

## COMMENT ON PROPOSED RULE

### CAN-SPAM Act Rulemaking

TITLE: Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act

CATEGORY: Controlling the Assault of Non-Solicited Pornography and Marketing Act Of 2003; Definitions, implementation, and reporting requirements

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### INTRODUCTION

On behalf of CMOR, which works to promote and advocate survey research, let me thank you for the opportunity to comment on your CAN-SPAM rulemaking process. The research profession is engaged in a legitimate and scientific process of acquiring data and opinions from the public. Researchers seek to determine the public's opinion regarding products, issues, candidates, and other topics. Such information is used to develop new products and improve services, and is used by health care providers, the government, airlines, private businesses, and many others, including the media. Virtually every major media outlet in the United States uses our data to report significant political, medical, and social trends to the American public. As a result, the work of the survey research industry benefits not just public preferences, but also public health and safety.

The survey research process is key to improving or maintaining the quality of life, and is a crucial element of the American democracy. Without the ability to hear from people who volunteer to take our surveys or re-contact those with whom we already have an established business relationship, many of those people would have no method of explaining their preferences to us. It is this vital element of an established business relationship that separates our industry from “spammers” who send mass e-mails to completely random lists. Also, our respondents have “opted in” to our survey process, and are not being bothered with products or services that are misleading, unsolicited, vulgar, or pornographic.

As the Director of Government Affairs for CMOR, I am entrusted with protecting the rights of our members throughout this broad and diverse industry. We hope that by explaining how our industry correlates with the “Do Not Call list” ruling handed down by the U.S. Court of Appeals for the 10<sup>th</sup> Circuit, and by proving the self-regulatory nature of CMOR organizations through “established business relationship” and “opt-in” standards, we can illustrate why the FTC should not issue a regulation that impedes the research industry’s ability to conduct its business.

## 10<sup>th</sup> CIRCUIT COURT: DO NOT CALL LIST

When one considers that the FTC has not yet issued a regulation dealing with spam, it becomes more important to seek out corollaries to similar issues. One such issue is the National Do Not Call list, a matter that was recently reviewed by the U.S. Court of Appeals for the 10<sup>th</sup> Circuit (*Mainstream Marketing v. FTC*, No.03-1429). There are a number of principles from that case that can be applied to a Do Not Spam regulation.

- **Commercial Speech.** The 10<sup>th</sup> Circuit Court ruled that the Do Not Call list restricts only core commercial speech (i.e., commercial sales calls). Because our members do not conduct any sales, the court found our industry to be exempt from Do Not Call status. We urge the FTC to regulate similarly in terms of e-mail; when sending a non-sales e-mail, even to a person with whom we do not have an established business relationship, our members should not be in violation of the FTC's final regulation, since established business relationships are not as vital to our industry's surveys as they are to commercial sales e-mail.
- **Opt In concept.** The 10<sup>th</sup> Circuit Court also noted that consumers who wish to restrict some, but not all, commercial sales calls can do so by using company-specific do not call lists or by granting some businesses express permission to call. The Do Not Spam regulation should work along similar lines--when people opt in to receive our surveys, we should be permitted to send them such surveys. And if someone wants to receive surveys from some of our members and not others, they should also be able to custom tailor precisely which CMOR members contacts them. The 10<sup>th</sup> Circuit Court went to great lengths to emphasize that most unwanted telephone solicitations are commercial in nature, and we recommend that the FTC regulate similarly. Non-sales related e-mails sent to opt in recipients to conduct survey research should not be barred.
- **Privacy, Intrusion and Abuse.** In the *Mainstream v. FTC* case, the court held that commercial calls should be regulated by a Do Not Call list because they are intrusive and pose a heightened danger of consumer abuse. The ruling made no attempt to include survey research calls in that analysis. One relevant point is that opt in e-mails are by definition not intrusive, since they are based on contacts from an established business relationship. Secondly, opinion research poses no danger of fraud or abuse, since no goods are being offered for sale.
- **Sources of the Problem at Hand.** In the Do Not Call case, the 10<sup>th</sup> Circuit Court ruled that commercial sales calls are the types of unsolicited calls that were causing problems in the eyes of Congress, the FCC, and the FTC. The court then ruled accordingly—to uphold the validity of including commercial sales calls in the national Do Not Call list. E-mail should be treated the same way—when not commercial in nature, e-mails from CMOR members, when sent to recipients who have opted in and have an established business relationship with that company, should be permitted under the FTC's final regulation on this matter.

## ESTABLISHED BUSINESS RELATIONSHIPS

In some cases, it is impossible for our industry to establish a business relationship for certain small surveys. However, because we are not engaged in any form of commercial sales, there is no potential harm or expense to a recipient of a survey. In larger, more organized surveys with significant sample sizes, we do have methods of establishing a business relationship.

For the purposes of online marketing research, an “established business relationship” is acquired via one of two methods: 1) through extension of an ongoing business relationship with a company who hires a third party agent (i.e., a research agency) to confidentially investigate opinion and reaction on their behalf; or 2) through a direct single or double opt-in process.

The nature of the ongoing business relationship between the respondent and client organization is often certified by the research agency through the use of the following type of statement:

“The list of customer names and email addresses which are to be provided for this study, “<StudyName>”, and dated <Date> are active clients and/or business associates of <Client>, with whom we have an established and ongoing business relationship. Contacting these people on our behalf will not likely be construed as an unreasonable invasion of privacy.”

A single opt-in process is often used when potential respondents are intercepted as they visit certain Web sites or sub-sites. A pop-up (interstitial page) or pop-on invitation is presented with a request to do a one-time survey or research task. By clicking on the invitation, the respondent signifies approval of the invitation and willingness to participate, but does not necessarily constitute an on-going business relationship (which is necessary for re-contact).

When people are recruited for longer-term research commitments (e.g. joining a panel or to participate in follow-up studies) our industry’s ethical norms typically result in a double-opt in process. This consists not only of accepting an invitation (through either online or offline channels) but also a second, profiling round wherein the potential panelist makes a concerted effort to establish a relationship by providing demographic and lifestyle data. This information, as well as log files showing the time and date of the profiling survey serve as the documentation of an on-going business relationship.

In these ways, our industry establishes business relationships without any undue intrusion on anyone’s privacy, and without presenting any potential for commercial sales or fraud. We hope the FTC recognizes this.

## OPT IN DATABASES

Our industry maintains databases of people who have opted in to receive e-mail contacts and online surveys. Sometimes, it is crucial for CMOR member organizations to save time by sending a single e-mail to all people who have opted in; these lists can easily number into the hundreds.

As a result, we urge the FTC to hold that e-mails to unlimited recipients are acceptable if they are sent exclusively to people who have opted in to receive contacts from CMOR or the CMOR member who is sending a given e-mail. While we understand that there may be a need for the FTC to regulate the number of recipients in certain commercial sales or spam-related e-mails (which are often sent to enormous and random e-mail lists by spammers), we urge the Commission to allow opt-in e-mails to include any number of recipients.

## EVOLVING TECHNOLOGY

The main goal of this regulation is to address a nascent form of technology that is still in the early stages of development. As a result, it becomes vital that the FTC's final actions are neither too stringent nor too inflexible to deal with the vast technological evolution that is sure to come over the next several years.

Already, several Internet Service Providers (ISPs) are experimenting with their own spam-blocking software, intended to weed out unsolicited commercial sales-based spam. It is crucial that the final regulation leaves enough room for ISPs to both develop and update this technology as they gain a better understanding of its effects. We strongly encourage the growth of such spam-blocking approaches, so long as it does not block survey-oriented messages from researchers with whom the recipient (a) has established a business relationship, and (b) has opted-in to such correspondence.

## CONCLUSION

In formulating this regulation, it is vital that the FTC take into consideration the precedents established by the 10<sup>th</sup> Circuit Court in its Do No Call list decision. This list has proven to be an effective means by which to regulate fraud and unwanted commercial sales calls, and it has not created an undue burden on anyone (as the court ruled in this same decision, *Mainstream Marketing v. FTC*). Therefore, it would be a reasonable basis for a similar regulatory framework in dealing with fraud and unwanted commercial sales-related e-mails.

Also, the FTC should take into account the many contributions to society routinely made by the survey research industry. Research makes a fundamental difference to the lives of consumers and citizens by representing their voice to business, government, and their fellow citizens, via numerous media outlets.

Also, this type of regulation would be flexible, and could be tweaked over time if necessary. If the regulation is too stringent, it may become outdated as the quickly evolving technology of e-mail and spamming progresses.

Respectfully submitted,

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