

THE NATIONAL BUSINESS COALITION ON E-COMMERCE AND PRIVACY

June 27, 2005

Mr. Donald S. Clark
Secretary
Federal Trade Commission
Office of the Secretary
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: CAN-SPAM Act Rulemaking, Project No. R411008

Dear Mr. Secretary:

On behalf of the National Business Coalition on Privacy and E-Commerce (the "Coalition"), we are pleased to have the opportunity to submit comments on topics relating to the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("the CAN-SPAM Act" or "the Act") pursuant to the Notice of Proposed Rulemaking ("NPRM"), issued on May 12, 2005.

The Coalition is comprised of nationally recognized companies from diverse economic sectors dedicated to the pursuit of a balanced and uniform national policy pertaining to electronic commerce and privacy. Our member companies are top competitors in the e-commerce marketplace, and are strongly committed to ensuring the privacy and security of our customers, both on-line and off-line.

As some of America's most reputable companies, we are deeply concerned about the problem of spam and false or misleading e-mail advertisements. The credibility of legitimate companies who market and advertise using the medium of e-mail is damaged when e-mail is perceived as being either deceptive or a nuisance. The Coalition is eager to act as a resource to the Commission during implementation of the Act in order to insure the FTC creates an effective, realistic, and efficient framework allowing for the continued success of e-mail marketing.

Definition of Sender

The Commission has proposed to clarify the definition of "sender" when more than one person's products or services are advertised or promoted in a single e-mail message. Specifically, the Commission has proposed certain criteria designating the sender of an e-mail message.

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GENERAL MOTORS
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KIM QUISH
CHAIR

601 PENNSYLVANIA AVENUE, N.W.
NORTH BUILDING, 10TH FLOOR
WASHINGTON, DC 20004-2601 USA
202.756.3385
FAX - 202.756.3333

While the Coalition supports these criteria, we believe additional clarification regarding the first of these criteria – control of the content of the message – would be extremely useful. Unlike the other two criteria which may be easily understood and applied, the control criteria leaves open the possibility of multiple advertisers “controlling” the content but only one advertiser listed in the from line or determining the e-mail recipients.

We suggest the Commission permit more than one advertiser to control the content of the message while still designating a single sender, provided only one advertiser is listed in the from line and determines the e-mail recipients. In such circumstances, multiple advertisers may designate a single sender provided the non-sender advertisers receive appropriate assurances from the sender advertiser that it will comply with the sender obligations under the Act. Finally, we believe the Commission should clarify that control does not include control over the advertisement or copy approval in a message.

Messages sent by an Employer to an Employee

The Coalition urges the Commission to interpret the Act to allow any messages sent by an employer to an employee to be deemed transactional or relationship messages, and thus not subject to the CAN-SPAM Act’s requirements including the ability to opt out of such messages. These types of messages are not commercial since the employer is in effect both the sender and the recipient – the recipient’s account is the property of the employer. In addition, companies are not in the business of providing or processing opt-outs for internal e-mail messages. The Coalition is not aware of any record of abuses in this context. For these reasons, the Commission should clarify that an employee does not have the ability to opt out of commercial e-mail sent by an employer.

Forward-to-a-Friend E-mail Messages

The Commission has indicated that the sender or initiator of a forward-to-a-friend e-mail would be responsible to provide an opt-out and appropriate disclosures, even where there is no consideration, because the recipient may have been “induced” to forward the message. The Commission bases its conclusion on its belief that every word in the definition of “procure” has to be read to have meaning in the phrase “intentionally to pay or provide other consideration to, or induce,” and, therefore, “induce” must mean something beyond mere consideration.

The Coalition believes that this conclusion is not required by the Act. In forward-to-a-friend scenarios, it is the “friend” who is sending the message, not the sender, who is merely routinely conveying the e-mail. Accordingly, we believe that the Commission should interpret the term “induce” as a component of the term “procure” designed to capture intentional acts “to pay or provide other consideration” in order to initiate a

commercial e-mail. By way of example, the Coalition does not believe that providing free samples or an additional contest entry should result in a forward-to-a-friend e-mail being treated as commercial e-mail under the Act.

As a practical matter, businesses cannot control whether or not a recipient of an e-mail containing the business' advertisement or promotion forwards such message and to what e-mail addresses the message is forwarded. Accordingly, the Commission's conclusion would result in far fewer businesses encouraging messages to be forwarded or businesses attempting to honor opt-out requests prior to the message being forwarded. We believe this result is not in consumers' best interests. Forwarding messages and business encouragement is a primary new form of word-of-mouth advertising in the electronic marketplace. Instead, the Coalition urges the Commission to conclude that forward-to-a-friend e-mail should not be treated as commercial e-mail where there is no consideration or value proposition.

Section 316.4 – Prohibition Against Failure to Honor Opt-out Requests within Three Business Days of Receipt

The FTC has proposed three business days as an appropriate deadline for effectuating an opt-out request. The Coalition strongly opposes this three-day deadline and believes a 10-day deadline – while problematic – is at least feasible from a technological standpoint and was clearly intended by Congress.

First, the Coalition believes that it was the clear legislative intent of the Act to impose a 10-day deadline. The Act states that the Commission shall modify the 10-business-day period if it determines that a different period would be more reasonable based on the underlying policy rationale, the interests of recipients of commercial e-mail, and the burdens imposed on senders of lawful commercial e-mail.¹ As the Commission itself notes in the NPRM, very few commenters suggested reducing the time period to honor opt-out requests. The Coalition believes the Commission has misconstrued many of the comments which are cited in support of the three-day deadline. We further believe that the burden for demonstrating the feasibility and desirability of the three-day deadline should be on the Commission – particularly in light of the fact that Congress gave a clear deadline in the Act and the Commission received strong industry and consumer support in favor of the 10-day deadline.

Second, while a three-day deadline may be technologically feasible in some instances, it is not possible from an operational standpoint. Large companies often have multiple sender business units which collect and manage suppression lists for the entire company. For example, a financial services company servicing millions of client relationships will face many difficulties in effectively and accurately respecting client

¹ 15 U.S.C. § 7704(c)(1).

opt-out preferences across its varied business units and client relationships and the complex systems involved within the three day deadline, including the following:

- Customers may often use multiple channels to request an opt-out. This may include automated opt-out responses generated either through e-mail replies or web-based mechanisms. However, in order to be responsive to client communication preferences, many times these requests are sent via general response queues managed by service representatives and must be manually processed by them. Depending on customer communications volume on a given day, it can take one or two days to record the opt-out through the various channels.
- An e-mail address can be associated with an individual customer, as well as multiple customers across multiple accounts, or even across entire household relationships. In addition, one client or household may have multiple relationships with one or more business units or affiliates within the same firm. The data for these different groups may reside in multiple databases. At least one firm represented by this Coalition goes through a weekly update process that joins this data together from various sources, matches and identifies relationships, and links all expressed preferences (e-mail, phone, mail, and affiliate sharing) to the right customers, accounts, and households. By the time this process takes place, a customer may have expressed an opt-out up to five days prior. Given that a firm may have millions of customers, complex relationships, and multiple preferences to manage, to perform more than a weekly update will subject such a firm to significant additional costs and may still not be systematically possible.
- In order to provide the kind of targeted, highly relevant communications that customers have come to expect, e-mail campaigns are often small and highly targeted. In a given month a firm may be managing 50 different campaigns across multiple channels. In order to measure relevance and ensure on-going delivery of meaningful content, these many lists are divided into various cells that reflect different client audiences and versions of the content. In order to build statistically relevant cells, it is critical that opt-outs be scrubbed against the list prior to a number of other list preparation activities. As a result, the entire list preparation cycle can take several days.
- Campaign content and lists are often sent out by a third-party service provider. In order to effectively manage the various components that must come together in order to launch a campaign (e.g., content build, list load, list Q&A and testing, and, finally, launch), while still maintaining adequate privacy and security controls such as the encrypted exchange of information with third-party service providers, it is not uncommon to require two to three days to complete creation and launch. In addition, large volume newsletter subscription campaigns – known to trigger spam filters – can also add one or two days to the launch time. These campaigns are often sent over a couple of days to ensure delivery to subscribers.

Currently, many large firms with sophisticated e-mail marketing programs struggle to meet the 10 day opt-out requirement for the reasons noted above. Although it is possible to perform each of the above processes within the stated three-day timeframe, the complexity of these various processes, running simultaneously throughout multiple entities on multiple campaigns, and potentially involving third-party service providers makes it impractical to accurately and effectively meet the proposed three-day requirement. A three-day timeframe would result in mistaken processing of opt-out requests and erroneous violations of the Act.

Third, insistence on a three-day deadline may limit a consumer's choice in the means of opting out. Many companies offer consumers multiple ways to communicate their decision to opt out. For example, a consumer may choose to communicate his or her choice to the company by e-mail, telephone, mail, web site, or a hyperlink in the e-mail. Only the latter choice, however, is fully automated; the remaining methods take longer to process. Accordingly, a three-day deadline could force companies to eliminate slower methods of opt-out notification, thereby reducing consumer options to communicate and eliminating the necessary safeguards that redundancy provides.

Section 316.5 – Receipt of Requests not to Receive Future Commercial E-mail Messages from a Sender

Although the Coalition supports the Commission's policy rationale underlying this proposal, we believe that the Commission's broad prohibition inadvertently undercuts this goal. Specifically, while we support the prohibition on fees, the current proposal would limit a sender's ability to authenticate and verify consumer intent by prohibiting the use of passwords, confirmation messages and the like prior to honoring an opt-out request. We believe it is common industry practice to authenticate and verify e-mail addresses and intent to opt out through use of a confirmation e-mail or request for password. If this ability of senders were prohibited, we believe that there would be far more mistaken opt-outs of consumers as a result. We urge the Commission to craft a narrow exception to permit future e-mail messages from a sender for the purpose of authentication and verification.

Duration of Opt-out

The Coalition would again urge the Commission to consider placing a reasonable cap on the duration of the "opt-out," once exercised. We do not believe that Congress intended for opt-outs to be in effect indefinitely, especially when the senders may change identities and new products and services may evolve over time. Given a rapidly-evolving marketplace and the finite life of a particular product or service, we believe that five years is a reasonable time period for a recipient's opt-out to apply to the sender who originally registered an objection. Much like the five-year period applicable to telephone numbers on the National Do Not Call Registry under the Commission's Telemarketing Sales Rule, consumers and industry would be better served by a similar expiration of

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individual opt-outs. As the Commission points out, there is no list of non-functional e-mail addresses to aid in scrubbing suppression lists. However, a time duration on opt-out requests would help eliminate some of these e-mail addresses from suppression lists. In addition, many common e-mail addresses are reassigned once they become inoperative. A five-year duration would ensure that individuals who obtain reassigned e-mail addresses would not be opted out of receiving commercial e-mail without their express consent. The burden on persons whose functional e-mail addresses re-enter sender lists is minimal.

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Again, the Coalition very much appreciates the opportunity to offer comments to the Commission on implementation of the CAN-SPAM Act. The Coalition will gladly provide any further information, should the Commission require clarification or additional explanation of any of the issues discussed herein.

Sincerely,

Kimberly M. Quish
Chair