

**BEFORE THE
FEDERAL TRADE COMMISSION
WASHINGTON, DC**

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In the matter of :
 :
DEFINITIONS, IMPLEMENTATION, AND : **Project No. 411008**
REPORTING REQUIREMENTS UNDER :
THE CAN-SPAM ACT :
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16 CFR Part 316 :
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**COMMENTS OF THE
AIR TRANSPORT ASSOCIATION OF AMERICA, INC.**

The Air Transport Association of America, Inc. (“ATA”) submits these comments in response to the Commission’s notice of proposed rulemaking (“NPRM”) about definitions, implementation, and reporting under the CAN-SPAM Act of 2003 (“the Act”).¹ 70 Fed. Reg. 25426 (May 12, 2005). ATA is the trade and service association that represents the larger U.S. airlines.² The Association and its members support the Commission’s efforts to control fraudulent, misleading and abusive commercial e-mail practices.

The Commission’s decisions in this proceeding will affect the ease with which this important and consumer-oriented Act is implemented. The Act provides the Commission discretion in several areas but the Act does not mandate Commission action

¹ Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, Pub. L. No. 108-187, 117 Stat. 2699 (2003), *codified at* 15 U.S.C. §§7701-7713.

² ATA’s members are: ABX Air, Alaska Airlines, Aloha Airlines, America West Airlines, American Airlines, ASTAR Air Cargo, ATA Airlines, Atlas Air, Continental Airlines, Delta Air Lines, DHL Airways, Evergreen International, FedEx Corporation, Hawaiian Airlines, JetBlue Airways, Midwest Airlines, Northwest Airlines, Polar Air Cargo, Southwest Airlines, United Airlines, United Parcel Service, and US Airways. ATA’s activities are described on our Web site: www.airlines.org.

in them, as the NPRM notes. *Id.* This distinction is important. Congress established in the Act what it determined to be the necessary structure to regulate commercial electronic mail and protect recipients' privacy. It weighed the competing public interest considerations in doing so. Proposals for regulatory actions that depart from that Congressional structure should carefully balance the costs of new regulatory requirements against the efficacy of such requirements. Three regulatory initiatives that the NPRM proposes do not meet that test. They are described below.

PROPOSED SECTION 316.2(M)—DEFINITION OF “SENDER”/CONTROL OF THE MESSAGE

The overall objective of this proposed provision appears to be sensible. However, one element of it—the third prong of the “sole sender” criteria—is a matter of considerable concern. We describe our concern more fully below.

Airlines routinely send messages to their frequent flyer club members; increasingly, these are electronic messages. Many of these messages contain advertisements for multiple airline marketing partners. Typically, these advertisements promote offers that can be used to earn mileage awards in the airline's frequent flyer program and also inform frequent flyer members how to apply program mileage to marketing partners' activities.

Under the Act, as the Commission currently construes it, each advertiser whose offer is featured in an e-mail message sent by an airline to its frequent flyer club members could be viewed as a "sender" of the message. *See generally id.* at 25428. The Commission has stated previously that there can be multiple "senders" of the same message. Under this view of the law, each advertiser/marketing entity whose offer is

featured in an airline frequent flyer program e-mail message would have a statutory obligation, among other things, to: (1) ensure that the message is not delivered to frequent flyer members who have previously opted-out of the advertiser's e-mail marketing programs; (2) include a reply e-mail address or hyperlink in the body of the e-mail message that can be used by recipients to prevent future e-mails transmitted by or on behalf of the advertiser and; (3) include its physical postal address in the body of each message.

The Commission's current construction of the Act creates significant administrative burdens for airlines and their marketing partners because it effectively requires the airlines to "scrub" their permission-based mailing lists against multiple partners' opt-out files before conducting e-mail communications. It also makes it difficult to format messages in a way that makes them compelling and understandable to recipients because they would have to include a welter of different opt-out links and postal addresses for multiple advertisers.

The Commission in this NPRM has expressed some willingness to reduce the compliance burdens imposed by the Act on the publishers of and participants in e-mail marketing programs that include offers from multiple advertisers. Specifically, the Commission has proposed that the publishers of e-mail marketing programs would be deemed to be the sole "sender" of the messages for purposes of complying with the list-scrubbing, labeling and unsubscribe requirements of the Act if: (1) the publisher independently meets the definition of a "sender" under the Act, meaning that the publisher's own products or services must be advertised somewhere in the message; (2)

the publisher does any of the following: (i) controls the content of the messages, (ii) determines the e-mail addresses to which the messages will be sent, or (iii) is the person identified in the "from" line of the messages; and (3) no advertiser whose offer is featured in the messages does any of the following: controls the content of the message, determines the e-mail addresses to which the message will be sent, or is identified in the "from" line. *See id.* at 25428-30; proposed section 316.2(m).

The first two requirements do not appear to be problematic. Unfortunately, however, depending on how it is construed, the third requirement noted above could make the Commission's proposed rule too restrictive to provide meaningful relief to airlines that include third-party information in their frequent flyer e-mail messages. This is because the airlines' third-party marketing partners typically provide some or all of the advertising copy associated with their individual offers and therefore could be deemed (at least in part) to "control the content of the messages."

In light of these circumstances, the Commission should eliminate the requirement that only one of the advertisers whose offers are featured in a permission-based commercial e-mail message "control the content" of the message. At least in the context of permission-based e-mail marketing programs, the remaining criteria equating the "sender" of a multi-advertiser e-mail with the party whose name appears in the "from" line of the message and who controls the destination of the message, are entirely sufficient to protect consumer's privacy interests and expectations. Alternatively, the Commission should clarify that any advertiser that contributes content or other information used in a frequent flyer program e-mail should not be deemed to "control the

content" of the message, so long as the publisher of the e-mail, whether an airline or other type of business, retains final decision making authority about the overall design, content and format of the message and/or the right to reject any advertising it deems unacceptable.

**PROPOSED SECTION 316.4—REQUIREMENT TO EFFECTUATE
AN OPT-OUT REQUEST WITHIN THREE BUSINESS DAYS OF RECEIPT**

The Commission proposes to reduce substantially the period in which a commercial entity must comply with a recipient's opt-out request from the Act's required ten business days to three business days. 15 U.S.C. §7704(c)(1); *see* 70 Fed. Reg. at 25453. The NPRM states that this reduction will enhance consumer privacy and "is supported by the record that current technology allows for processing such opt-out requests more expeditiously than the current ten-business-day time frame." *Id.* at 25442. We respectfully disagree with that conclusion.

The record in this proceeding reveals substantial differences in system and business process capabilities among commenters, and, therefore, calls into question the Commission's conclusion that a substantial decrease in the statutorily prescribed opt-out period is warranted.³ Since the very statutory provision that gives the Commission discretion to change the ten day opt-out rule also requires it to consider several factors before making any change, we urge the Commission to avoid changing from the more

³ Compare, for example, comments such as those by GoDaddy Software, Inc. (April 20, 2004) with those of MBNA America Bank, N.A. (April 20, 2004). In addition, the Commission acknowledges that "Nearly half of consumers who commented, and some e-mail senders who commented, indicated that ten business days is an appropriate period for processing opt-out requests...." *See* 70 Fed. Reg. at 25442.

reasonable period that Congress established to one that would impose significant new operational and technical costs on senders of legitimate commercial e-mails.⁴

As the Commission acknowledged in the NPRM, several commenters in the previous proceeding stated that many firms do not have the technology or business processes, or both, to fulfill a shortened compliance period. *Id.* at 25442-43. The broad spectrum of technical capabilities among those commenters mirrors those of ATA's members and generally illustrates the danger of reducing the opt-out requirement fulfillment period rather than either keeping the statutory ten-day period or even it expanding it as many commenters have suggested. *See* Comments of Time Warner, Inc. (April 20, 2004).

Some senders can comply with a three day opt-out requirement; however, these are typically firms that have simplified technology systems that have only one or a few databases upon which e-mail permission is stored. A sender's ability to comply with an opt-out requirement is commensurate with the complexity of its technology systems and the number of databases upon which it stores e-mail permission information. Actual compliance times will vary from company to company because of the need to synchronize all databases in responding to the opt-out instruction. Many ATA members rely on batch processing (or "batching")⁵ to update consumer data, including opt-out information. Batching is an efficient way to process information, especially for companies with multiple databases but it is more time consuming than a 24/7 individual-

⁴ 15 U.S.C. §7704(c)(1) allows the Commission to change the ten day opt-out requirement if the Commission determines that a different period would be *more reasonable* after it takes into account three specific elements: the statutory requirements for transmission of electronic messages, the interests of recipients of commercial electronic mail; *and* the burdens imposed on senders of lawful commercial electronic mail.

⁵ Batch processing gathers data or multiple transactions across a window of time and processes them during predetermined periods.

transaction-based operation. This is because the frequency of batches depends on what database is implicated and the times in which the applicable database is programmed to initiate updates.⁶ Moreover, if the firm operates in a consumer service industry, it may receive a significant volume of communications from customers via mail. Data must be keyed in these situations, which generates longer processing times. We suggest that the Commission's regulations state that opt-out requests that are not transmitted or received through the electronic means identified in section 7704(a)(3)(A)(i) be exempt from the ten day opt-out requirement or other comparable period that the Commission may adopt.

In addition to the effect of differences in system complexity and processes among businesses on the ability of companies to comply with a less than ten day opt-out period, technology that has been cited as facilitating opt-out requests is not necessarily affordable to all companies or easily compatible with their existing systems and processes. Changes to these systems and processes are expensive and must be evaluated in light of companies' financial situations. Thus, the touchstone in this proceeding cannot merely be the availability of technology; the costs of its acquisition and implementation, and the ability of industry to pay those costs must also be carefully considered.

For example, the U.S. airline industry is suffocating in red ink. The data portray the industry's dismal situation. The 2004 financial results show a net loss last year of about \$9.1 billion for the U.S. airline industry. Total losses for the 2001-2003 period were \$23 billion. Unprecedented fuel costs portend a continuation of these dismal

⁶ This sequence of activity is why it could take upward of ten business days to complete the updating. When a consumer makes an on-line change to communication preferences, this may result in the updating of her or his main database record within a day of the recipient's input of the instruction. That update, however, must still be migrated across other databases used to make selections for upcoming e-mail communications. Further, to allow time for quality control testing of an e-mail communication campaign, audience selections must be made up to three days in advance of the transmission date, depending on the complexity of the e-mail's content.

results. Many ATA members, suffering from these dire financial circumstances, are inhibited from immediately acquiring specific technology or implementing drastic changes to systems or database processes. Furthermore, airline information technology departments continue to have their resources stretched by passenger data reporting requirements that the Department of Homeland Security—particularly its Bureau of Customs and Border Protection and Transportation Security Administration—have imposed upon them. We respectfully urge the Commission to consider the demands that these other government-imposed information requirements have imposed on the airline industry in evaluating the reasonableness of proposed section 316.4.

The differences in business operating environments underscore that the wherewithal to respond to opt-out instructions varies considerably. In an environment characterized by such disparities, the proposed three-day rule will place unreasonable burdens on lawful electronic mail senders that are not commensurate with the benefits that recipients may realize. *See generally* 15 U.S.C. §7704(c)(1). Congress established the ten-day rule after weighing the competing interests affecting such a rule. The record in this proceeding reveals decisionally significant differences in firms' capabilities, which would generate substantial disparities in compliance costs if the proposed reduction in the opt-period were to occur. The record thus does not establish good cause for departing from the Congressional timetable.⁷

**PROPOSED SECTION 316.5—PROHIBITION AGAINST REQUIRING
ANY ADDITIONAL INFORMATION TO OPT-OUT**

⁷ If despite this lack of record support for a shortening of the statutory opt-out period, the Commission decides to reduce that period, we urge that the Commission do so with a two-year transition period, which would ameliorate the adverse consequences of such a change.

Section 316.5 of the proposed rule would prohibit requiring a sender to “provide any information other than the recipient’s e-mail address and opt-out preferences....” 70 Fed. Reg at 25453. The Commission has included this proposed limitation because it believes that “it would be a complete subversion of [the Act’s]...privacy protection to allow senders to compel recipients to disclose personally identifying information as the price of opting out.” Id. at 25445.

ATA supports facilitating a recipient’s ability to exercise her or his opt-out rights under the Act. However, there are legitimate reasons to require additional information beyond the mere e-mail address of an individual to fulfill an opt-out request. In the case of airline frequent flyer members, for example, e-mail permission information is most often maintained as part of a customer’s online profile. These membership profiles contain the airline’s current information about the customer.⁸ Because of the personal nature of this information, airlines often require the individual to login by entering her or his frequent flyer number or membership number and password to validate the identity of the person accessing the records. This requirement is intended to prevent unauthorized access to the individual’s account. Only after the member number and password are verified will the individual be allowed to link to her or his pre-populated profile to make edits, which may include changes to the individual’s e-mail subscription. Opting-out under this procedure is convenient but with the important added benefit of protecting the frequent flyer’s personal information. Since this practice deters unauthorized access to personal information and does not place an undue burden on the exercise of the individual’s right to opt-out, we request that the Commission allow this airline industry

⁸ The exact nature and amount of information contained in these profiles varies from airline to airline but generally includes personal information, such as contact details, credit card information, frequent flyer miles balances, and existing or future reservations.

practice to continue, even if this requires exempting airlines from any prohibition it may otherwise impose in this proceeding.

CONCLUSION

The Act creates important privacy safeguards for the recipients of commercial electronic mail messages. Those safeguards reflect Congress' weighing of competing public interest factors. We respectfully urge that Commission consider the issues that we have raised in these comments and adopt a balanced approach that will continue to allow airlines and other publishers of permission-based e-mail marketing and affinity programs to communicate with their members on reasonable and commercially workable terms.

Respectfully submitted,

s/ James L. Casey

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June 27, 2005