

**Before the  
FEDERAL TRADE COMMISSION  
Washington, D.C. 20580**

**COMMENTS OF  
TIME WARNER INC.**

**Responding to the Discretionary Rulemaking Request for Public Comment**

**CAN-SPAM Act Rulemaking, Project No. R411008**

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## **I. Introduction**

Time Warner Inc. thanks the Federal Trade Commission (“FTC” or “Commission”) for the opportunity to submit these comments in response to its request for public comment on its discretionary rulemaking under the CAN-SPAM Act, 16 C.F.R. Part 316; 70 Fed. Reg. 25426, May 12, 2005. Time Warner also submitted comments on the primary purpose notice of proposed rulemaking, 69 Fed. Reg. 50091, Aug. 13, 2004, and the advance notice of proposed rulemaking (ANPRM), 69 Fed. Reg. 11776, March 11, 2004.

Time Warner’s divisions, including America Online (AOL), Home Box Office (HBO), Time Inc., Time Warner Cable, Turner Broadcasting System, and Warner Bros. Entertainment, are committed to reducing spam and providing consumers with choice and control over the types of commercial e-mail messages they receive. Our research and development teams provide consumers with software solutions and customer support systems to combat unwanted e-mail, and we respect consumers’ choices with respect to receiving commercial e-mail from us.

AOL, in particular, has been at the forefront of the spam battle. Our efforts include the development of sophisticated technologies to filter and block spam from reaching AOL customers. AOL has sued well over 100 spammers, and has sophisticated anti-spam operations teams active around-the-clock to respond to spam attacks. AOL continues to invest in new technologies to protect its members from spam and other e-mail-borne intrusions, such as viruses and phishing attempts, and continues to work closely with other ISPs on a variety of technology and enforcement initiatives to help reduce spam.

All of the Time Warner divisions share the common goal of reducing spam to help preserve the effectiveness of the e-mail medium. Our company strongly supported passage of the CAN-SPAM Act, and we will continue to support new policy initiatives that build on existing technology and enforcement efforts.

Our comments regarding this proposal focus on the following issues:

- (1) The proposed criteria for establishing a single sender in messages that contain multiple advertisers;
- (2) The proposal to shorten, from 10 business days to 3, the time frame for honoring opt outs;
- (3) Treatment of “forwarded” or “tell-a-friend” messages;
- (4) Transactional messages sent pursuant to a subscription;
- (5) Duration of opt-out requests; and
- (6) Steps recipients can take in connection with opt-out requests.

## **II. The Commission Should Clarify What Constitutes “Control of the Content” of a Commercial E-mail Message Under the Proposed Single-Sender Criteria**

Time Warner strongly supports the Commission’s initiative to develop criteria for a single “sender” when more than one person’s products or services are promoted or advertised in a single commercial e-mail message. With further refinement, Time Warner believes that the

Commission's proposal would provide meaningful guidance for advertisers with respect to how to structure their messages so that there will be only one sender for purposes of the Act.

The Commission proposes the following criteria for commercial e-mail messages with multiple advertisers to establish a single sender who must comply with the Act's requirements: (1) control of the content of the message, (2) determination of the e-mail addresses to which the message is sent; *or* (3) identification in the "from" line as the sender of the message. In addition, the Commission's proposal would require that the designated sender be the only entity that possesses any of these three characteristics.

Time Warner believes that although the second and third criteria are self-explanatory, the Commission must clarify further the meaning of the first criterion—"control of the content of the message." It is standard industry practice for advertisers to exercise control over use of their trademarks and branding in any communication to protect their brands. In our joint marketing arrangements, we exchange pre-approved content with our partners and reserve the right to approve the message copy. For example, if a distributor sends commercial e-mail communications that include an offer for *People* magazine, Time Inc. would provide the content to the distributor, as well as exercise control over the presentation of the offer.

Similarly, and to illustrate the converse situation in which we include a partner's advertising in our messages, we might create a co-branded Web site with an advertising partner, where the advertising partner would have varying degrees of control over the copy of the e-mail communications sent to promote the site. Warner Bros. Online, for example, has such a relationship with Verizon Wireless, where television commercials for Verizon VCast service feature clips from the new Warner Bros. "Batman Begins" movie, while the "Batman" e-mail newsletter created and sent by Warner Bros. Online may contain promotional messaging for VCast and other products, approved by Verizon Wireless. Time Warner believes that these types of activities should not otherwise disqualify senders from eligibility for the single-sender criteria.

Thus, to ensure that the Commission's criteria provide a workable framework, the Commission could clarify that control over the content of the message should be interpreted to mean primary or ultimate editorial control over the entire content of the message or final approval of whether all of the content in the message may be included. Stated differently, the Commission could clarify that control over the content is equivalent to control over whether the commercial e-mail message is sent.

We believe that with this clarification, the Commission's proposal will provide an important means of addressing some of the concerns raised by joint marketing arrangements and will allow the continued growth of these types of messages, which expand consumers' access to content.

### **III. The Commission Should Not Shorten the Amount of Time that a Sender Has to Honor a Recipient's Opt-Out Request**

The Commission proposes to shorten the time frame for honoring an opt-out from 10 business days to three. In support of this proposal, the Commission states that "many commenters are already able to process opt-out requests virtually instantaneously." 70 Fed. Reg.

at 25444. In addition, the Commission indicates that this change would further the CAN-SPAM Act's objectives in affording e-mail recipients "maximal privacy consistent with reasonable compliance costs." *Id.*

Time Warner urges the Commission to maintain the current statutory requirement to honor opt outs within 10 business days, in order to allow companies adequate time to properly process consumer opt-out requests.

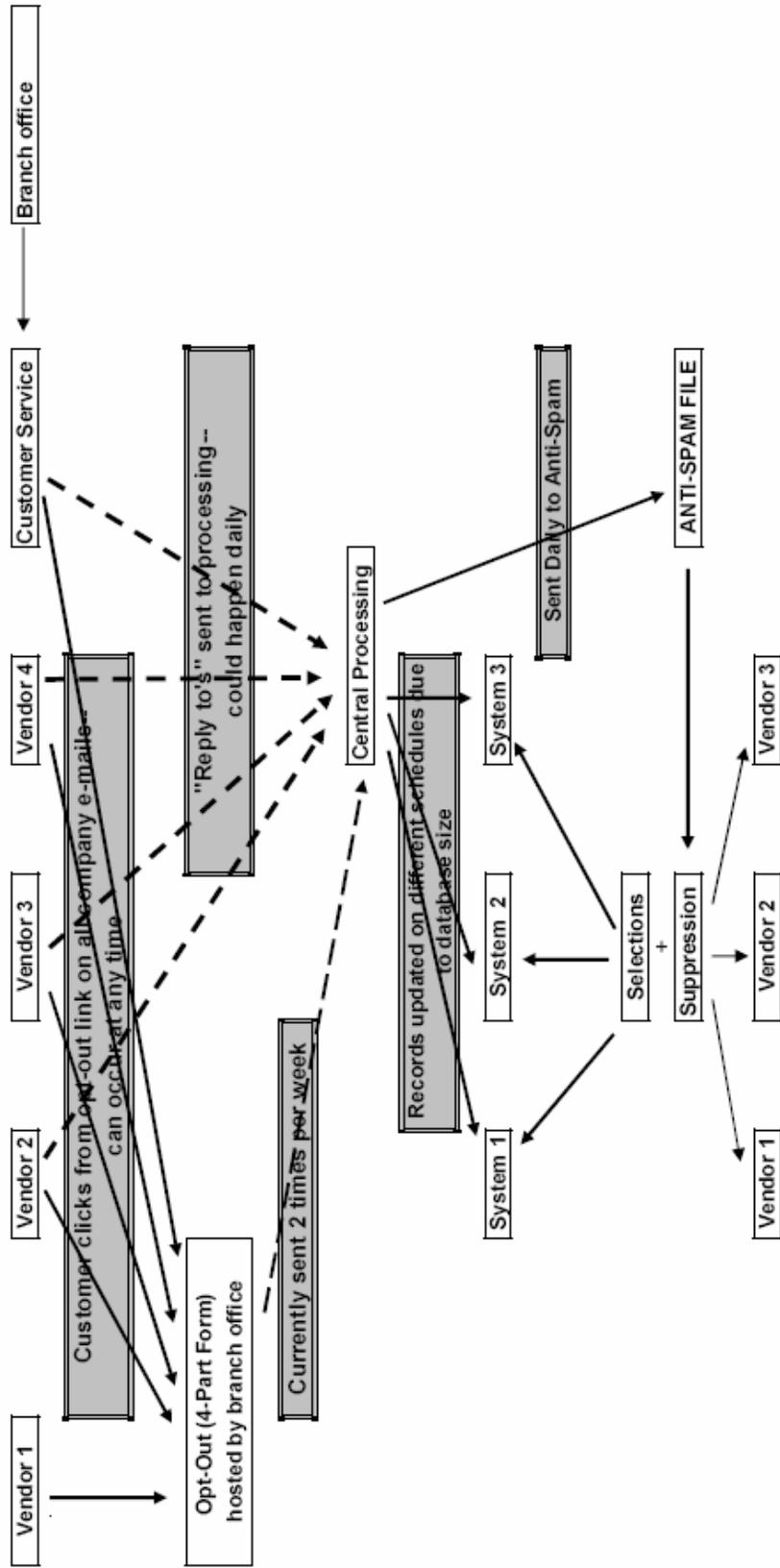
Based on our current experience in processing opt outs under the 10-business-day time frame, Time Warner believes that three business days is operationally impractical, particularly for responsible companies that have complex systems with multiple databases and companies that use service providers and fulfillment houses to send e-mail. Some of our divisions' e-mail activities do not allow for instant processing of opt-outs. If a customer opts out by using the "reply to" function in an e-mail or by sending an e-mail message to the magazine editor, etc., it could take two to five business days just to get the request to the correct person to begin the opt-out process.

Furthermore, if a consumer elects to send an opt-out request by a separate means, such as by sending an e-mail message to a corporate e-mail address or a letter to a physical postal address, it would not be possible to implement the request within three business days. Also, in cases where outside vendors collect opt-out requests, it would take at least 10 business days to send the list over to the company and then implement all of the requests.

The current requirement of 10 business days already is aggressive, and poses significant compliance challenges. In order to reduce the time to process opt-outs, particularly as opt-out lists continue to grow in size, businesses would need to increase use of outside vendors. However, this would create further inefficiencies and could itself delay the processing of opt outs, impose additional costs, and create increased potential security risks as a result of increased transfers of personal data.

To attempt to comply with a three-business-day requirement, we would have to undertake the expensive process of restructuring our e-mail activities yet again, and retrofitting our systems. Even when opt-outs are processed in-house, the proposed change would impose significant costs on companies, in the form of additional employees needed simply to ensure proper processing of opt-outs.

Below is a chart that illustrates the many steps that are involved for just one business unit within of one of our divisions to process opt-out requests.



By way of further example, following is an overview of the current multiple-step process that another one of our business units undertakes to honor opt-out requests: All opt-outs are stored in a centralized database that the business unit manages in-house to ensure that each vendor receives all appropriate opt-out information. Each week, this business unit obtains the opt-out requests received by each vendor during the previous week. In addition to the files provided by each of the business unit's third-party e-mail service providers, this business unit also receives opt-outs sent directly to each of its Web sites. All of these opt-out files are converted into a common format, and then incorporated into a centralized opt-out database. Further, the business unit manually enters any ad-hoc opt-out requests sent directly to its customer service centers. After all new opt-outs are converted and added to the opt-out database, the business unit creates updated opt-out files and sends them electronically to each vendor. The vendors then apply these new opt-out files to the mailing lists to ensure that all individuals who have opted out are suppressed from future promotions.

Depending on the exact timing of file creation and the time when a particular opt-out request is received, these opt-out requests generally are honored within one to six business days. To ensure compliance with a three-business-day standard, the business unit would need to hire additional employees and update its opt-out files much more frequently, which would be quite costly and impractical for a company managing a large number of lists.

The Commission's proposal would present even greater challenges in the context of joint marketing relationships, which require multiple parties to scrub their respective lists. By way of example, one of our divisions reports that for certain joint marketing e-mail activities, such as where a list provider sends out e-mail on behalf of one of our divisions, it takes three separate employees (*i.e.*, a report writer, a database administrator, and an Internet marketing team member) and a total of three person-hours per list to process each list. Shortening the time frame from 10 to three business days would triple the amount of time per month needed to process these opt outs. Although we generally support the criteria for designating a single sender subject to additional clarification, and believe it will help ease some of the current compliance challenges of processing opt-out requests within the prescribed time frame, these concerns continue to persist given the fact that many messages may not qualify for the single-sender criteria, still requiring cross-scrubbing of lists, but potentially in a much shorter time frame.

As the Commission itself recognizes in its proposal, there is no record evidence of abuse (*e.g.*, "mail bombing") during the opt-out period that would justify a departure from the 10-business-day time frame that is contained in the CAN-SPAM statute. *See* 15 U.S.C. § 7704(a)(4)(A)(ii); 70 Fed. Reg. at 25444 (discussing the appropriate deadline for effectuating an opt-out request). There seems, therefore, to be only a marginal benefit to consumers that is gained by shortening the period by seven days, while there is a tremendous cost to companies working to implement the opt-out requests they receive.

Absent any record evidence to justify a departure from the current time frame, needlessly imposing additional compliance costs on companies is unwarranted. For these reasons, Time Warner urges the Commission to maintain the current statutory requirement to honor opt outs within 10 business days to allow companies adequate time to properly process consumer opt-out requests.

#### **IV. Subject to Additional Clarification, the “Forward-to-a-Friend” Interpretation Would Provide Meaningful Guidance to Companies with Respect to These Types of Communications**

In its proposal, the Commission clarifies that “making available the means for forwarding a commercial e-mail message, such as using a Web-based ‘click-here-to-forward’ mechanism would not rise to the level of ‘inducing’ the sending of the e-mail.” 70 Fed. Reg. at 25441. The Commission explains that this conduct falls within the statutory carve-out for “routine conveyance” where messages are sent through an automated technical process for which another person has identified the recipients. 15 U.S.C. § 7702(15).

By contrast, the Commission states that if a person who uses a Web-based mechanism to transmit a commercial e-mail message to another receives “money, coupons, discounts, awards, additional entries in a sweepstakes, or the like” from a seller/advertiser in exchange for forwarding the message, then the seller/advertiser would be the sender or initiator and would be responsible for ensuring that the message contains the required opt-out mechanism and disclosures, and that opt-out requests are honored. 70 Fed. Reg. at 25441.

Time Warner believes that this interpretation represents a positive step forward in ensuring the continued availability of these types of communications that enable consumers to share content, which have become very popular with our Web site users and are used at many of our divisions’ Web sites. This clarification is consistent with the Act’s purposes and consumers’ expectations, and will help ensure that consumers who want to use these tools can continue to share these messages with their friends, and that recipients of these messages can continue to receive them.

However, Time Warner requests that the Commission shed further light on the comment articulated in footnote 178, 70 Fed. Reg. at 25441, regarding active solicitation of the use of tell-a-friend functionalities as compared to *de minimis* persuasion. In footnote 178, the Commission suggests that in instances where senders specifically encourage recipients to forward messages to others (*e.g.*, affirmatively acting or making an explicit statement that is designed to urge another to forward messages, such as “Tell-a-friend—Help spread the word by forwarding this message to friends! To share this message with a friend or colleague, click the ‘Forward E-mail button’”), such messages will be deemed commercial e-mail covered by the Act. By contrast, where a company merely provides the functionality in the form of a link in an e-mail or on a Web site that simply states “E-mail-a-friend,” such messages would not be deemed commercial messages because there is only *de minimis*, if any, persuasion or influence exerted through such a statement. *See* 70 Fed. Reg. at 25441 nn.178, 180.

Time Warner believes that the distinction between these instances is not readily apparent, and would undermine what otherwise would be clear and useful guidance with respect to compliance obligations for these types of messages. This approach would add an element of subjectivity into this process, and would engender debates about which text would rise to the level of active solicitation, as opposed to *de minimis* persuasion. Rather than attempt to draw a distinction based on the text that accompanies the forward-to-a-friend functionality, Time

Warner believes that the Commission should focus, as it has, on whether there is consideration in the form of, for example, money, coupons, discounts, awards, or additional entries in a sweepstakes in determining the treatment of such messages.

In addition, with respect to e-mail messages forwarded by an original recipient to, for example, a family member or friend, Time Warner believes that the Commission should clarify that such messages are not commercial e-mail messages covered by the Act. As the Commission recognizes in its proposal, companies do not have any control over the content of the message or the destination address and, thus, lack the ability to ensure CAN-SPAM Act compliance. 70 Fed. Reg. at 25440. As a practical matter, it would not be possible to honor potential opt-out requests of recipients to whom such messages could be forwarded because the e-mail address of a recipient to whom the message is forwarded would not be routed through our systems.<sup>1</sup> Moreover, this approach is consistent with industry-standard practice, which has been to focus on referral marketing activities that include the collection of personal information, rather than those that simply encourage an individual to forward a marketing piece on to another individual. *See, e.g.*, Article 39 of The DMA Guidelines for Ethical Business Practice, <<<http://www.the-dma.org/guidelines/ethicalguidelines.shtml#online>>>.

Alternatively, and at a minimum, the Commission should clarify that tell-a-friend messages that are forwarded from original recipients would be subject to the same interpretation and analysis provided in the context of Web-based functionalities, under which only those messages that provide consideration to recipients in exchange for their forwarding the message would be deemed commercial e-mail messages subject to the Act's requirements.

#### **V. The Definition of Transactional Messages Should Be Further Clarified to Include E-Mail Sent Pursuant to Subscription**

The Commission seeks comment on categories of messages that should qualify as "transactional or relationship" messages and, thus, warrant exclusion from the CAN-SPAM Act's requirements for commercial e-mail messages. Specifically, the Commission asks whether e-mail messages, the primary purpose of which is to deliver products or services where a recipient has entered into a transaction with the sender that entitles the recipient to receive future newsletters or other electronically delivered content, should be deemed transactional or relationship in nature. 70 Fed. Reg. at 25450, question 2.h. under Questions on Proposed Specific Provisions.

As stated in our prior comments on the ANPRM, Time Warner believes that the Rule should contain a limited exception where a consumer has affirmatively asked for a specific product or service, such as a newsletter. Such an exception would be consistent with the Act's

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<sup>1</sup> Although the Commission recognizes that some of these concerns are addressed where the seller/advertiser actually originates the transmission, such as where the recipient submits a list of friends and family to receive commercial messages, this does not alleviate all concerns regarding these messages and does not reflect the practical realities of these types of e-mail activities. *See id.* at n.165.

requirements and purposes, and is a natural extension of the current exceptions, listed within the definition of “transactional or relationship” message, for messages that facilitate or complete a transaction the recipient has agreed to enter into with the sender and messages that deliver goods or services that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender. Where consumers affirmatively request such communications, they should not be subject to the Act’s opt-out requirements. Consistent with standard industry practice, such messages contain an opt-out mechanism and, thus, consumer choice is honored.

## **VI. Senders Should Have Flexibility with Respect to Consumer Opt-Out Mechanisms, Provided the Means is Simple**

The Commission proposes that senders may not require recipients to pay a fee, provide personally identifiable information other than their e-mail address and opt-out preferences, or take any steps other than sending a reply e-mail message or visiting a single Internet Web page to submit a valid opt-out request. 70 Fed. Reg. at 25445. Time Warner supports the goals of this proposal to ensure that the opt-out mechanism is convenient, clear, and simple, requiring minimal consumer effort. However, Time Warner believes that the Commission should allow for some flexibility to enable senders to determine the most effective means for processing opt-out requests, provided that the approach is not burdensome for the consumer. For example, clear and conspicuous hyperlinks may lead a user through one or two additional pages to process an opt-out without frustrating in any way the user’s desire to opt out. Affording sufficient flexibility to effectively process opt-out requests and honor consumer choice is in the interest of both consumers and businesses.

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Time Warner appreciates the opportunity to provide the Commission with comments in this proceeding. We believe that the CAN-SPAM Act provides valuable tools to combat spam, and we look forward to continuing working with the Commission on anti-spam enforcement initiatives that will help to reduce the amount of unwanted commercial e-mail in consumers’ inboxes.