

COMMENT ON PROPOSED RULE

CAN-SPAM Act Rulemaking

16 CFR 316

[Project No. R411008]

RIN 3084-AA96

Definitions, Implementation, and Reporting Requirements under the CAN-SPAM Act

AGENCY: Federal Trade Commission (“FTC” or the “Commission”)

This comment is submitted by the Council of American Survey Research Organizations, Inc. (“CASRO”) and the American Association for Public Opinion Research (“AAPOR”) (collectively, the “Research Associations”) in response to the Commission’s Advance Notice of Proposed Rulemaking; Request for Public Comments (the “ANPR”) with respect to “Definitions, Implementation and Reporting Requirements Under the CAN-SPAM Act (the “Act”).

The Research Associations are not-for-profit industry and professional associations representing more than 2,000 research companies, institutions and practitioners engaged in survey research regarding a wide variety of public policy, forensic, health, scientific, economic and other public and private areas of inquiry. Their members are responsible for the overwhelming majority of the survey research conducted each year in the United States and a significant portion of global survey research.

Survey research contributes significantly to the public interest by providing reliable, verifiable analyses of a wide variety of public policy, sociological, legislative, regulatory, political, forensic, scientific, public health and economic areas of inquiry. Survey research is an invaluable and irreplaceable tool of behavioral science used to measure, track, analyze and predict public attitudes, opinions, awareness and preferences. Survey research is virtually the only source of

statistically reliable and verifiable information of this type, on which government, business and private interests rely to formulate their actions and decisions.

Among the principal purposes of the Research Associations is the establishment, maintenance and enforcement of professional and ethical standards in survey research and the protection of the privacy interests of those who choose to participate in survey research. These principles reflect the social utility of survey research and the need to protect and respect the industry's most valuable resource -- its survey respondents.

As the leading representatives of the U.S. survey research industry, the Research Associations have an interest in articulating the compelling public, governmental and business need for protecting not only survey research, but also the rights and concerns of the public and survey respondents. We believe that privacy is one of these important concerns. Accordingly, the Research Associations support the Act and the regulation of commercial e-mail as important tools in protecting that right. The Act regulates "commercial electronic mail messages", which encompass "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an internet website operated for a commercial purpose)." In the ANPR, the Commission states that it "seeks comment on how to determine an electronic mail message's primary purpose, including comment that would facilitate this determination." The Research Associations hereby respond to that portion of the ANPR.

Generally, the Research Associations recommend that the Commission promulgate rules that are consistent with the Act's legislative intent and the policy of the FTC and other federal agencies in administering national privacy regulations; i.e., that such regulations should be carefully applied so that they continue to cover sales and advertising solicitations, but not other,

legitimate, non-commercial consumer emails, such as those used to conduct survey research. We urge the Commission to adopt rules that continue to exclude non-sales contacts, such as those utilized for research, from the coverage of the Act, just as it has done in connection with its rules establishing the national Do Not Call Registry and the FCC has done in establishing its Fax rule under the Telephone Consumer Protection Act.

The survey research industry further supports rules that would facilitate the application of the Act to those sales and advertising emails that attempt to conceal their true commercial purpose by posing as an invitation to participate in research. This practice, known as “selling under the guise” of survey research, or “Sugging”, is already prohibited by the Commission as a deceptive trade practice and is violative of the research industry’s own codes of conduct and self regulatory framework. Since the implementation of the Do Not Call Registry and the CAN SPAM Act, unscrupulous marketers and advertisers have increasingly resorted to Sugging in an effort to evade the operation of these regulations. This places a burden on legitimate survey research by dissuading potential respondents from participating in surveys for fear they might unknowingly become the targets of email marketing or telemarketing. We encourage the Commission to adopt CAN-SPAM “primary purpose” criteria that would effectively curtail this cynical and abusive activity, while continuing to exclude bone fide survey research from the coverage of the Act.

The Commission has requested replies to specific questions in connection with this portion of the ANPR. The Research Associations respectfully offer the following information in response to those questions:

Question: 1. The term “the primary purpose” could be interpreted to mean that an email’s commercial advertisement or promotion is more important than all of the email’s other

purposes combined. Does this interpretation provide relevant criteria to help determine the primary purpose of an email? Why or why not? Answer: We believe that this interpretation does provide relevant criteria to help determine the primary purpose of an email. We believe that deceptive attempts to cause an email recipient to believe that a sales email is actually a survey are excellent examples of emails that initially represent one purpose, but quickly and overwhelmingly reveal themselves to be commercial in nature.

Question: *When an email has more than one purpose, what determines whether one purpose is more important than all other purposes combined?* Answer: In the case of Sugging, the “survey” portion of the email is usually very brief, there are numerous links to commercial sales sites and the “survey” is not scientifically sound data collection but either (a) an irrelevant set of extremely simple questions (e.g., “what is your favorite color”) or (b) questions solely and specifically designed to assist the sender of the email to market to the specific recipient of the email (a practice that is strictly forbidden by the codes of conduct of legitimate research).

Question: 2. *The term “the primary purpose” could be interpreted to mean that the email’s commercial advertisement or promotion is more important than any other single purpose of the email, but not necessarily more important than all other purposes combined. Does this interpretation provide relevant criteria to help determine the primary purpose of an email?*

Why or why not? Answer: We believe it does not. We believe that that if commercial sales or advertising is more important than any other single purpose of the email, then the importance of other purposes should not be aggregated in order to determine whether the commercial purpose is more important. We believe that email marketers could utilize such an aggregation concept to facilitate Sugging and other attempts to evade the application of the Act.

Question: *When an email has more than one purpose, what determines whether one purpose is more important than any other purpose?* Answer: We believe that the noncommercial content of the email should be evaluated in light of the identity of the sender and the response the sender seeks from the specific recipient of the email. For example, content that has no value or purpose to the sender other than to evade the application of the Act should not be considered indicative of a noncommercial primary purpose. In the case of survey research, if there is any content other than an invitation to participate in a survey, the Associations would consider it to be Spam, regardless of the net impression of the entire email.

Question: *3. In other contexts, the FTC has stated that marketing material is to be judged by the net impression that the material as a whole makes on the reasonable observer. The “net impression” standard has been used to assess the meaning of an advertisement and the adequacy of disclosures. This standard takes into account placement of disclosures within the marketing material, the proximity of disclosures to the relevant claims, the prominence of the disclosures, and whether other parts of the marketing material distract attention from the disclosure. Should this “net impression” analysis be applied to determining whether the primary purpose of an email is a commercial advertisement or promotion? Why or why not?* Answer: “Net impression” is a relevant criterion, but should not be applied exclusively. While some content that a sender includes specifically to evade the coverage of the Act may be easily recognized as such, other content may be intentionally designed to give the recipient a false non-commercial net impression. Again, in the case of an email invitation to participate in survey research, if there is any sales or marketing content, the Associations would consider it to be Spam and/or Sugging, regardless of the net impression of the entire email.

Question: *Are there considerations unique to electronic mail that would influence the application of such analysis, and if so, how?* Answer: Yes, there are. Email marketers can construct emails, and websites to which they are linked, so that the recipient believes he or she is interacting with a non-commercial site and/or engaging in non-commercial activity, while the sender is actually gathering or providing information designed to sell or advertise to that individual.

Question: 4. *The term “the primary purpose” could be interpreted to mean that a commercial advertisement or promotion in an email is more than incidental to the email. Does this interpretation provide relevant criteria to help determine “the” primary purpose of an email? Why or why not?* Answer: Yes. We believe that in using the term “primary purpose”, Congress intended that the Act cover emails whose commercial aspect is more than incidental.

Question: 5. *In determining whether a commercial advertisement or promotion in an email is the primary purpose of the email, one approach could be to base the analysis on whether the commercial aspect of the email financially supports the other aspects of the email. For example, an electronic newsletter may be funded by advertising within the newsletter. Such advertising arguably would not constitute the primary purpose of the newsletter. Does the issue of whether the commercial aspect provides the financial support for non-commercial content provide relevant criteria to help determine the primary purpose of an email? Why or why not? Does it matter what the overall purpose of the newsletter is? Why or why not? Is this an appropriate way to approach the question of whether an email’s primary purpose is commercial? Why or why not?* Answer: We believe that whether the commercial activity funds the non-commercial activity is a relevant criterion to determine whether the commercial activity constitutes the email’s primary purpose. Indeed, if the financial relevance of the commercial activity to the sender of the email is limited to funding the noncommercial activities, then that would indicate

that the email's primary purpose was not commercial. If, on the other hand, the commercial activity generated revenue from the recipients that materially exceeded the expense of the noncommercial activity, then this would indicate that the primary purpose of the email was commercial.

Question: *6. Should the identity of an email's sender affect whether or not the primary purpose of the sender's email is a commercial advertisement or promotion? Why or why not?* Answer: Yes, it should. If, for example, the sender of the email is a retailer or email marketing company, then inclusion of a survey about irrelevant matters (e.g., "who is your favorite movie star") would be indicative of content that the sender has included solely to evade the operation of the Act.

Question: *For example, if a professional sports league sends email promoting its involvement with a charitable organization, should that email be considered to have a commercial "primary purpose" under the Act based on the league's "for-profit" status?* Answer: The "for-profit" status of the sender alone should not be sufficient to classify an email as having a commercial primary purpose. We would suggest a three prong test that considered the sender's identity, the email content in question and the action of the respondent sought by the sender. Under the above example, the sender is not trying to use the content to take direct action (e.g., to sell something) with respect to the specific individual that has received the email. Accordingly, we believe that such an email would not have a primary commercial purpose.

Question: *7. Are there other ways to determine whether a commercial advertisement or promotion in an email is the primary purpose of the email? Do these approaches provide relevant criteria to help determine the primary purpose of an email? Why or why not?* Answer, as stated above, we believe the Commission should not focus on just one factor, but rather create

a three prong test that considers the sender's identity, the actual email content in question and the action of the respondent sought by the sender.

Respectfully submitted,

The Council of American Survey Research Organizations

and

The American Association for Public Opinion Research

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