

Comments on the CAN-SPAM Act  
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MMS is pleased to afford itself of this opportunity to comment on certain provisions of the CAN-SPAM Act and related topics.

The CAN-SPAM Act overall is a remarkable enlightened piece of legislation. It is pro-jobs, respectful of the First Amendment's protection of commercial speech, and has the promise to stem the tide of obscene, fraudulent, and simply irritating Spam that threatens the very survival of the most innovative communication mode since the invention of the telegraph.

The following comments are related to specific aspects of the e-mail legislative and regulatory matrix and are so headed.

#### **E-Mail Postage**

MMS supports the concept of e-mail postage. Spam is a classic example of the problem of the commons. Imposing even a miniscule toll on messages would put most of the egregious spammers out of business by raising the threshold of success from one customer to hundreds or thousands. To paraphrase P. T. Barnum, a sucker may be born every day, but not in sufficient volume to provide the necessary return on investment from the more ludicrous commercial e-mails were there a price to pay for postage. Note the absence of such follies from the USPS mail stream for proof of concept.

E-postage might be imposed by a private or public sector entity or a partnership thereof. The deficit reduction possibilities are obvious, and even the most ardent anti-tax constituencies would be hard pressed to oppose a Spam tax. The United States Postal Service (USPS) would be an excellent instrument to enforce CAN-SPAM through its postal inspection authority. Utilizing the USPS as part of the solution would also provide a new mission with a bright future to the Service as it faces the economic realities of the age with postal reform. The caveat is that postal involvement must preserve the freedom and ease of communication represented by the status quo, leaving the dead hand of over-regulation as embodied in the Domestic Mail Manual behind.

### **Do Not E-Mail List**

The creation of a do-not-e-mail list would be a travesty that would be ineffective and counterproductive. It would destroy the job-creating capacity of this exciting new medium. In addition, it would open the nightmarish possibility of theft by hackers, who would unleash an unprecedented flood of Spam on the unfortunates who sign up. Furthermore, it would eliminate only legitimate commercial e-mail by reputable marketers. It is naïve to think that scofflaws would honor this provision of this law when they criminally ignore any number of other statutes.

### **Definition of Sender**

MMS believes that clarification of the definition of sender should make it clear that the advertiser or marketer of the goods or service promoted in commercial e-mails who pays for the transmission of the e-mail is the sender, opposed to facilitators of the transaction such as list owners/brokers/managers, broadcast services, and other direct marketing entities not promoting their own products and services in a particular e-mail.

Further rulemaking regarding the "line of business" concept would also be appropriate. For example, various therapeutic classes of medicines arguably should be considered separate lines of business even if they are not marketed by separate subsidiaries. For example, a physician who opts out of e-mails for erectile dysfunction products may welcome messages about oncology remedies.

Another aspect of the definition of sender that has caused confusion is some of the more highly evolved marketing techniques such as omnibus promotions including multiple products and newsletters with banner ads. Here it is clear that the entity that pays for transmission should bear the sender responsibility. E.g., if the New York Times sends an e-mail I have not requested with an ad for Macy's, the *Times* should be the sender, not Macy's. Similarly, if Macy's sends an e-mail promoting Hoover vacuums and myriad other merchandise, Macy's should be held accountable for CAN-SPAM compliance, not Hoover.

### **Definition of ISP**

MMS also suggests that a definition of an Internet Service Provider (ISP) should be added to the bill which would stipulate that such status for purposes of the statute should be limited to what the legislation contemplated, that is, firms like Microsoft, AOL, Comcast, Yahoo, et. al. who transport a relatively large volume of e-mail on behalf of subscribers, rather than heads of households who provide their families access to e-mail as the current definition as incorporated by reference could be construed in extremis.

### **Bounty Hunting**

MMS opposes the notion of bounty hunting. We have directed unscrupulous messages to [uce@ftc.com](mailto:uce@ftc.com) without putting a burden on the public purse, and believe that concerned citizens should view this as a civic duty and privilege as we do.

### **Primary Purpose/Transactional or relationship message**

Some clarification is on order as this along with other provisions of the law have caused confusion on the part of legitimate marketers who are bending over backwards to comply. Commonsensically, a mass e-mail sent to prospective rather than current customers attempting to sell them something should be subject to the relevant provisions of the Act. An e-mail to one recipient who is a current customer should not. This might involve introducing two additional concepts into the law present in other statutes and rules governing commercial speech--quantity and existence of a business relationship. It might also make sense to distinguish between business-to-business and business-to-consumer communications, allowing more latitude to the former ala the rules implementing the do-not-call list in the interest o stimulating commerce.

### **Forward to a friend**

This is an innocuous and useful element of many compliant messages, the online analog of word-of-mouth marketing, and clearly should be considered protected speech. Introduction of a quantitative threshold would obviate the issue. Absent such threshold, it is arguable that the forwarder is the sender. While it is somewhat absurd to hold the forwarder accountable for compliance, liability might be mitigated by application of the primary purpose test. Unless the forwarder personally profits along the lines of a multi-level-marketing (MLM) scheme, the forwarder may be held harmless on the grounds that he or she does not stand to commercially gain by the act of forwarding. This would introduce the economic concept of profit or economic gain to the construct along with payment as cited above in "definition of sender"

### **The effectiveness and enforcement of the CAN-SPAM Act**

E-mail can be a powerful tool for job creation and economic stimulus. In combination with economic and technical Spam solutions proposed by Microsoft and others, it can put an end to the scourge of Spam. The Act must be given time to work in concert with private sector initiatives.