

**BEFORE THE
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580**

In the Matter of)
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CAN-SPAM Act Rulemaking – Further) Project No. R411008
Comment)
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**COMMENTS OF THE
NEWSPAPER ASSOCIATION OF AMERICA**

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I. Summary

The Newspaper Association of America (“NAA”) hereby submits its comments in response to the Federal Trade Commission’s (“Commission’s”) further *Notice of Proposed Rulemaking* (“NPRM”) regarding certain issues affecting “commercial” electronic mail.¹ NAA is a non-profit organization representing more than 2,000 newspapers in the United States and Canada. NAA members publish nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily U.S. newspapers. The majority of NAA’s members are in small markets with a printed circulation of 25,000 or less. NAA members typically serve as the leading online providers of news and advertising information in their local communities, and many provide a range of online services.

In these comments, NAA will address the multiple sender issue, “forward-to-a-friend” emails, and the proposed 70 percent reduction in the amount of time allowed for processing of an

¹ *Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act, Notice of Proposed Rulemaking*, 70 Fed. Reg. 25,426 (May 12, 2005) (“NPRM”).

opt-out request.² In particular, NAA:

- Supports the Commission’s proposal regarding the “multiple sender” issue, subject to an appropriate clarification of the concept of “control” of a message;
- Supports the Commission’s proposal that the original sender of a “forward-to-a-friend” email is not a “sender” of the forwarded email in the absence of consideration and requests confirmation that a Web-based forwarding mechanism does not render the Website a “sender” absent consideration; and
- Opposes the proposal to reduce the time allowed to process an opt-out request from the current ten business days to three days, which fails to consider factors that could make it difficult for NAA members to comply.

II. In Identifying A Single Sender Of A Multiple Advertiser Email, The Commission Should Clarify That “Controls the Content” Refers to the Entire Message, Not Individual Advertisements

As NAA has previously commented, in many circumstances a “commercial” email may contain advertising on behalf of more than one advertiser. Substantial practical difficulties would arise if each advertiser in such an email were considered a “sender” for purposes of the CAN-SPAM Act. For example, those responsible for commercial emails having multiple advertisers would be obligated to maintain records as if each advertiser had sent the email, to purge each email transmission list against each advertisers’ do-not-email list, and to engage in a bewildering exchange of opt-outs and purges among all advertisers. In the case of a newspaper emailing a commercial “special offer” containing promotions for several advertisers,³ a requirement that the newspaper “scrub” its own lists and the lists of all its advertisers before sending each email would pose an incalculable burden. Equally burdensome would be a duty to share opt-outs it receives from such multi-advertiser emails with every advertiser in the email.

² NAA has previously commented on several of these issues. See Comments of the Newspaper Association of America and the Online Publishers Association, FTC Project No. R411008 (filed Sept. 13, 2004).

³ This discussion would apply equally to any email subject to regulation as “commercial” under the CAN-SPAM Act.

In recognition of these potential burdens, the Commission is proposing to exercise its discretionary authority under the CAN-SPAM Act to modify the definition of “sender” in its regulations to clarify the identity of the “sender” of a multiple advertiser “commercial” email.⁴ The Commission would add the following proviso to the definition of “sender.” In such situations:

when more than one person’s products or services are advertised or promoted in a single electronic mail message, each such person who is within the Act’s definition will be deemed to be a “sender,” *except that*, if only one such person both is within the Act’s definition and meets one or more of the criteria set forth below, only that person will be deemed to be the “sender” of that message:

- (1) The person “controls the content of such message”;
- (2) The person determines the electronic mail addresses to which such message is sent; or
- (3) The person is identified in the “from” line as the sender of the message.

70 *Fed. Reg.* at 25,428.

NAA appreciates that the FTC’s proposal is intended to address the problem. And, indeed, the second and third elements of the proposed proviso are clear, understandable, and readily applicable to commercial emails sent on behalf of multiple advertisers. However, NAA respectfully submits that clarification of the “controls the content” criterion is necessary in order for the Commission’s proposal to constitute a reasonable solution to the problem.

In particular, NAA believes that the Commission should clarify that by “controls the content of such message,” the agency intends merely to recognize that the e-publisher has the ultimate authority over what advertisements and editorial messages to include in the entire

⁴ These proposals apply only to “commercial” emails; consistent with FTC’s prior ruling, newsletters, etc., containing editorial content are not regulated. Accordingly, this rulemaking would apply to a purely commercial email such as a “localnewspaper.com” special offer, which typically is sent to consumers who have given prior consent.

“message” – *i.e.*, the entire email. Importantly, the Commission should clarify that it does not intend to ignore or override the well-established fact that it is the advertiser that “controls” the content of a particular advertisement contained in such an email. The regulation should not be interpreted as requiring an e-publisher, in order to earn the protection of the single sender proviso, to have the power to dictate the text of any paid advertising. Such is certainly not the way the world works. Advertisers control the text of their ads, while publishers (including electronic publishers) make the ultimate decision whether to carry the advertisement at all, and its location in the message. A contrary interpretation, on the other hand, could greatly disrupt standard industry practices.

Put differently, the outcome that best comports with both marketplace realities and the purpose of the Act is for the “sender” in a multiple advertiser scenario to be the party that is responsible for assembling the entire email message. This responsibility includes accepting advertisements prepared by others (subject, of course, to the right to refuse to carry any particular ad).

Such clarification appears fully consistent with the text of the proposed new proviso. Parsing that language, in every instance the term “message” appears it is in the singular. As such, the only reasonable construction is that the term “message” refers to a “single electronic mail message” – *i.e.*, the email in its entirety rather than any single advertisement contained therein. By contrast, the proposed proviso refers to the advertising or promotion of more than one person’s “products or services” in a single electronic mail message. Thus, the proposed regulation contemplates only one “message” while recognizing that such a single message may contain advertising or promotions for more than one person.

Accordingly, the Commission should clarify in its explanatory text that the new proviso to address the “multiple advertiser/single sender” issue is not intended to disturb the well-established principle that an advertiser is fully responsible for the content an advertisement, but merely seeks to confirm the role of the “single sender” in assembling, and having ultimate responsibility for, the entire email. With that clarification, NAA would support the proposed proviso.

III. The Commission Correctly Recognizes And Should Confirm That “Forward-To-A-Friend” Emails Are Not “Commercial” Absent Consideration

A recipient of a newspaper’s special offer email may freely forward the email to whomever he or she wants without any assistance by the newspaper. And many online newspapers provide a Web-based service that enables users to send an article or other site content to recipients of the user’s choosing. Where a recipient or website visitor chooses to forward material without any incentive from the newspaper, that individual determines the email’s existence, content and destination, not the newspaper.

Responding to numerous previous comments, the *NPRM* sets forth the view that a “forwarded-to-a-friend” email is not a “commercial” email unless the forwarder (the original recipient) receives consideration or other intentional inducement from the original sender to do so. This recognizes the fundamental principle that a publisher that originates the initial email, or that maintains the website through which such an email is forwarded, is not responsible for further dissemination of that message by the recipient to others unless it has paid consideration to the forwarder for doing so. NAA supports this approach.

Despite recognizing the importance of consideration, the *NPRM* nonetheless has left open the possibility that merely providing a Web-based “click-here-to-forward” mechanism could, in unspecified circumstances, be considered an “inducement” that might convert the online

publisher into a “sender.” It does so by stating that a Web-based forwarding mechanism “would not *likely* rise to the level of ‘inducing’ the sending of the email.”⁵ Although the *NPRM* is attempting to draw a distinction between “inducing” a forwarding (making the original sender a sender of the forwarded email) and “routine conveyance” (where the original sender would not be a sender of the forwarded email), that attempt has merely created confusion where clarity is necessary. Without more explicit guidance as to when a Web-based forwarding in fact would become an “inducement” in the absence of consideration, publishers may choose the safer option of simply removing such features to avoid any risk. Consumers would thereby lose a convenient service.

Such an outcome is entirely unnecessary because the *NPRM*’s general approach strikes a reasonable balance at “consideration.” If an online publisher provides consideration in exchange for the forwarding of a commercial email, then it satisfies the definition of a “sender” because it has procured the transmission of an email.⁶

Accordingly, the Commission should adhere to the principle that in the absence of consideration, the original sender will not be deemed a “sender” of a forward-to-a-friend mail or Web-based forwarded message. It follows that making available a Web-based forwarding mechanism, without other consideration, would not convert the publisher into a “sender” of a forwarded message. With this clarification, NAA would support the Commission’s proposed approach.

⁵ See *NPRM* at 25,441 (emphasis added).

⁶ Perhaps the *NPRM* arrives at this unsatisfactory outcome because of a perceived need to confer meaning to the term “induce” in the definition of “procure.” This is a strained outcome. A more reasonable interpretation of the word “induce” is that it serves to cover fact scenarios, such as additional entries in a contest, that might not always constitute “consideration” under applicable law.

IV. NAA Opposes the Proposal To Burden Businesses By Reducing the Time In Which They Must Process Do Not Email Requests To Three Days

The *NPRM* proposes to reduce from ten to three business days the time in which a sender must honor a do-not-email request. While NAA understands the reasoning underlying this proposal, factors not considered in the *NPRM* would create difficulties for many publishers in meeting such a short deadline. Therefore, the proposal should not be adopted.

Although there has been insufficient time to conduct a comprehensive survey of its membership regarding this issue, NAA has been able to obtain some information from member newspapers. The responses have indicated certain issues that the Commission appears not to have taken into account that will affect newspapers' ability to meet the three business day deadline.

First, newspaper companies that process do-not-email requests electronically are able, as the *NPRM* assumes, to honor such requests submitted electronically almost immediately. However, experience indicates that consumers – for whatever reason -- do not always use the convenient and obvious electronic procedure. For example, some consumers apparently choose to register their do-not-email requests by mail or by telephone. Others ignore the unsubscribe mechanism in the email and attempt to opt-out by a reply email to the sending email address. In a large newspaper company, such requests may be received by personnel unrelated to the email marketing operations, and several days may elapse before they arrive at the correct department. In instances where the request is mailed, it conceivably might not even arrive within three business days of being mailed.

Second, some large newspapers have multiple suppression lists. Running a do-not-email request against multiple lists requires additional steps. Three business days would be an excessively tight mandate for running this operation.

Third, contrary to an implicit assumption in the *NPRM*, many smaller market newspapers still process do-not-email requests manually. In their situations, the immediate, automatic process envisioned in the *NPRM* simply does not exist. It is not unusual for only one person on the staff to be designated to handle such requests. While the current 10-day period for honoring opt-out requests has not posed a problem to these newspapers, there is some concern that they would have difficulty complying with the three-day period if the staff person designated to process such requests takes a vacation or even a long weekend.

For these reasons – and the absence of a record of abuse under the current rule -- NAA urges the Commission not to reduce the period for honoring do not email requests to the proposed three business days.

V. Conclusion

For the foregoing reasons, NAA respectfully submits that the Commission should adopt the proviso regarding the multiple advertiser/single sender issue as clarified, and adhere to its approach to “forward-to-a-friend” emails, again as clarified. However, the Commission should not adopt the proposal to reduce the time period allowed businesses to process do-not-email requests.

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