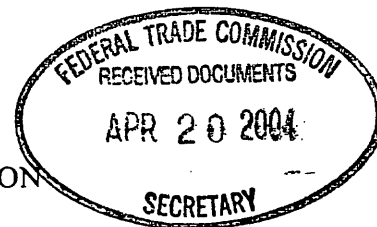


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BEFORE THE FEDERAL TRADE COMMISSION

Washington, D.C. 20580

In the Matter of

CAN-SPAM Act Rulemaking, Project No. R411008

Comments of

Lenox, Incorporated

1 Lenox, Incorporated ("Lenox") submits these comments pursuant to the request of the Federal Trade Commission (the "Commission") for comment on the CAN-SPAM Act (the "Act") published on March 11, 2004.

2 Since 1889, Lenox has created gifts, tableware, and collectibles for U.S. presidents, dignitaries, and families across America. Lenox is committed to upholding high standards of excellence in artistry and craftsmanship, and our commitment extends to our Internet business and e-mail marketing efforts. Our Lenox.com Web site is an online shopping and information resource on dining and entertaining, product care and gift ideas, plus expert tips on bridal registry, collecting, and home décor. Lenox.com meets the standards for Good Housekeeping® Web site certification and is the recipient of a 2003-2004 Golden Web Award and a VeriSign Consumer Safe Award.

3 Many Lenox customers have longstanding relationships with Lenox, and most of our customers fall within the forty-five (45) to fifty-five (55) age range.

4 Lenox is committed to protecting the privacy of its customers, and therefore supports the goals of the Act.

5 The primary purpose of these comments is to encourage the Commission to:

(a) clarify the definitions of "commercial electronic mail message" and "transactional or relationship messages" contained in Section 3 of the Act so as not to unreasonably restrict the ability of an informed consumer to receive electronic mail messages containing information about new products which the consumer has expressed an interest in receiving or agreed to receive;

(b) clarify the legal obligations of creators of and those procuring "forward-to-a-friend" messages to ensure that such an entity or person is not considered a "sender" merely because it offers Web site visitors or e-mail recipients the ability and convenience of forwarding an e-mail to a friend; and

(c) clarify the definition of “sender” under Section 3(16) of the Act by clearly setting out that a company is not a “sender” unless it both originates or procures the origination of a commercial e-mail, and identifies the recipients of the e-mail.

Informational Newsletters or other Messages Requested by Consumers

6 One of the express purposes of the Act is to prevent the receipt of unrestricted unsolicited commercial electronic mail. Act, Section 2 (a) (3). Congress expressly authorized the Commission to modify the definition of “transactional or relationship messages” “to the extent such modification is necessary to accommodate changes in electronic mail technology or practices and accomplish the purposes of the Act.” Act, Section 3 (B). Lenox believes that the intent of the Act is not (and should not be) to prevent a recipient from receiving communications that the recipient has asked or expects to receive from a sender. This appears to be the intent of the exemption of “transactional or relationship messages” from the definition of a “commercial electronic mail message.” However, Lenox believes that the definitions of “commercial electronic mail message” and “transactional or relationship message” are not clear and may be capable of narrow interpretation which would contradict the intent of the Act.

7 The definition of “commercial electronic mail message” states that such a message is an “electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service.” This definition is ambiguous and subject to interpretation when applied to electronic mail newsletters containing information regarding collectibles, bridal registries, and/or tableware and giftware that the publisher markets and sells.

8 Lenox’s customers and prospective customers desire to receive information from Lenox. Many customers are interested in receiving information about collectibles. They want to know when new products are developed and introduced. They also want to know about other Lenox collectors. Other “customers” may not be direct-to-Lenox customers, but nevertheless express an interest in LENOX® products, bridal registries, and/or wish lists of items they would like their friends and/or family to buy for them. These individuals and couples want to receive information about weddings, honeymoons, and setting up new households. In Lenox’s view, the primary purpose of these communications is informational. They are used to maintain the relationship that the recipient agreed to establish with Lenox.

9 Similarly, where the *primary* purpose of an email is to convey information about the sender’s products and/or services, the e-mail should be expressly included within the definition of a “transactional or relationship message” even if it includes incidental promotional material. For example, an e-mail may provide information about the products, industry, or services in which customers have expressed an interest. The e-mail also may contain a promotion which, for example, may provide consumers a discount on the purchase of a product or service that may be described in the e-mail. This e-mail should be considered a “transactional or relationship message” because its *primary* purpose is to provide information that the recipient has requested or expects to receive, rather than to advertise or promote a product or service.

10 Equally, where a person sends an e-mail or submits an inquiry via a Web site to criticize, praise, or ask a question of a company, that company's response should be expressly included within the definition of a "transactional or relationship message" because the *primary* purpose of the response is to address the concerns or acknowledge the comments of the consumer. This remains the case even where the company's response to praise or questions incorporates the promotion of a product or service of the company. For example, an individual may e-mail Lenox to say he or she is very happy with the set of LENOX® china she or he received as a gift. Lenox may send an e-mail thanking the consumer for writing, and mentioning that Lenox has a Breakage Replacement Program which allows individuals who have signed up for the Program to replace any broken piece of china that is in stock at Lenox, at 50% off the current suggested retail price. While such responsive communications serve to build upon the goodwill of a company, the primary purpose of responsive e-mail communications is not the commercial advertisement or promotion of a commercial product or service. Therefore, they should not be considered "commercial electronic mail messages."

11 Without clarification of the definitions of "commercial electronic mail message" and "transactional or relationship message" such informational e-mails as the ones describe above may be susceptible to falling within the definition of "commercial electronic mail messages" in contravention of the intent of the Act. In summary, Lenox is protective of its customer relationships and will maintain the high standards of privacy associated with its Web site and electronic communications. However, Lenox believes it would be inappropriate to characterize relationship newsletters and other informational or responsive material sent to consumers as "commercial electronic mail messages."

Communications Sent At the Request of a Consumer

12 When a consumer makes an informed decision to agree to receive electronic e-mails from a particular sender, the e-mail should not be viewed as unsolicited. For example, an individual may agree to receive communications about new products or promotions when the individual registers on the Lenox.com Web site or submits a form in a retail store. Many Lenox customers are long-term customers. They come to expect to receive communications from us regarding new products, collectibles and sales and promotional events. While such communications are clearly permitted under the Act (until and unless a recipient opts out of receiving such messages), the language of the Act may be susceptible to a narrow interpretation that would find that a communication that the recipient asked to receive as part of an ongoing commercial relationship and/or which provides information that the recipient has requested to receive from the sender falls outside the definition of "transactional or relationship message." Since such communications are, by definition, not unsolicited, it would accomplish the purpose of the Act to expressly include in the definition of "transactional or relationship messages" messages that the recipient expressly agrees to receive.

13 In order to meet the intent of the Act, a "transactional or relationship message" should include communications that a recipient agrees (or "affirmatively consents") to receive, either (a) as part of an ongoing commercial relationship under Section 3 (19) (A) (iii) of the Act; or (b)

under the terms of a transaction that the recipient has agreed (or “affirmatively consented”) to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender under Section 3(19) (A) (v) of the Act. By so doing the Act will make it clear that consumers may agree to receive commercial messages from the sender; and a sender engaged in an ongoing direct commercial relationship with a recipient may notify the recipient of new products that the recipient has agreed to receive as a result of or under the terms of a transaction the recipient has entered into with the sender.

14 Lenox understands the substantial harm posed by the distribution of unsolicited commercial e-mail and supports the purposes of the Act. It recognizes, however, that the right to privacy is a right that an informed consumer should be free to exercise or choose to limit or modify by agreement in exchange for valuable consideration. The definition of “transactional or relationship message” should be modified accordingly, since a communication a consumer knowingly chooses to receive is not unsolicited.

“Forward-to-a-Friend” Services

15 A “Forward-to-a-Friend” service refers to a function on a Web site that allows an individual to instruct the operator of the Web site to forward information on the site or an e-mail message (such as an invitation) to an e-mail address that is provided by the individual. The process is automated so that the individual chooses the content to be forwarded, perhaps with some customization by the individual, and an e-mail is automatically sent to the e-mail address supplied by the individual. Where there are graphics or HTML code (including links to Web sites) in the e-mail, this process prevents the formatting from being lost if an e-mail is simply forwarded as an attachment. These are very popular among Web site visitors and e-mail recipients, because they afford consumers the convenience of passing along information they think their friends will find interesting or informative.

16 The Act applies expressly to “senders” of commercial e-mail. The Act contemplates that entities or persons acting as service providers who actually transmit a commercial e-mail may not be the “senders” of the e-mail. It defines a “sender” as a person who both identifies the recipients of an e-mail and causes the e-mail to be sent to those recipients.

17 Specifically, a “sender” is defined as “a person who (both) *initiates* a (commercial e-mail) and whose product, service, or Internet Web site is advertised or promoted by the (e-mail).” Section 3(16), emphasis added. The term “initiate” means “to originate or transmit a (commercial e-mail) or to procure the origination or transmission of such a message,” excluding making a “routine conveyance” of the message. Section 3(9). A “routine conveyance” of an e-mail means the “transmission, routing, relaying, handling, or storing, through an automatic technical process, of an [e-mail] for which another person has identified the recipients or provided the recipient addresses.”(Section 3(15)).

18 The Act does not and should not regulate the ability of a recipient of an e-mail to forward a commercial or other e-mail to a friend or other person using the recipient's own e-mail service (for example, by using the "Forward" function). Where a Web site visitor or an e-mail recipient initiates the transmission of the communication through a "Forward-to-a-friend" service and the Web site operator or e-mail creator is merely serving as a service provider in routing the content chosen by the visitor to the person(s) indicated by the visitor. Therefore, the transmission at the direction of a recipient should be expressly included within the definition of a "routine conveyance" by the sender within the meaning of Section 3(9) of the Act. This remains the case regardless of whose name appears in the e-mail's "from" line so long as the name or e-mail address of the person who requested the conveyance is identified somewhere in the e-mail itself.

19 Accordingly, Lenox suggests that the definition of "routine conveyances" be clarified so that there is no ambiguity that the Web site operator or original transmitter of a forwarded e-mail is viewed as the sender of a "Forward-to-a-friend" communication.

Multiple "Senders" of Commercial E-mails

20 The Act is intended to apply to the "sender" of commercial e-mail. Congress expressly authorized the Commission to issue regulations on the definition of "sender" "to the extent such regulations would be useful in clarifying the scope and applicability of the Act." Lenox believes that the intent of the Act is not (and should not be) to apply to advertisers or other parties who do not select or identify the recipients of an e-mail and cause the e-mail to be sent to those recipients.

21 It is not unusual for an entity to pay for an advertisement in an e-mail newsletter of another party or otherwise provide an incentive for the transmission of an advertisement which is part of a larger commercial electronic mail communication, or even to be viewed as the "sponsor" of an event that is primarily sponsored and advertised by another party. For example, a department store may host an in-store event featuring tableware. To promote its own event, the department store may send an e-mail with a Lenox advertisement at one edge of the e-mail or featuring LENOX® tableware to the department store's own e-mail list. The entity that pays for advertising or otherwise sponsors the e-mail (in this example, Lenox) does not provide a list of recipients. Under these circumstances it would be inappropriate to consider the advertiser (e.g. Lenox) a "sender" of that commercial e-mail.

22 To consider such advertisers "senders" under the Act would unfairly burden entities who do not control the means by which recipients receive e-mails or select who the recipients are. In the example set out above, the department store would have to disclose to the advertiser the e-mail addresses or other information from recipients who opt-out of receiving department store communications. This could result in the department store inadvertently violating its own privacy policy by disclosing personally identifiable information to a third party. Moreover, there is no reason to believe that a recipient opting out of receiving commercial e-mails from the department store desires to opt out of receiving communications from the advertiser. Overall,

such a situation does not serve the needs of the consumer and unreasonably burdens both the true “sender” of the communication as well as the advertiser or sponsor.

23 In summary, Lenox firmly believes that responsibility for compliance with the Act should firmly rest with those who are responsible for identifying the recipients and actually distributing a commercial electronic communication. The Commission should clarify the definition of “sender” so that the party ultimately responsible for identifying the recipients and distributing the commercial e-mail (or who procures transmission by service providers) is considered the “sender” and responsible for compliance with the Act. This will reduce the confusion that can result from the possibility that there are multiple senders of a single communication, and make compliance with and accountability for compliance with the Act less problematic without adversely impacting on fulfilling the intent of the Act.

Respectfully submitted,

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