



March 31, 2004

Mr. Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: CAN-SPAM Act Rulemaking, Project No. R411008

Dear Secretary Clark:

The Electronic Retailing Association (the “ERA”) is the leading trade association representing the electronic retailing industry. The ERA has over three hundred (300) member organizations encompassing a wide range of entities, such as advertising agencies, direct response marketers, telemarketers, Internet and “brick and mortar” retailers, fulfillment service providers and television shopping channels.

The ERA is submitting herein initial comments in response to the Federal Trade Commission’s (the “Commission”) March 11, 2004 Advance Notice of Proposed Rulemaking and Request for Public Comment with respect to various topics relating to the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the “CAN-SPAM Act”). In particular, we are now providing comments addressed to the forthcoming Commission report regarding the practicality, technical feasibility, privacy and enforceability of a National Do Not E-mail Registry.

As discussed in greater detail below, the ERA does not believe that a National Do Not E-mail Registry is appropriate. As Congress found in enacting the CAN-SPAM Act, e-mail has become an extremely important and popular means of communication, relied upon by millions of Americans on a daily basis for personal and commercial purposes. A primary policy behind the enactment of CAN-SPAM was the elimination of fraudulent and deceptive e-mails. However, there is nothing inherently fraudulent or deceptive about commercial e-mail messages that would indicate that the creation of a National Do Not E-Mail Registry – which would greatly restrict the sending of such legitimate e-mail messages – is appropriate. To the contrary, legitimate commercial e-mail messages benefit both consumers and marketers in that they allow marketers to reach a large number of potential customers in an efficient and cost-effective manner and afford consumers the opportunity to easily learn about a wide range of goods and services and provide them with a significant degree of choice in terms of the providers of such goods or services.

The ERA fully supports any efforts by the Commission to prohibit the transmission of fraudulent and deceptive e-mail messages (i.e., spam) by unscrupulous marketers. Such spam messages not only harm the recipients thereof, but also undermine the viability of e-mail as a communications channel between marketers and consumers, as such messages greatly increase the volume of e-

2101 Wilson Boulevard
Suite 1002
Arlington, VA 22201
Tel: 703.841.1751
Fax: 703.841.1860

Toll Free: 800.987.6462
(US only)

www.retailing.org



mail traffic, undermine the effectiveness of legitimate e-mail messages, and generally increase costs for both consumers and marketers.

Nevertheless, the ERA does not believe that the creation of a National Do-Not E-mail Registry is appropriate. Such a registry would not protect consumers from unlawful spammers and would not serve to further the CAN-SPAM Act's stated purpose of reducing fraudulent and deceptive e-mail messages. Indeed, we believe that the burden and costs that would be imposed upon legitimate marketers – particularly small online businesses struggling to compete with larger, more established brick and mortar operations – would significantly outweigh any perceived benefits to consumers. Moreover, rather than benefiting consumers, we believe that the creation of a Do Not E-mail Registry might well expose them to additional privacy risks.

1. Do Not E-mail Registry Will Not Prevent Fraudulent and Deceptive Spam

Even prior to the enactment of the CAN-SPAM Act, the Commission had broad authority to prosecute the sending of fraudulent or deceptive e-mails under Section 5 of the FTC Act. Despite this broad enforcement power, however, the level of fraudulent and deceptive e-mails has continued to grow. This is a result, at least in part, of the ease with which unlawful spammers can evade enforcement by employing false routing information to hide their identities and locations and/or by locating their spamming operations offshore – outside the jurisdiction of U.S. authorities. Even with the enactment of CAN-SPAM, many spammers continue to send fraudulent and deceptive e-mails. As the majority of these spammers are not in compliance with existing laws, we believe it is reasonable to assume that they are unlikely to comply with and honor any Do Not E-mail Registry.

Moreover, there is a fundamental economic difference between e-mail marketing and telemarketing which further suggests that a Do Not E-mail Registry is significantly less likely to be effective than the Do Not Call Registry introduced by the Commission last year. Telemarketing costs are significantly greater than the cost of sending e-mail messages. As such, marketers have a much greater incentive to target their telemarketing campaigns to those consumers who are likely to be receptive to their offers and, thus, to scrub their calling lists against the National Do Not Call Registry. (In addition, telemarketers have much less ability to hide their identities or avoid jurisdiction). In contrast, the reduced cost of sending e-mail messages allows spammers to transmit such messages in bulk to millions of consumers without the need to target their campaigns to specific consumer interests.

As a result, we believe that consumers would continue to receive the most egregious forms of unlawful commercial e-mail messages – regardless of whether they placed their email addresses on a National Do Not E-mail Registry.

2. Registry Would Unfairly Burden Legitimate Marketers

In contrast, responsible marketers that do not engage in the unlawful spamming practices sought to be eliminated by CAN-SPAM are the very entities that are most likely to comply with a National Do Not E-mail Registry. We believe that the creation of such a registry would cause significant injury to these marketers that would far outweigh any perceived or purported benefit to consumers.

While the Commission has given no indication as to the anticipated cost of creating, maintaining and enforcing such a registry, it is reasonable to assume that the costs will be substantial. Indeed, it is likely that the costs will far exceed those associated with the implementation and enforcement of the National Do Not Call Registry – as there are many more e-mail addresses



than residential telephone numbers, consumers change e-mail addresses much more frequently than they change telephone numbers, and the enforcement challenges with respect to the transmission of unlawful e-mail messages far exceed those related to violations of the Telemarketing Sales Rule. As the senders of fraudulent and deceptive e-mails are unlikely to register and pay for access to a National Do Not E-mail Registry, the cost of the registry will be borne disproportionately by legitimate marketers. We believe that this would be inequitable and burdensome in light of the less onerous alternative of allowing consumers to simply opt-out of future commercial e-mail messages, which is already in place under the CAN-SPAM Act.

Moreover, the increased cost of engaging in e-mail marketing, coupled with a drastic reduction in the number of e-mail addresses to be contacted, would raise serious anti-competitive concerns, as it would significantly impact upon small on-line businesses that have flourished in the e-commerce environment and which are able to compete with larger entities by advertising and communicating with potential and actual customers through cost-effective methods such as e-mail.

3. Registry Would Reduce Consumer Choice and Raise Privacy Concerns

Increased compliance costs imposed on e-mail marketers will also eventually lead to increased costs for consumers in the form of higher prices for goods and services and, further, will likely lead to a decrease in the amount of legitimate e-mail offers received by consumers, thereby undermining consumer choice. As noted, we believe that the current opt-out structure of the CAN-SPAM Act is sufficient to protect consumers from unwanted commercial e-mail messages from legitimate marketers while allowing them to easily and inexpensively learn of offers from other marketers.

Finally, we believe that the creation of a National Do Not E-mail Registry would create potential privacy concerns for consumers as there is a risk that spammers could attempt to access the registry, and its list of e-mail addresses, and use it unlawfully to send even more spam messages.

In conclusion, the ERA would urge the Commission not to allow the unscrupulous actions of spammers, who regularly engage in the sending of fraudulent or deceptive e-mails, to taint the Commission's view of an otherwise lawful and legitimate marketing practice. We respectfully submit that the opt-out mechanism currently in place strikes the proper balance between the desire of consumers to avoid unwanted e-mails from certain marketers and the benefits to both consumers and marketers from allowing cost-effective and easy communications through the e-mail channel.

Very truly yours,

Barbara Tulipane
Linda Goldstein
William Heberer