

**Can-Spam Commentary**  
**- Rebecca Lieb, Executive Editor, the ClickZ Network**

**Transactional or relationship messages are exempt from the act's provisions. Should the definition of such messages be modified?**

Yes. Add "affirmative consent" (i.e., opt-in) newsletters to this category. It keeps with the spirit of the law ("CAN-SPAM" is, after all, an acronym for controlling the assault of *non-solicited* pornography and marketing act) and rewards good behavior. It also exempts opt-in newsletters from one of CAN-SPAM's stickiest wickets: Does an advertiser in an ad-supported newsletter count as a "sender," and is a newsletter in violation of the law if a subscriber opts out of mailings from a specific advertiser but not the newsletter itself?

**Are 10 business days sufficient to honor an opt-out request?**

Absolutely.

**The commission may designate additional "aggravated violations" of the act.**

My suggested additions are:

Text and/or graphics in a subject line or message body with no purpose other than to facilitate delivery in a deceitful or duplicitous manner. Examples include white-on-white (i.e., invisible) text and gobbledygook copy intended to bypass Bayesian filters.

Online opt-out requests that result in browsers being hijacked by explosions of pop-up windows and other forms of excessive and intrusive unsolicited advertising.

The subscribing or furnishing of third-party e-mail addresses to commercial mailers without that party's knowledge or consent. If that process is automated, it should be considered an aggravated violation.

**Should commercial e-mail senders induce recipients to forward to a friend (and potentially no longer be considered the sender)?**

Forward-to-a-friend campaigns should be acceptable, providing there is no material inducement or incentive to do so. Increasing the original recipient's chances of winning a prize or assigning a bounty to the number of messages forwarded encourages indiscriminate forwarding and a subsequent increase in the volume of unwanted e-mail.

**Can several entities be considered senders, and is the e-mail in violation if the recipient has opted out of messages from an advertiser or sponsor in the message?**

If the recipient opted in to receive e-mail from the *primary* sender, subsequent advertisers or sponsors should be accorded non-sender status. This includes newsletter advertisers, conference sponsors, and retailers advertising multiple products (e.g., an Amazon.com mailing promoting three brands of TVs).

If the message is *not* opt in, more complex, multiple-sender regulations should apply. This would encourage marketers to send desired, targeted mailings and to responsibly segment their lists. The end effect could be a reduction in unsolicited e-mail volume.

**Should a Do Not E-Mail registry be established?**

FTC Chairman Timothy Muris is dead on in his assessment a do-not-e-mail registry is an ill-conceived idea. The challenge is to educate a public overwhelmingly in favor of the idea that what works stunningly well for telemarketing cannot translate to this channel. Comments on this one issue are due March 31, earlier than the April 12 deadline for all other commentary.

### **Should commercial e-mail be labeled?**

Again, opt-in ("affirmative consent," in legal-speak) should set the benchmark. If only unsolicited messages are subject to labeling requirements (adding abbreviations such as "ADV" or "ADULT" to subject lines), senders would again be forced to segment their lists. Meanwhile, consumers and ISPs could much more easily filter unsolicited messages. In theory, everyone wins. Except spammers.

In the effort to protect consumers and minors from receiving and viewing pornographic e-mail, compliance is the wild card. What else is new? But if *unsolicited* messages were prohibited from containing adult content and images, were labeled "adult" in the subject line, and required click-through with an explicit "18 and over" notice to view the content, a legal guideline would at least be in place.

### **What should the criteria be for determining if the primary purpose of a message is commercial?**

The commission presents a number of scenarios that blur the lines between purely commercial intent and other messaging, including ad-supported newsletters and a commercial organization that promotes its involvement in a charity.

Since CAN-SPAM was enacted, commercial e-mail in noncommercial clothing has abounded. Messages from bogus institutes (click to buy snake oil) or joke-of-the-day newsletters (click and they'll try to sell you a mortgage) have proliferated. Meanwhile, my credit card statement -- which I need and my provider is legally obligated to deliver -- could be considered commercial if there's an ad or promotion at the bottom of the message. Well, they stuff paper bills with garbage, too.

I may sound like a broken record here, but let affirmative consent prevail. If the *sender* is a commercial entity and the recipient didn't request the message, then the primary purpose of the message is commercial, unless it can be defined as a transactional or relationship message.

### **Offer other considerations for rulemaking.**

Issue record-keeping requirements, please. Commercial and bulk e-mailers should be required to maintain records of date, time, IP address, and e-mail address of every opt-in and -out to their lists. These are simple and inexpensive to maintain. Even the smallest business can keep e-mail files that contain extended header information. Such records would protect mailers if legal, consumer, or ISP challenges arise regarding the legitimacy of their e-mail practices.