

BEFORE THE
FEDERAL TRADE COMMISSION

COMMENTS OF
THE DIRECT SELLING ASSOCIATION
ON THE
CAN-SPAM ACT RULEMAKING

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John W. Webb
Associate Legal Counsel and Manager of Government Relations

Direct Selling Association
1275 Pennsylvania Avenue, NW, Suite 800
Washington, DC 20004-2411

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I. Introduction\General Background

The Direct Selling Association (DSA) is pleased to have this opportunity to provide comments on the CAN-SPAM Act to the Federal Trade Commission.

Founded in 1910, the Direct Selling Association (DSA) is the national trade association representing over 160 companies that sell their products and services by personal presentation and demonstration, primarily in the home. These direct selling companies, with 13 million individual American direct sellers, include some of the nation's most well known commercial names, such as Alticor (parent of Amway and Quixtar), Avon Products, Inc., Mary Kay Inc., The Pampered Chef, Longaberger Baskets, Creative Memories, The Fuller Brush Company, Home Interiors and Gifts, Southern Living At Home, Binney and Smith At Home and Tupperware. The home party and person-to-person sales methods used by our companies and their independent contractor sales forces have become an integral part of the American economy. Our industry represents over \$28 billion in domestic sales and over \$87 billion in worldwide sales each year. The 13 million individual direct sellers who sell for direct selling companies in the U.S. are independent contractors; they typically sell on a part-time basis to their neighbors, relatives and friends to supplement their family income. The direct selling industry attracts individuals seeking job flexibility, with low start-up costs and often minimal work experience. Their direct selling activities are generally neither extensive nor sophisticated.

We understand that the volume of unsolicited commercial emails or "spam" has become a major problem for some and that the intent of the CAN-SPAM Act is to set a national standard for the regulation of commercial electronic mail. DSA will address our comments specifically to our concerns as direct sellers.

As you may know, direct selling companies enter into agreements with individual direct sellers via a written contract to sell their products or services. Individual direct sellers are independent contractors and in a business-to-business relationship with the direct selling company. Individual direct sellers are statutory non-employees for federal tax purposes.¹ Many direct selling companies communicate with their independent contractor sales force via email. Given the nature and purpose of the relationship, invariably, an email from a company to an independent contractor will concern the sale of products and services and could be misconstrued as a commercial email. The FTC should make it clear that any and all communications via email between a direct selling company and their independent contractor sales force are not covered by the Can-Span Act.

The individual direct sellers may also, from time to time, communicate via email with existing or potential customers. Typically, if a direct seller uses email, she will contact people she knows or with whom she has a mutually established relationship. On occasion, a direct seller will be referred by a current customer to a prospective customer and will contact that person via email or by telephone to set up an appointment. Additionally, a hostess of a direct selling party might use email or the telephone to invite potential guests. The unique circumstances of individual direct

¹ 26 U.S.C. § 3508 (2001)

sellers should be considered when formulating regulations to implement the CAN-SPAM Act. These legitimate, occasional, incidental and harmless uses of emails by direct sellers are not the “spam” often cited by consumers as problems. In short, there are a variety of legitimate, occasional, non-obtrusive uses of email by independent direct sellers that could be significantly (and negatively) affected by regulations to implement the CAN-SPAM Act.

II. Primary Purpose Definition

Many direct selling companies communicate with their independent contractor sales force via email. As mentioned above, this is a business-to-business communication with the purpose of selling products and services to the ultimate consumer of that product or service. These emails could be construed as being commercial electronic mail messages under the CAN-SPAM Act.

The FTC specifically asks for comments on defining “primary purpose.” In determining an email’s primary purpose, we request that FTC also look at the relationship of the sender and recipient of an email. As discussed above, email communications between direct selling companies and their independent contractor sales force should not be considered commercial electronic mail messages under the CAN-SPAM Act. The FTC should clarify that these business-to-business communications are not covered by the CAN-SPAM Act and are presumed to be for the purpose of furthering their mutual business relationship.

In addition to taking into consideration the relationship between the sender and recipient, we recommend that the term “the primary purpose” should be interpreted to mean that an email’s commercial advertisement or promotion is more important than all of the email’s other purposes combined. The reasonable person standard could be used as the appropriate test. Specifically, one should ask whether a reasonable person viewing the email would consider the primary purpose (more important than all other purposes) to be to the commercial advertisement or promotion of a commercial product or service.

III. Transactional or Relationship Messages Definition

Specifically excluded from the definition of “commercial electronic mail messages” are “transactional or relationship” emails. “Transactional or relationship messages” are those, the primary purpose of which is either:

- To facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender;
- To provide warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient;
- To provide specified types of information with respect to a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender;

- To provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or
- To deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender.

As mentioned in the advanced notice of proposed rulemaking, Section 3(17)(B) of the CAN-SPAM Act gives the Commission the authority to modify the definition in § 3(17)(A) to “expand or contract the categories of messages that are treated as “transactional or relationship messages” for the purposes of this Act to the extent that such modification is necessary to accommodate changes in electronic mail technology or practices and accomplish the purposes of the Act.”

Many of the email communications that a direct selling company sends to individual direct sellers easily fit within the current definition. However, clarification and if necessary expansion of this definition is warranted for direct selling companies that communicate via email with their individual direct sellers.

As mentioned above, direct selling companies may communicate with their independent contractor sales force to facilitate that relationship. By their very nature these communications are “transactional or relationship messages.” These are communications to facilitate a business-to-business relationship between separate legal entities that entered into a contractual obligation with each other. This is definitely not the kind of email that the CAN-SPAM Act was created to regulate.

We specifically request that you add to the definition of “transactional or relationship messages” emails whose primary purpose is to facilitate the ongoing contractual business relationship between a business and an independent contractor.

IV. Recognizing Individual Direct Sellers as Separate Legal Entities

Direct selling companies and the individual direct seller independent contractors who sell their products and services are distinct, legally separate entities. We ask that the FTC specifically recognize this for the purposes of the CAN-SPAM Act.

In the situation where a customer decides that she would like to opt-out of receiving additional emails from the individual direct seller, that should only apply to that individual direct seller, not to other individual direct sellers selling for the same company or the company itself. Direct selling companies have no mechanism for honoring an opt-out request sent to individual direct sellers.

In the same fashion, when a customer decides to opt-out from receiving additional emails from the direct selling company, that should only apply to the company and not to individual direct sellers who sell the company’s products or services.

In many instances, customers will only be receiving emails from either the company or the individual direct seller. In these cases, only one opt-out request will be necessary. In the case

where the customer is receiving emails from the company and the individual direct seller, one additional opt-out request could be necessary.

The CAN-SPAM Act recognizes the distinction between separate lines of business or divisions within a larger company. As a result, a line of business (or a division) will be considered separate from its parent and other lines of business if it sends an email that addresses only its particular business. In the same way direct selling companies and individual direct sellers should be recognized as distinct legal entities for the purposes of the CAN-SPAM Act.

V. Obligation to Include Physical Street Address in Commercial Emails

While requiring a company to provide a physical street address may cause little concern, individual direct sellers and other home-based businesses are in a unique circumstance. Direct sellers who may, from time to time, send out commercial emails could be concerned if they have to include their personal home address in that email. Almost all direct sellers work from the home. Approximately 80% are women. A requirement to include a personal home address in an email could be a security risk to those direct sellers.

We ask that the FTC allow home-based businesses such as direct sellers to use a post office box, instead of their personal home address. This option will allow those with security concerns to comply with the law without risking the safety of their families.

VII. Regulatory Flexibility Act Estimates

As requested pursuant to the Regulatory Flexibility Act, direct sellers are “small entities” under the Small Business Act.² The CAN-SPAM Act could have a significant negative impact on direct seller small businesses by requiring compliance with the regulations. The number of direct sellers who would be potentially impacted by changes to the regulation would be 13 million individual small business owners. Impact could be minimized by addressing the concerns raised in this filing.

VII. Summary

In summary, DSA respectfully asks the Commission to consider the recommendations made within this document when crafting regulations to implement the CAN-SPAM Act. DSA has raised several concerns that should be address in any regulation implementing the CAN-SPAM Act.

Effective laws and regulations are always narrowly tailored to address a specific harm. Overly broad laws and regulations create administrative problems for the public and private sector and dilute their own effectiveness. We ask the FTC to maximize the effectiveness and efficiency of the CAN-SPAM Act by tailoring it to regulate the elements creating the harm and not overburdening business in a time of economic instability. The Direct Selling Association appreciates the opportunity to express our views.

² 5 U.S.C. § 601(6).