

**BEFORE THE  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	
Definitions, Implementation, and	)	FTC Project No. R411008
Reporting Requirements Under the	)	
CAN-SPAM Act:	)	
Do-Not-E-Mail Registry	)	
	)	

**COMMENTS OF THE  
NEWSLETTER & ELECTRONIC PUBLISHERS ASSOCIATION**

The Newsletter & Electronic Publishers Association (“NEPA”) is a trade association representing publishers of approximately 3,000 newsletters and other specialized information services. NEPA submits these comments in response to the Federal Trade Commission’s (“FTC”) Advance Notice of Proposed Rulemaking.<sup>1</sup> Specifically, the FTC seeks comment on the practical, technical, security, privacy, enforceability, and other concerns associated with a national Do-Not-E-Mail Registry under the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“Can-Spam Act” or “the Act”).

As outlined below, NEPA believes the establishment of a Do-Not-E-Mail Registry is unnecessary in light of the Act’s existing provisions, which adequately protect consumer choice regarding commercial communications from legitimate businesses such as newsletter publishers. As for the serial, fraudulent spammers of most concern to the public, who mask their identities and already violate the Can-Spam Act provisions, an e-mail registry would provide no additional protection. Thus, the most likely effect of a Do-Not-E-Mail Registry would be simply to burden unnecessarily legitimate businesses and constitutional speech interests without stopping the most problematic “spam.”

For NEPA members, many of whom are small businesses or sole proprietorships publishing one or a handful of titles – in a very real sense, the modern-day equivalent of Thomas Paine’s “lonely pamphleteers” – an e-mail registry also represents a serious threat to their

---

<sup>1</sup> *Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act: Advance Notice of Proposed Rulemaking*, 69 Fed. Reg. 11776 (March 11, 2004).

livelihoods by interfering with their ability to communicate effectively with subscribers and potential subscribers about their publications and services.

## **I. THE CAN-SPAM ACT SHOULD BE GIVEN A CHANCE TO WORK**

NEPA believes that the Can-Spam Act, though in need of clarification of several key provisions through FTC rulemaking, generally balances e-mail account-holder privacy rights against unnecessary burdens on businesses and upon free speech. The law properly protects against deceptive practices and gives recipients the option not to receive solicitations from certain companies. Just three months after it became effective, newsletter publishers and other responsible companies are scrupulously complying with the various provisions of the Act. Compliance is likely to increase even further in coming months as lagging businesses catch up with the new rules, and as significant remaining uncertainties in the Act's application are resolved through anticipated FTC rulemaking.

Newsletter publishers, even more than many other businesses, have a vested interest in respecting the e-mail preferences of their subscribers and potential subscribers. Unlike fellow publishers such as mass-circulation newspapers and magazines, many newsletters decline advertising to better maintain their editorial integrity. Thus, the survival of a given newsletter may be wholly dependent on maintaining its subscription base.

In the absence of any evidence that the Can-Spam Act's current framework somehow fails to protect consumers from unwanted e-mail sent by the many "law-abiding businesses" described by the Act<sup>2</sup> – as opposed to criminal spammers who would not be deterred by either the current rules or a registry – a Do-Not-E-Mail Registry simply ratchets up the regulatory burden on businesses with absolutely no offsetting benefit to consumers.

## **II. ADOPTION OF A DO-NOT-E-MAIL REGISTRY IS UNLIKELY TO SOLVE THE PROBLEM OF ABUSIVE E-MAIL TACTICS BY SERIAL SPAMMERS**

Given current technology and the borderless nature of the Internet, a Do-Not-E-Mail Registry is unlikely to deter the troublesome spammers who continue to flout the current provisions of the Can-Spam Act. We agree with Commission Chairman Timothy Muris, who stated at the Aspen Summit last year that, although he was convinced that a Do-Not-Call Registry would reduce unwanted telemarketing calls, he believed that a similar Do-Not-E-Mail

---

<sup>2</sup> Can-Spam Act of 2003, Pub. L. No. 108-187, § 2(a)(11), 117 Stat. 2699, 2700.

Registry would be ineffective “because spammers can constantly create new e-mail addresses and identities.”<sup>3</sup> Unlike phone solicitations, which use a telephone infrastructure and can more easily be regulated, spammers willing to operate through fraud and online aliases simply ignore the requirements of the Can-Spam Act and continue to operate until traced and prosecuted. As the FTC testified to Congress, “Spammers can easily hide their identity, forge the electronic path of their email messages, or send their messages from anywhere in the world to anyone in the world.”<sup>4</sup> It can take months for government authorities even to identify of a spammer.<sup>5</sup> Against this backdrop, there is no indication that a registry, as opposed to the disclosure and opt-out provisions already in place, will deter such abusive spammers.

NEPA endorses the comments that it understands have been filed separately by the Newspaper Association of America (“NAA”). As the NAA correctly points out, a potential Do-Not-E-Mail Registry not only runs the risk of failing to reach the abusive e-mail most of concern to the FTC and to the public, but also may exacerbate the problem. Such a registry would represent a gold mine of working e-mail addresses to unscrupulous bulk senders who already mask their identity. As a result, a Do-Not-E-Mail Registry could achieve the worst of all worlds: failing to deter the true problem of abusive e-mails while in fact actually aiding abusive e-mail campaigns by making addresses available.

### **III. AN E-MAIL REGISTRY WOULD SIGNIFICANTLY BURDEN SMALL, LEGITIMATE BUSINESSES LIKE NEWSLETTER PUBLISHERS**

Newsletter journalists regularly report on a multitude of federal agencies, including the FTC, and newsletter journalists are accredited members of the Periodical Press Gallery in Congress, the White House press corps, and other such institutions, domestic and international. Yet newsletters, by their nature, tend to have small subscription bases compared to that of a daily metropolitan newspaper. These newsletter subscribers often depend heavily upon a given publication for specialized, accurate and up-to-the-minute information and analysis of developments and trends in a focused area. Targeted communications – such as by e-mailing

---

<sup>3</sup> FTC Press Release, *FTC Chairman Calls Spam “One of the Most Daunting Consumer Protection Problems FTC Has Ever Faced,”* Aug. 19, 2003.

<sup>4</sup> Prepared Statement of the Federal Trade Commission on “Unsolicited Commercial Email,” before the Senate Commerce, Science, and Transportation Committee (May 21, 2003), available at <http://www.ftc.gov/os/2003/05/spamtestimony.pdf>

<sup>5</sup> See note 2, *supra*.

free, sample copies of newsletters – are among the least intrusive, most cost-effective means for newsletter publishers to seek renewal requests from, or to market new publications and products to, their current and former subscribers.

In fact, for many of these newsletter publishers, e-mail represents one of the few remaining affordable and effective avenues to share their editorial content with potential subscribers. Federal regulations restrict marketing by facsimile machine, and the Do-Not-Call Registry allows consumers the option of a blanket opt-out of all sales calls. For publications with a specialized focus, such as newsletters, mass-circulation advertising is both inefficient and expensive because these publications have a more limited potential audience than do general interest publications. And direct mail, an expensive means of informing potential subscribers about a news product, is prohibitively costly for many “mom and pop” newsletter publishers.

Thus, a one-size-fits-all opt-out such as a Do-Not-E-Mail Registry would pose a serious threat to newsletter publishers. E-mail account holders might sign up for the registry expecting to avoid pitches for loan consolidation, pornography, and weight-loss and sexual-performance drugs, not realizing that such a registration might also foreclose access to information about newsletters reporting on matters of concern to them.

#### **IV. AN E-MAIL REGISTRY RAISES SERIOUS FIRST AMENDMENT CONCERNS**

Blanket restrictions on practices such as e-mailing newsletters raise profound constitutional questions, another reason NEPA believes that considering a Do-Not-E-Mail Registry is premature at a time when the Can-Spam Act’s implementing regulations have not yet resolved these tensions. Absent a clear and appropriate definition for the “primary purpose” of a “commercial electronic mail message” under the Act, for example, a registry runs the significant risk of imposing overbroad restrictions on speech. A sample newsletter sent through e-mail to potential subscribers would appear to meet the definition of a commercial message under the Act, despite the fact that the content of these publications are entitled to the full protection of the First Amendment. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (“That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.”); *see also Pacific Gas and Elec. Co. v. Public Util. Comm’n*, 475 U.S. 1, 8 (1986) (plurality) (stating that utility newsletter inserted in billing envelope “receives the full protection of the First Amendment”).

In this regard, the FTC indicated in the *Advance Notice of Proposed Rulemaking* that “an electronic newsletter may be funded by advertising within the newsletter,” and that “[s]uch advertising *arguably* would not constitute the primary purpose of the newsletter”<sup>6</sup> (emphasis added). This language, of course, raises the possibility that, if an e-mail newsletter did include advertising, it could be considered a commercial message under the Act. NEPA respectfully requests that FTC clarify that news material subject to First Amendment protection does not fall within the reach of the Can-Spam Act as a “commercial message,” regardless of any possible ancillary advertising.<sup>7</sup> Absent such a clarification, there is a significant risk that publishers would limit e-mail dissemination of protected speech for fear of violating a potential Do-Not-E-Mail Registry – certainly not the intent of a Congress largely concerned with fraudulent bulk e-mail.<sup>8</sup>

Moreover, should the FTC decide to implement a Do-Not-E-Mail Registry, NEPA urges that newspaper and newsletter publishers, who play a unique role in providing for an informed citizenry, who have a history of responsible e-mail practices, and whose messages implicate profound First Amendment interests, be generally exempted from the effect of such a list.

Respectfully submitted,

Newsletter & Electronic Publishers Association

By: /s/

---

W. Thomas Hagy

Chairman, Government & Legal Affairs Committee  
Newsletter & Electronic Publishers Association  
1501 Wilson Boulevard, Suite 509  
Arlington, Virginia 22209  
(703) 527-2333  
(703) 841-0629 (Facsimile)

---

<sup>6</sup> See 69 Fed. Reg. 11776, 11780.

<sup>7</sup> NEPA intends to separately file comments by April 12 addressing the definition of a “commercial message” and other issues for which the FTC has also requested public comment.

<sup>8</sup> See Can-Spam Act of 2003, § 2(a)(5), (7)-(9), 117 Stat. 2699, 2699-2700 (discussing trend toward vulgar and fraudulent bulk e-mail messages).