

**Before the
FEDERAL TRADE COMMISSION
Washington, D.C.**

**COMMENTS OF
REED ELSEVIER INC.**

on the

CAN-SPAM ACT RULEMAKING, PROJECT NO. R411008

Advance Notice of Proposed Rulemaking

Steven M. Manzo
Vice President, Government Affairs
Steven M. Emmert
Director, Government & Industry Affairs
Reed Elsevier Inc.
1150 18th Street, N.W., Suite 600
Washington, D.C. 20036
202.857.8253

Counsel:

Ronald L. Plesser
Karin M. Miller
Piper Rudnick LLP
1200 19th Street, N.W.
Washington, D.C. 20036
202.861.3900

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I. **Background**

Reed Elsevier Inc. appreciates this opportunity to submit comments to the Federal Trade Commission (the “Commission”) in response to the Commission’s Advance Notice of Proposed Rulemaking, 16 C.F.R. Part 316, 69 Fed. Reg. 11776 (March 11, 2004), (“ANPRM”) on the regulations to be enacted under the Controlling the Assault of Non-Solicited Pornography and Marketing Act, Pub. L. No. 108-187, 117 Stat. 2699 (“CAN-Spam Act” or the “Act”).

Reed Elsevier is one of the world’s leading publishing and information companies, employing more than 20,000 people in the United States and over 35,000 people worldwide. Reed Elsevier provides critical information in both hard copy and electronic formats to the government, scientific, legal, educational, and business communities. Reed Elsevier businesses include Reed Business Information, Reed Exhibitions, Harcourt Education, LexisNexis, and Elsevier. All of our businesses rely on e-mail to communicate with our customers, collect and verify information, and for other important purposes.

Reed Elsevier businesses use e-mail in a variety of ways, including to communicate with and offer choices to current and potential customers about their product and service offerings, to provide up-to-date information via e-mail newsletters, to conduct surveys and other market research, to provide subscriber account expiration and renewal information, and to legitimately advertise products and services. In addition, Reed Elsevier provides many products that are available solely in electronic form or as an alternative to hard copy versions. For instance, we currently offer digital editions of periodicals normally published in print form and have plans to greatly expand this aspect of our business to serve increasing customer demand.

Reed Elsevier supports efforts to eliminate fraudulent and deceptive e-mail. We share the common goal of making e-mail a more useful medium for both businesses and consumers. At the same time, we believe that the Act is not intended to curtail legitimate commercial e-mail and electronic commerce, and should not be implemented in a manner that does so.

The following are the recommendations we urge the Commission to consider in drafting the CAN-SPAM Act rulemaking. Each of these recommendations is discussed in detail in Sections II through VIII below.

II. **An objective standard should be established for determining whether “the primary purpose” of an electronic mail message is commercial**

Section VI.A of the ANPRM suggests various criteria to determine the “primary purpose” of an electronic mail message which, in turn, will establish whether a particular message constitutes a “commercial electronic mail message” subject to the Act’s requirements and prohibitions.

A. “Net impression” standard

Of the proposed criteria provided in the ANPRM, a standard of the “net impression” that the material as a whole would make on a reasonable observer should be applied to make this determination. Such a standard would permit various existing and unforeseeable factors to be weighed to determine whether a message is commercial in nature and would be adaptable to new technology and developments in electronic commerce.

While this standard may provide the greatest flexibility while focusing on the impression that the electronic message makes on recipients, this standard is on its face vague and does not, on its own, provide sufficient guidance for senders of electronic mail. Reed Elsevier encourages the Commission to identify additional criteria to be weighed to determine the net impression the material would make on the reasonable observer and to provide examples of these factors. As the Commission notes, a net impression standard should take into account placement of disclosures within the marketing material, the proximity of disclosures to the relevant claims, the prominence of the disclosures, and whether other parts of the marketing material distract attention from the disclosure. In addition, Reed Elsevier suggests the following additional factors providing objective criteria to businesses:

1. The first criterion to consider should be whether or not the e-mail itself contains an offer such as an advertisement or solicitation. If no offer is made within the e-mail, then this factor could weigh heavily against the primary purpose being commercial in nature.

2. If the e-mail does contain an offer, the primary factor to consider should be whether the business that sent the message would have sent it irrespective of the offer. If the e-mail would not be sent “but for” a commercial purpose, that fact would weigh heavily toward the message being considered a commercial electronic mail message. However, this test should not be applied to transactional messages where the purpose of the e-mail is to deliver bona fide editorial content, including newsletters, periodicals, or other documents.

3. The percentage of the text that is commercial in nature versus text that serves another purpose would be a useful, objective criterion to weigh in the net impression test. For instance, if more than 51% of the electronic mail message was an advertisement, that would weigh in favor of the primary purpose being commercial in nature. It is important to note that there should be one and only one primary purpose in each mailing.

4. If there is a transactional component to the e-mail, the presumption should be that the primary purpose of the e-mail is not commercial. In such instances the requirements of the Act are less necessary because the recipient of the e-mail has a direct relationship with the sender.

B. Exceptions for electronic messages where the primary purpose is not commercial in nature

The Commission should make it clear in the rulemaking that an electronic message in which the primary purpose is not commercial is exempt from the requirements of the Act. The following are examples of electronic communications where the primary purpose is not commercial in nature and should not be subject to the requirements under the Act.

Digital Periodicals. The Commission should clarify that digital periodicals are not commercial electronic mail messages. Digital magazines and other periodicals do not have a commercial primary purpose even though a large percentage of the material within a periodical may consist of advertisements. Rather, their primary purpose is to deliver legitimate editorial content. *See* Sec. 3(17)(A)(v) of the Act (providing that e-mail, the primary purpose of which is to deliver goods or services, is transactional in nature). Approximately 10-12% of Reed Elsevier's readers have opted to receive periodicals in digital editions rather than in print. Reed Elsevier plans to expand this aspect of our business in the near future to serve increasing customer demand. Moreover, since the publication and distribution of these periodicals is protected by the First Amendment to the U.S. Constitution, we believe that periodicals cannot be restricted whether in electronic or paper format.

Selling in Transactional Messages. The Commission should clarify that up-selling in transactional messages does not make the e-mail commercial in nature. For instance, a billing e-mail that contains an offer for a new discounted service should not be considered to be a commercial message and subject to the requirements of the Act. The message would have been sent regardless of the advertisement and is sent primarily to satisfy billing requirements; therefore, it should not be "transformed" into a commercial message by the inclusion of an up-selling offer.

Newsletters. The Commission should provide that newsletters are not commercial electronic messages subject to the requirements of the Act. Newsletters, which primarily provide text regarding news or other information and which do not primarily describe a product or service being offered, do not have a primary purpose that is the "advertisement or promotion of a commercial product or service" and thus would not be commercial e-mail under the statute.

Any electronic message in which the primary purpose is not commercial should be exempt from the requirements of the Act – even if the message is not a transactional or relationship message. It is conceivable for all factors to weigh against a commercial primary purpose, but for the message not to fit within one of the defined categories of transactional or relationship messages. The Commission should fill this gap by clearly stating that messages need not fall within a transactional or relationship category to be exempt from the Act's requirements for senders of "commercial electronic mail."

III. Certain categories of messages should be classified as transactional or relationship messages and should be exempt from the requirements of the Act

In section VI.B of the ANPRM, the Commission seeks comment on additional categories of messages that changes in technology or practices might warrant excluding from the definition of “commercial electronic messages” by designating them as “transactional or relationship messages.”

A. Billing statements

Reed Elsevier requests the Commission to clarify that billing statements are transactional or relationship messages under section 3(17)(A)(iii)(III) of the Act. Section 3(17)(A)(iii) of the Act states that “transactional or relationship messages” are those for which the primary purpose is 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.

Billing statements sent on a regular basis that contain advertisements do not have a primary purpose of a commercial advertisement or promotion of a commercial product or service because they complete a commercial transaction that the recipient has previously agreed to enter into with the sender. In addition, billing statements would be sent irrespective of the inclusion of an advertisement.

B. Renewals

Reed Elsevier requests the Commission to state that renewals are included under section 3(17)(A)(iii)(III) of the Act. Notifications regarding subscription renewals and the renewal of other ongoing services are transactional in nature and deal with both existing and prior commercial relationships. While most renewals are sent during the term of an existing relationship, some offers may be considered a new contract if the term of the prior subscription has expired. Nonetheless, such information should be characterized as an “ongoing commercial relationship involving ongoing purchase or use by the recipient of products or services offered by the sender” under section 3(17)(A)(iii)(III) of the Act.

For instance, Reed Elsevier sends e-mail notices to existing customers to alert them of exhibition space renewal. In this process, called “Space Draw,” exhibitors, in advance of attending a current event, are e-mailed to participate in a Space Draw for the upcoming event. Space is sold on a “first right of refusal” basis, and is based on a point system. If a high-priority exhibitor does not receive the e-mail notification for Space Draw, Reed Elsevier and the exhibitor may find themselves in a difficult situation.

Similarly, it has been a long-standing practice for Reed Elsevier to send existing advertisers reminders of advertising opportunities in future issues of some of its publications. While each new ad placement might be viewed as a separate transaction,

taken as a whole, the placements and related communications are part of a single ongoing commercial relationship.

C. **Consensual e-mails**

Reed Elsevier also requests that a category be added to transactional or relationship messages in section 3(17)(A) of the Act to include all individuals who affirmatively consent to receiving commercial electronic mail or have otherwise requested the e-mail. Many messages where consent exists are already encompassed in the existing categories of “transactional or relationship” messages. For example, section 3(17)(A)(i) of the Act provides that e-mail sent to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to is a transactional or relationship message not subject to the requirements of the Act. There is, however, a category of consensual e-mail that may not fit within this or the other categories enumerated in the Act. In all instances where an individual requests an e-mail, that e-mail should be a transactional or relationship message. In such instances, the requirements of opt-out, suppression, and other inclusions are wholly unnecessary. It is clear that if an individual requests e-mail, then they desire to receive such e-mail. Creation of a category for e-mails requested or consented to will provide businesses with certainty when they send such messages that they do not need to take the steps of analyzing the e-mail under the Act and determining who is the sender and its corresponding requirements.

IV. **The definition of “sender” in the joint marketing context should be clarified**

In section VI.E of the ANPRM, the Commission seeks comments on which entities are “senders” with respect to commercial electronic mail. The definition of “procure” is intended to make a company responsible for e-mail messages that it instructs a third party to send on its behalf. The section is intended to ensure that a company that does not originate or transmit the commercial e-mail messages, but instead pays or induces someone to carry out that act on its behalf is covered by the law. Procure is not intended to cover situations when the message is not originated or transmitted solely “on one’s behalf,” such as a situation where there are multiple advertisers or in joint marketing situations.

The interpretations of the words “sender,” “initiate” and “procure” should not result in a situation in which multiple advertisers place ads in another communication that would need to check opt-out lists of each advertiser against the potential recipient list prior to sending. Rather, in the multiple advertisers context, the opt-out requirement should only apply to the entity from whom the commercial electronic mail message appears to be sent. For purposes of the definition of sender, the entity that the commercial e-mail appears to be sent from should be the entity that must check its suppression lists for recipients who opted out of receipt of such e-mails – not all advertising partners.

V. The Commission should not recommend ADV labeling of commercial electronic mail

In section VI.I of the ANPRM, the Commission requests comments on the proposed requirement that commercial electronic mail be identifiable from its subject line through the use of “ADV:” or a comparable identifier. Reed Elsevier urges the Commission to recommend against such a plan. The Act already requires clear and conspicuous indication that a message is an advertisement or solicitation. Any further requirement would not help combat spam and would have costly unintended consequences.

The Commission’s report, *False Claims in Spam*, released last year, indicated that only 2% of all of the “spam” that it evaluated contained “ADV” in the header even though numerous state laws required that certain e-mail messages contain such a heading. *False Claims in Spam*, A Report by the FTC’s Division of Marketing Practices (April 30, 2003), at 11. Such sparse compliance indicates that large scale spammers will not comply with a federal “ADV” requirement either.

Rather than combating spam, such a labeling requirement would be burdensome on businesses and could create a system where Internet service providers and others could elect to block all messages with a specific label. This labeling requirement could result in the blocking of messages that the intended recipients would like to receive, particularly where the message contains mixed content. Not only would the advertisement be blocked and/or deleted, but the entire e-mail would be filtered out. The net effect would be to effectively prohibit all businesses from engaging in marketing activities via e-mail, without regard to the content of the message, the ethical practices of the business, or the recipient’s desire to receive the message.

Clear and conspicuous notice that a message is an advertisement or solicitation contained within the body of the e-mail is sufficient to notify consumers of advertisements. Likewise, subject lines are limited in space, and a labeling requirement would result in many messages having similar, if not identical headers. This could leave consumers with homogenized in-boxes where one e-mail is virtually indistinguishable from another. For these reasons, the Commission should recommend against subject line labeling.

VI. The proposed 10-business-day period for processing opt-out requests is unworkable and should be changed to 31 calendar days

In section VI.C of the ANPRM, the Commission asks if the 10-business-day time frame for acting on opt-out requests is appropriate. The 10-day period for processing opt-out requests is unworkable. Our businesses frequently partner with other companies to co-sponsor programs and events and contract with third parties to conduct e-mail campaigns. It will take more than 10 days to review and comply with all opt-out requests sent to all parties involved. Reed Elsevier recommends that a 31-calendar-day suppression deadline be adopted in accordance with the opt-out time frame contained in

the Telemarketing Sales Rule for businesses that engage in telemarketing to suppress telephone numbers listed on the federal do-not-call registry.

VII. Labeling of e-mail messages by divisions of companies should be permitted

Section VI.E.5 of the ANPRM requests comments on section 5(a) of the Act regarding false or misleading transmission information displayed in an e-mail message. Many companies, like Reed Elsevier, have divisions that are not legal entities on their own, but that represent specific products and services offered by that division. For instance, LexisNexis is a division of Reed Elsevier Inc. that provides specific products and services. The Commission should clarify that the labeling of e-mail messages as being sent by a product or division of a corporate entity (such as LexisNexis) rather than by the corporate entity itself (such as Reed Elsevier) is appropriate.

VIII. The Commission should recommend against adoption of a bounty system under the CAN-SPAM Act

Reed Elsevier opposes the creation of a bounty system for violations under this Act and requests that the Commission recommend against such a policy. The creation of a bounty system would result in significant incentives for unscrupulous individuals to seek monetary gain by alleging violations of the Act even if none has occurred.

Given the factual nature of allegations by unscrupulous individuals, such claims would not be easily dismissed and would require significant time and resources by both the Commission and the accused business. It can be readily anticipated that some individuals will contest the nature of transactional messages, disavow consents previously given, or disavow the existence of a prior relationship. The burden of resolving these complaints likely would fall hardest on small businesses and on businesses that lack the systems or the sophistication to document every information request received, every consent received, every transaction made, and every message sent.

The above-stated concerns are not mere speculation. With respect to the sending of faxes, members of the business community have been beset this past year with claims from individuals, or from attorneys alleging to have purchased claims from individuals, that transactional fax messages sent in response to transactions initiated by the individual were in fact unsolicited faxes sent in violation of the Telephone Consumer Protection Act. These complaints are motivated by the belief that the individual, or in the case of assigned claims the attorney, can personally profit by alleging that a fax was unsolicited. While most individuals can be counted on to act responsibly, the cost to the business community of resolving these unfounded complaints has become significant.

In addition to creating an environment that would foster the filing of unfounded complaints, a bounty system would create complex management and administrative law issues for the Commission. For instance, policies would have to be implemented to determine who should receive the bounty. The creation of such procedures and resolution of the disputes that would arise could result in the diversion of valuable

resources from the Commission's spam fighting efforts to administering the reward system. Such a policy could, ironically, have the unintended result of more of the Commission's resources being spent on who should get the reward than on catching large scale spammers.

IX. Conclusion

Reed Elsevier thanks the Commission for the opportunity to provide these comments on the ANPRM. All Reed Elsevier businesses are committed to complying with the CAN-Spam Act and appreciate all guidance offered by the Commission in that regard. Should the Commission have any questions concerning these comments or our practices and procedures, please do not hesitate to contact us.

Respectfully submitted,

REED ELSEVIER INC.

By: _____
Steven M. Manzo
Vice President, Government Affairs