



Top Etailers' Compliance With CAN-SPAM's Opt-Out Provisions

A Report by the Federal Trade Commission's Division of Marketing Practices

July 2005



I. Overview

This report describes the results of a study of 100 top online merchants' compliance with the opt-out requirements of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act").¹ Results of the study show that the online marketers substantially complied with all of the CAN-SPAM Act's opt-out provisions. In this study, undertaken by staff of the Federal Trade Commission's ("FTC") Division of Marketing Practices, FTC staff registered to receive commercial email from 100 top "etailers," those retailers who make significant use of the Internet to market their goods or services, and determined whether: (1) commercial email from these etailers contained clear and conspicuous notice of the recipients' right to opt out of receiving future marketing messages; (2) commercial email from these etailers provided recipients with an opt-out mechanism; and (3) the etailers honored opt-out requests made by FTC staff.

II. Background

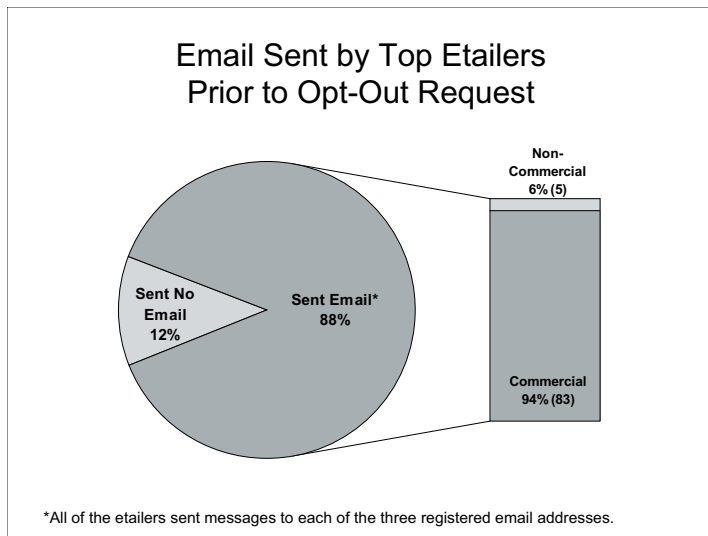
One of the most important aspects of the CAN-SPAM Act is the right it gives consumers to stop receiving commercial email from a sender who has sent them a message.² First, all commercial email must contain clear and conspicuous notice of the recipients' ability to opt out of future commercial email.³ Second, all commercial email must contain a functioning return email address or other Internet-based mechanism that a recipient may use to request not to receive future commercial email from the sender.⁴ Third, a sender may not send a commercial email to a recipient more than ten business days after receiving an opt-out request.⁵

The CAN-SPAM Act mandates that the FTC issue certain rules to supplement the Act,⁶ and conduct four studies, including one to assess the effectiveness and enforceability of the Act.⁷ In preparation for that study, FTC staff conducted the present review of etailers' compliance with CAN-SPAM's opt-out requirements.

III. Methodology

For this study, FTC staff measured 100 top etailers' compliance with the opt-out provisions of the CAN-SPAM Act. The 100 etailers were selected based on staff research concerning the significance of the etailers' on-line presence⁸ and the ease of registering to receive commercial email from the etailers.

After selecting the etailers, FTC staff established three newly-created email accounts. Starting in the first week of December 2004, staff visited each etailer's website, the majority of which solicited visitors to sign up to receive special offers, promotions, updates, and newsletters via email.⁹ Staff opted in to receive these offerings, once for each of the three email accounts, and then monitored the accounts for approximately six weeks.

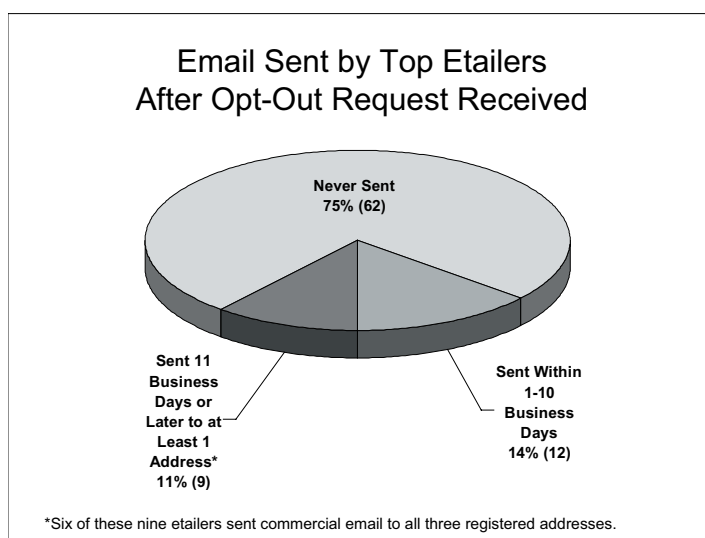


The email traffic from each etailer varied widely, with one sending as many as three emails per day and others sending no emails at all during the entire period.¹⁰ Eighty-eight of the etailers sent email to each of the three registered accounts. Of these, five sent only non-commercial email.¹¹

Staff reviewed each commercial email received to determine whether the message contained: (1) a clear and conspicuous notice of the recipient's right to opt

out of receiving future commercial email messages from the sender; and (2) a clearly and conspicuously displayed functioning return electronic mail address or other Internet-based mechanism that recipients could use to opt out.

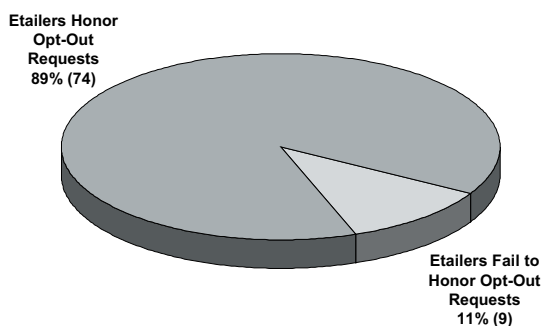
Starting on January 14, 2005, staff opted out from receiving future commercial email from each etailer that sent email during the study. Opt-out requests were sent from each of the three email accounts to each of the etailers. Staff monitored the email traffic and noted the number of commercial emails sent between one and ten business days following the opt-out (if any), and the number of commercial emails (if any) sent thereafter. Etailers that sent commercial emails to the email accounts more than ten business days after receiving an opt-out request did so in violation of the CAN-SPAM Act. Violations of the opt-out requirements may lead to enforcement actions by the FTC and its state law enforcement partners.



IV. Findings Regarding Opt-out Practices

This study of top etailers' email practices assessed compliance with all three CAN-SPAM opt-out provisions – notice of the right to opt out, the ability of a recipient readily to exercise this right, and the honoring of this right by etailers.

Honoring of Opt-Out Requests by Top Etailers



The results of this study show a high rate of compliance with the opt-out provisions of CAN-SPAM by those etailers studied. All of the etailers who sent email to our accounts provided clear and conspicuous notice of recipients' right to opt out of receiving future commercial email. Similarly, all provided recipients with an opt-out mechanism, as required by the CAN-SPAM Act.¹²

Moreover, 89% (74 of 83) of the etailers honored all three of the

opt-out requests made by FTC staff. Eleven percent – nine etailers – failed to honor staff's opt-out requests. Of those nine etailers, six did not honor any of the three opt-out requests sent (one opt-out per account was sent), while three honored opt-out requests from two out of the three accounts, but continued sending commercial email messages to one account.¹³ All nine etailers continued to send email following staff's opt-out requests for at least 30 days past the 10-day grace period; five did so despite confirming our opt-out preference.

V. Conclusion

The results of this study provide a snapshot of prominent online etailers' compliance with the CAN-SPAM Act's opt-out requirements one year after the Act became effective. This snapshot is encouraging - all of the etailers surveyed provided recipients notice of their right to opt out and supplied an opt-out mechanism in their commercial email message, and 89% of etailers studied complied with opt-out requests for all three of our accounts, with 93% complying with opt-out requests for at least some accounts. The Commission will continue to analyze email practices and will report further on CAN-SPAM compliance in the required upcoming study of the effectiveness and enforceability of the Act.

Endnotes

1. In December 2003, Congress passed the CAN-SPAM Act, which took effect January 1, 2004. As of that date, the Act required that all commercial email messages meet certain standards designed to protect recipients from fraudulent marketing and unwanted messages.
2. In enacting the CAN-SPAM Act, Congress found that:

While some senders of commercial electronic mail messages provide simple and reliable ways for recipients to reject (or “opt out” of) receipt of commercial electronic mail from such senders in the future, other senders provide no such “opt-out” mechanism, or refuse to honor the requests of recipients not to receive electronic mail from such senders in the future, or both. 15 U.S.C. § 7701(9).
3. 15 U.S.C. §§ 7704(a)(3)(A)(i) and (5)(A)(ii) (2004).
4. 15 U.S.C. § 7704(a)(3) (2004).
5. 15 U.S.C. § 7704(a)(4) (2004). Pursuant to the Act, the Commission may modify the ten-business-day opt-out period if it “determines that a different period would be more reasonable after taking into account the purposes of section 7704(a); the interests of recipients of commercial electronic mail; and the burdens imposed on senders of lawful commercial electronic mail.” 15 U.S.C. § 7704(c) (2004). At the time this study was conducted, no such modification had been made.
6. The first such rulemaking, to establish protections for recipients of sexually explicit email, was completed in April 2004 (<http://www.ftc.gov/os/2004/01/canspamfrn.pdf>). In December 2004, the FTC also published its final rule setting forth the criteria by which the primary purpose of an email is ascertained (<http://www.ftc.gov/os/2005/01/050112canspamfrn.pdf>). A Notice of Proposed Rulemaking on various discretionary rulemaking topics was published on May 12, 2005 (<http://www.ftc.gov/os/2005/05/05canspamregformfrn.pdf>).
7. This study is due 24 months after enactment of the Act, or December 16, 2005. In addition, the FTC was charged with studying the feasibility of a National Do Not Email Registry (which it did in a report released in June 2004, <http://www.ftc.gov/reports/dneregistry/report.pdf>), the costs and benefits of a reward system for those who turn in spammers (which it did in September 2004, <http://www.ftc.gov/reports/rewardsys/040916rewardsysrpt.pdf>), and the efficacy of an email labeling requirement (report forthcoming in June 2005).
8. The etailers were culled from two sources: a list of prominent online organizations taken from a previous CAN-SPAM compliance survey ([http://www.arialsoftware.com/whitepapers/CAN SPAMComplianceAudit2004.pdf](http://www.arialsoftware.com/whitepapers/CAN%20SPAMComplianceAudit2004.pdf)) and a list of top 100 retailers (<http://www.stores.org/pdf/04%20JULY%20TOP%20100cxs.pdf>).
9. Staff registered to receive special offers, promotions, updates, and newsletters because these are the types of emails that are most likely to be covered under CAN-SPAM’s definition of commercial email. *See* 15 U.S.C. § 7702(2)(a) (2004).
10. Between these two extremes, several etailers sent email almost daily, seven etailers only sent one email during the entire period, while others sent only every week or so.

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11. Interestingly, each of the five etailers who sent non-commercial email included an unsubscribe link and honored each of staff's requests to be unsubscribed even though non-commercial email is exempt from CAN-SPAM's opt-out requirements.
 12. Thus, all 88 of the etailers who sent email to our accounts, including the 5 who sent only non-commercial email, complied with these two provisions. The actual language used in notices varied considerably, with a small percentage of etailers (5%) using merely the word "Unsubscribe" or the phrase "Remove me" to signal recipients' right to opt out. The vast majority (75%), however, used language such as "This email was sent to [email address used by FTC staff]. If you would like not to receive further information about our specials, please send us an email with "Unsubscribe" in the subject line or click here [hyperlink to Internet-based opt-out mechanism] if you wish to unsubscribe." In the view of staff, each of the etailers' messages complied with the Act's minimum requirements. However, while phrases such as "Unsubscribe" were deemed minimally acceptable under the Act's requirements in this study, it is the staff's opinion that it is a better practice to include more context (as done by 75% of the etailers in this study) so that all recipients of any commercial email message will be fully informed of their opt-out rights. Moreover, depending on the circumstances, the mere use of the terms "Remove Me" or "Unsubscribe" may not satisfy the clear and conspicuous notice requirements of sections 7704(a)(3)(A)(i) and (5)(A)(ii) of the CAN-SPAM Act.
 13. All three of these etailers immediately ceased sending any further email to the two accounts for which opt-out requests were honored.

