAM Act, § 3(17)(A)(iii). MPA believes that this category of transactional or relationship message should be expanded to include the sending of any email messages regarding the transaction which formed the basis of the relationship between the seller and the consumer, rather than simply the information currently specified in the Act. For example, magazine publishers should be able to contact their customers via email with respect to the renewal of their magazine subscription or enhancements to the subscription without being subject to the commercial email provisions of the Act. MPA similarly believes, that where there has been an ongoing relationship between a consumer and a business, as is the

case with magazine subscriptions, communications with consumers whose subscriptions may have recently lapsed falls within the spirit of a “transactional or relationship” message as well. The definition of transactional and relationship message should also encompass any emails sent to consumers who have opted-in to receive such email messages. By opting-in consumers are evidencing their express desire to receive such messages. As such, these emails are, by definition, neither unwanted nor unsolicited and should not be subject to the provisions of the Act.

MPA also believes that the definition of a “transactional or relationship message” should be expanded to expressly include emails sent in the business to business context as part of necessary day-to-day operations of the business. Again, MPA is concerned that the content of such emails may not always fall within the limited categories of “specified” information set forth in the Act. Such emails, however, are generally sent to particular individuals or a limited group of clients, advertisers, vendors and such and not on a mass mailing basis. If these emails were deemed subject to the Act, businesses would be placed in the untenable position of having to scrub such mailings against the company’s suppression list. This process would require substantial changes to the manner in which most companies conduct their business-to-business operations and would thus impose an enormous burden on industry, without yielding any consumer benefit.

### 3. Clarify the Scope of the Act With Respect to Multiple Sender Emails

The CAN-SPAM Act defines a “sender” of a commercial email message as a person who initiates such message and whose product, service, or Internet web site is advertised or promoted by the message. “Initiate” in turn is defined as originating or transmitting a commercial



electronic mail message, or procuring the origination or transmission of such message.

As the Commission itself noted in its NPRM, an email promoting an upcoming conference might include advertisements not only for the conference itself, but also for the entities sponsoring the conference. Alternatively, a publisher or other entity might send out a periodic email message with special promotions from current issue advertisers or marketing partners. Based on the definitions of “sender” and “initiate” set forth above, any and all of the entities whose products or services are advertised in these examples (e.g., the conference sponsors or business partners) could be deemed a “sender” of the commercial email message at issue and, thus, subject to opt-out and valid postal address provisions of the Act (and any other provisions applicable to senders).

MPA is also concerned about the application of the obligations applicable to “senders” in situations where its member’s publications are promoted via email messages sent by third party agents. As the Commission is well aware, the sale of magazine subscriptions by third party agents accounts for a substantial portion of magazine sales. Technically, under the definition of “sender” set forth in the Act, a magazine publisher could be deemed to be a “sender” under the Act, because it is the publisher’s magazine that is being promoted in the email. In a third party situation, however, the magazine publisher may have no control over or involvement with the email being initiated by the third party. Although the magazine publisher will service the magazine subscription, communications with the consumer, including customer service and billing may be performed by the third party. Clearly, in such a situation, it makes no sense to include the physical address of all the magazines that may be offered for sale or to require each of the magazines to honor opt-out requests.

While there are numerous other examples of situations which could be provided

demonstrating the practical and administrative difficulties of complying with the Act in situations where multiple entities may technically fall within the broad category of “sender” as currently defined in the Act, we believe the point is clear. In order for CAN-SPAM to be manageable from an industry standpoint, and properly service the consumer’s interests, the Commission should clarify the obligations of the various parties in instances where a single commercial email message contains advertisements or promotions from multiple parties or where a party’s products or services are contained in an email message over which that party has no control. In our view, classifying all parties whose products or services may be the subject of a single email message as “senders” of that message imposes unreasonably high costs on these entities with little, if any, benefit to consumers in terms of protection from unwanted commercial messages.

Where multiple products or services are promoted in a single email, there is some risk that a recipient may have previously opted out of receiving emails from one (but not all) of the entities whose products or services are advertised within the email. If all entities are deemed to be senders, it would appear that the email distribution list would have to be scrubbed against each advertiser’s opt-out list prior to being sent (and could not be sent if the potential email recipient appeared on even one such advertisers opt-out list). This would be very costly and burdensome for marketers, as opt-out requests received by one entity would have to be communicated to, and honored by, numerous other affected marketers. Moreover, consumers would be harmed, as they would be precluded from receiving emails from marketers to whom they had not sent opt-out requests. In addition, if each entity whose products or services are advertised within a single email message are deemed to be the “sender”, then either each marketer would be bound by any opt-out request submitted by the consumer in response to the

email message or a mechanism would have to be established whereby the consumer could submit an opt-out request to each entity whose products or services are contained within the email message. This would result in a lengthy and expensive menu to maintain which would likely cause confusion to the consumer, impose extreme technological burdens on industry, and increase the risk of privacy and security problems if data on individuals has to be transmitted to all advertisers in the email.

As such, MPA believes that the Commission should articulate a standard whereby it limits the “sender” obligations with respect to emails containing advertisements or promotions for multiple entities to the entity or entities primarily responsible for directing and controlling the email communication. Criteria for determining primary responsibility for directing and controlling an email message could include:

- The entity name appearing in the “from” field of the email message. If the from line of the message makes the identity of the sender clear to the recipient, ancillary advertisers within that email message should not also be treated as senders of the email.
- Application of the “but for” analysis. If an email message would have been sent regardless of whether or not a particular advertiser’s commercial advertisement was contained therein, that advertiser should not be deemed to be a sender of that message.
- The entity responsible for selecting the list of names to whom the email message would be sent. Since the primary obligation imposed upon the sender under the Act is the requirement to honor the opt-out requests, MPA believes that unless the entity has provided the list of names to whom the email message will be sent, that entity should not be considered a “sender” under the Act.

The following examples attempt to apply certain of these criteria to circumstances faced by MPA members:

- A magazine sends a weekly email that features special offers from advertisers who also advertise in the magazine. The email is sent to the magazine's subscribers and others who have registered at the magazine web site. The email is clearly branded with the magazine's name and the featured advertisers can change each week. In this case, the magazine would be the sole sender of the email.
- A third party agent sends an email communication offering magazine subscriptions to a choice of publications. The agent controls the list and the email is branded with the agent's name. While the publishers will fulfill the magazine subscriptions, the agent will bill consumers directly. In this case, the agent rather than the publishers would be the sole sender of the email.

#### 4. Labeling Commercial Email Advertisements

MPA feels strongly that the Commission should not recommend requiring the inclusion of a specific label such as ADV in the subject lines of commercial email messages.

The Act already requires that commercial email messages clearly and conspicuously identify the message as an advertising solicitation. The clear and conspicuous disclosure standard is an established Commission standard with a rich history of case law sufficient to provide clear guidance to the industry. Throughout its rule-making history the Commission has

avored application of a performance standard that allows marketers the flexibility to determine how to comply with a clear and conspicuous disclosure standard rather than mandating specific affirmative language or placement requirements for disclosures. MPA would urge the Commission to follow a similar approach in this instance. The “clear and conspicuous” standard already requires as one of its components that the disclosure be in language that is easily understandable to the consumer. MPA believes that simply applying this standard in the instant case will be sufficient to effectuate the clearly expressed Congressional intent, provide adequate protection to the consumer and not unduly burden industry. This is a standard that provides the needed flexibility to marketers and which is well understood.

MPA is also concerned that, if all commercial emails were required to contain the ADV subject line, anti-spam filters could easily be set to block all emails containing such a designation. This would unduly burden legitimate marketers, who would essentially be precluded from communication with consumers via the email channel. At the same time, the senders of unwanted and deceptive spam messages would be unlikely to comply with this ADV requirement and their messages might well get through the spam filters. Thus, consumers would be in the position of continuing to receive the most egregious and unwanted spam messages while failing to receive bona fide commercial offers from legitimate marketers. Clearly, this is not the purpose of the Act.

##### 5. CAN-SPAM Act Should Not Apply to Forward-to-a-friend email Programs

Publishers that communicate with subscribers and other interested individuals via email may occasionally use Forward-to-a-friend email programs in which email recipients are encouraged to forward email messages to their friends who the forwarding consumers reasonably

believe would be interested in the publisher's products and special offers. MPA does not believe that such Forward-to-a-friend email messages should be viewed as commercial email messages subject to the provisions of the Act.

While the publisher's purpose in sending the underlying commercial email message may be commercial, the forwarding consumer's email message is a private communication between that consumer and his or her friend or family member. The forwarding consumer will presumably send the message only to those of his or her friends or family members who are likely to have an interest in the underlying offer. Moreover, such messages are often accompanied by a personal message from the forwarding consumer to the recipient. Clearly this type of email is not the type of unwanted commercial solicitation that the CAN-SPAM Act was intended to regulate.

Indeed, MPA believes that these forwarded messages are most analogous to personal emails that attach a link or web page. The only difference is that the Forward-to-a-friend email is easier to send for consumers who are not technologically savvy. Consumers should be free to send Forward-to-a-friend emails in the same manner as they forward and send links and web pages to their friends. The primary requirement of the Act – providing recipients with an opt-out mechanism for future commercial email messages – makes little sense with respect to Forward-to-a-friend emails.

It is likewise neither appropriate nor practical to classify the marketer who originated the email as the sender of the email forwarded by the consumer to a friend. Even if the email contained a link to the marketer, that link might not convey in the email to the friend or the recipient might simply hit reply and end up telling the originating friend that they wanted to opt-out. The originator would then have to transmit the opt-outs back to the marketer which is

obviously impractical. As the Commission can appreciate, such a scheme is virtually untenable and would in effect result in the elimination of all such programs which have proved efficient and rewarding to marketers and consumers alike. Forward-to-a-friend emails increase the likelihood that the message will relate to a product or service of interest to the consumer.

6. 10 Day Period For Processing Opt-out Requests Should Be Extended

MPA recommends that the current ten (10) day period for honoring opt-out requests be extended to thirty-one (31) days in light of the burden imposed on senders in attempting to comply with the current ten day standard and the risks to consumers from more frequent transfers of their email address information.

Magazine publishers and other entities engaged in the dissemination of commercial email may send such email in several ways – either directly to the consumer or through affiliate programs whereby the publisher uses a third party to send the email on its behalf. In instances where third party affiliate programs are used there is a transfer of opt-out information from the third party sender to the publisher. The transfer of opt-out files typically happens once a week. Thus, an opt-out request can often be over a week old before it is received by the publisher (as it takes the third party affiliate a few days to process the opt-out request internally and store it in a file for transfer to the publisher).

Even when publishers handle emails internally, they will typically have multiple internal systems that process emails and, in many cases, the opt-out request must move sequentially through these systems. For example, opt-out requests may be received from renewal emails sent by a publisher's fulfillment system. This opt-out request would have to be processed not only by the company's fulfillment system, but also by its marketing database and email system – all of which may not be fully integrated or may be outsourced by the publisher.

As such, it can frequently take well over ten days to fully process opt-out requests and MPA believes that requiring companies to attempt to comply with this short time period would impose a significant financial burden. In our view, thirty-one days is a more feasible and cost-effective time frame.

In addition, security concerns regarding the transfer of these opt-out/suppression lists continue. Companies will typically download and access suppression lists from an File Transfer Protocol (FTP) server. While these servers are password protected, there can be security risks. The more frequently that consumers email addresses are transferred through these servers the more likely that they can fall into the hands of spammers and other unintended third parties.

#### 7. Duration of Opt-Out Requests

The Commission has requested comment on whether there are any additional issues that should be addressed in this ANPR. MPA would request that the Commission consider establishing a time limit for maintaining opt-out requests and would suggest that an appropriate time limit is not more than three years. Given the relative ease and low cost of establishing email addresses, it is not surprising that email addresses change quite frequently. MPA is concerned that unless a reasonable time limit is established for maintaining opt-out requests, marketers will quickly be saddled with an extraordinarily large suppression list of inactive email addresses. This will create an administrative and financial burden on industry with no corresponding benefit. Furthermore, Internet Service Providers may quickly reassign email addresses leading to invalid suppressions. Accordingly, MPA requests that the Commission establish a not more than three year time limit.

#### **Conclusion**

We thank the Commission for providing us with the opportunity to submit the preceding



comments on behalf of our membership. Our organization is committed to working with the Commission to ensure that its regulations under the Act represent an appropriate balancing of the needs and requirements of the senders and recipients of email communications. If you have any questions or concerns regarding these comments or any other aspects of the MPA, please feel free to contact us.

Respectfully submitted,

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