

**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)	
)	
)	

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

The Newsletter & Electronic Publishers Association (“NEPA”) submits these comments in response to the Notice of Proposed Rulemaking recently issued by the Federal Trade Commission (“FTC” or “Commission”).¹ Specifically, the FTC again seeks comment on a variety of regulatory issues associated with the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“Can-Spam Act” or “Act”).²

I. INTRODUCTION

As discussed more fully in its previously filed comments in this proceeding, NEPA is a trade association representing publishers of approximately 3,000 newsletters and other specialized information services. The typical newsletter customer relies upon a given newsletter for accurate and up-to-the-minute information and analysis in a focused area. Newsletter publishers regularly use e-mail messages to communicate with their customers for a variety of purposes, including to report on breaking news in the newsletter’s subject area, facilitate subscription renewals, announce trade conferences, update business directory listings, and

¹ *Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act: Notice of Proposed Rulemaking*, 70 Fed. Reg. 25426 (May 12, 2005) (“*Notice of Proposed Rulemaking*”).

² Can-Spam Act of 2003, Pub. L. No. 108-187, 117 Stat. 2699.

introduce new products. In addition, publishers increasingly deliver their products electronically, most notably, for example, in the form of e-mail newsletters. E-mail represents one of the most affordable and effective vehicles to share editorial content with subscribers and potential subscribers. *Accord* Can-Spam Act, § 2(a)(1) (e-mail's "low cost and global reach make it extremely convenient and efficient, and offer unique opportunities for the development and growth of frictionless commerce").

NEPA recognizes the need for the FTC to regulate certain e-mail marketing practices consistent with its congressional mandate, but we respectfully offer these comments to assist the Commission in developing rules that will not interfere with the right of newsletter publishers to communicate effectively with customers and potential customers about their publications and services. In this regard, we think it bears emphasis that newsletter publishers and other businesses have conscientiously attempted to comply with the Can-Spam Act and the FTC's implementing regulations in the eighteen months since the Act took effect. By the same token, however, it is clear that certain unscrupulous e-mailers – often derisively categorized as "spammers" – are unlikely to voluntarily comply with the Act under any circumstances.

Thus, we think it imperative that, in considering whether to impose new regulatory burdens, the FTC resist the temptation to adopt ever-tightening restrictions on legitimate businesses who market by e-mail in an attempt to address consumer complaints about spammers who are no more likely to comply with such heightened restrictions than they are willing to comply with existing regulations. *Accord Subject Line Labeling As A Weapon Against Spam: A Report To Congress*, Federal Trade Commission, June 2005, at 13 (rejecting mandatory subject-line labeling of e-mail solicitations because, among other reasons, "spammers are unlikely to comply with a labeling requirement that might result in automatic filtering of their email" while,

at the same time, legitimate marketers who will comply would have their e-mail messages automatically filtered out before their communications could ever reach consumers).

II. E-MAIL NEWSLETTERS TO SUBSCRIBERS SHOULD FALL WITHIN THE DEFINITION OF A “TRANSACTIONAL” OR “RELATIONSHIP” MESSAGE, REGARDLESS OF THE DEGREE OF ADVERTISING CONTENT

Of particular concern to NEPA members, the Commission’s *Notice of Proposed*

Rulemaking seeks public comment on the following question:

Where a recipient has entered into a transaction with a sender that entitles the recipient to receive future newsletters or other electronically delivered content, should e-mail messages the primary purpose of which is to deliver products or services be deemed transactional or relationship messages?

70 Fed. Reg. at 25450. Although this question is rather broadly stated, we think the FTC’s recent regulations regarding the “primary purpose” of an e-mail message have properly laid to rest any contention that an e-mail newsletter sent to an *existing* subscriber could fall within the main strictures of the Act simply because the newsletter contained advertising content ancillary to news reporting and other content fully protected by the First Amendment. *See Definitions and Implementation Under the CAN-SPAM Act*, 70 Fed. Reg. 3110, 3118 (Jan. 19, 2005) (“*Primary Purpose Rulemaking*”). On the contrary, the Commission noted its “careful consideration of relevant First Amendment law” in emphasizing “in the strongest possible terms” that neither the Act nor its implementing regulations were intended to apply where a newsletter is sent to an individual who has affirmatively subscribed to it. *Id.* at 3111, 3125. In such circumstances, the Act does not apply, “regardless of whether the periodical consists exclusively of informational content or combines informational and commercial content.” *Id.* at 3118. Simply put, such an e-mail newsletter meets the quintessential definition under the Act of a “transactional” or “relationship” message because its self-evident purpose is to deliver requested goods or services

the e-mail recipient (*i.e.*, the subscriber) is entitled to receive under the terms of a transaction previously entered into between e-mail sender and recipient. *See generally* Can-Spam Act, § 3(17)(A), (i)-(v) (delineating variety of e-mail communications initiated by businesses to their own customers, including delivery of goods and services, as “transactional” rather than “commercial” messages under Act).

As we understand the Commission’s request for comments in the context of this *Notice of Proposed Rulemaking*, the FTC seeks more specific guidance on its view that “Can-Spam’s regulation of a message delivered pursuant to a subscription depends upon whether or not the message contains exclusively commercial content.” 70 Fed. Reg. at 25437; *see also id.* (observing that, even when received pursuant to subscription, “an exclusively commercial message does *not* satisfy” the definition of a transactional or relationship message) (emphasis in original). NEPA respectfully submits that, regardless of whether an e-mail newsletter contains exclusively commercial content, it should fall within the definition of a transactional or relationship message if the e-mail recipient has indicated that he or she affirmatively wishes to receive such a newsletter or message. In other words, an e-mail newsletter sent to an existing subscriber should not be subject to varying degrees of regulation depending upon the amount of advertising content contained within the communication. Such an approach threatens to interfere with news publishers’ ability to communicate effectively with existing customers who have indicated that they wish to receive certain publications, regardless of the degree of advertising content. Whether exclusively commercial in nature or not, such an e-mail message is in fact the “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.” Can-Spam Act, § 3(17)(A)(v). Whether the e-mail in question furnishes a catalog of goods, an announcement of an upcoming

trade conference, or a list of newsletter titles available for purchase, the e-mail functions every bit as much as the delivery of a good or service as does an e-mail message that contains some lesser quantity of advertising content. There is also little to be gained from a consumer privacy perspective in more strictly regulating the delivery of exclusively commercial publications by e-mail to consumers who have affirmatively asked to receive them.³

Moreover, it should be noted that, if the FTC were to clarify that e-mail messages sent by companies to existing customers (or sent upon request to non-customers), are “transactional” within the meaning of the Act, consumers would still have significant protection. First, the Act’s central prohibitions against false and deceptive e-mail solicitations apply to both commercial and to transactional messages, *see* Can-Spam Act, § 5(a)(1), and thus the Commission would still be in a position to deter e-mailers from “bait and switch” tactics such as delivering an advertising-laden publication to a consumer who reasonably had a different expectation. *See Primary Purpose Rulemaking*, 70 Fed. Reg. at 3118 n. 90 (describing situation in which an e-mail recipient receives a subscription periodical “overwhelmed by commercial content that clearly exceeds what the recipient might reasonably have expected”).⁴ Second, if a customer makes a request directly to a business not to e-mail, the FTC of course retains the authority to require

³ Indeed, in the marketing context more generally, Congress and agencies such as the FTC and the Federal Communications Commission that are charged with enforcing advertising law have recognized that even *unsolicited* commercial overtures made where the foundation of a business relationship already exists are considered by consumers to be less intrusive. For example, in enacting the Telephone Consumer Protection Act, 47 U.S.C. § 227, which generally regulates commercial solicitations via telephone and facsimile, Congress observed that, where an existing business relationship exists, “consumers would be less annoyed and surprised by [an] unsolicited call since the consumer would have a recently established interest in the specific products or services.” H.R. Rep. No. 102-317, at 14 (1991). The same principle applies all the more so here, where the consumer has affirmatively requested information regarding a solicitation from a company with which the consumer has voluntarily entered into a relationship.

⁴ It should be noted that legitimate publishers have very little incentive to engage in the tactics that the Commission fears. Such practices would undoubtedly alienate a large number of subscribers who, by definition, are the lifeblood of a successful publication.

companies to honor such requests even where a subscription relationship exists. *See Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991*, 68 Fed. Reg. at 44144, 44158 (July 25, 2003) (recognizing “established business relationship” exception for Do Not Call Registry, but nonetheless requiring companies to honor “opt out” requests made by current customers). In conclusion, NEPA urges that the Commission emphasize that an e-mail newsletter sent pursuant to an existing subscription agreement is a transactional or relationship message within the meaning of the Act, regardless of the degree of advertising content the publication may contain.⁵

III. THE COMMISSION SHOULD CLARIFY THAT ADVERTISERS WHO MERELY CONTROL THE CONTENT OF THEIR OWN ADS DO NOT FALL WITHIN THE DEFINITION OF A “SENDER” UNDER THE ACT

NEPA agrees with the FTC that the definition of an e-mail “sender” under the Act should not include any and all commercial advertisers referenced within an e-mail message. *See Notice of Proposed Rulemaking*, 70 Fed. Reg. at 25428. In this regard, NEPA, the Newspaper Association of America and others have explained in their previously filed comments in this proceeding that it would be a particularly onerous burden on publishers if each advertiser mentioned in a newsletter were considered a sender within the meaning of the Act, as distinct from the sender being limited to the entity which in fact transmitted the message. The effect of such a requirement would be that, if a consumer had previously made a request to an advertiser to opt out of that advertiser’s solicitations, the publisher of a newsletter would have to delete any advertisement from that specific company from the newsletter. Newsletter advertising, however,

⁵ A contrary approach also raises First Amendment concerns, as the Supreme Court has repeatedly held that commercial speech is entitled to constitutional protection, *see, e.g., Central Hudson Gas & Electric Corp. v. Public Service Comm’n of New York*, 447 U.S. 557 (1980), and, moreover, the commercial speech at issue here is only that which consumers have affirmatively indicated they wish to receive.

is not customized for individual customers and to mandate such a requirement would be particularly burdensome on smaller publishers with limited staff and financial resources. *Accord id.* at 25429 (“in the case of online newsletters or similar publications, the need for multiple suppression lists could endanger the existence of such newsletters because it would be impossible to create a different newsletter tailored for each recipient”).

Nevertheless, NEPA remains concerned that under the proposed three-part test for determining an e-mail “sender” within the meaning of the Act, there is arguably ambiguity with respect to what actions will constitute “control[ing] the content” of the e-mail message. *Id.* at 25428.⁶ The Commission should therefore make clear that, merely because an advertiser determines the content and or placement of its own advertisement within a newsletter, the advertiser does not become a sender of the entire newsletter within the meaning of the Act. As would be expected, advertisers typically control the content of their own advertising. Indeed, few advertisers would purchase advertising space if they were denied such authority. By the same token, advertisers rarely (if ever) have a role in determining the content of the publication as a whole and, unless an advertiser does have such a unique role, an advertiser should not fall within the definition of a sender within the meaning of the Commission’s regulations. To hold that an advertiser can become an e-mail sender simply because the advertiser insists on the right to control the way in which its own goods and services are promoted is to, in effect, designate each advertiser mentioned in a newsletter as a sender within the meaning of the Act. Particularly where there is nothing to suggest that electronic publishers are currently evading the existing definition of an e-mail sender under the Act to circulate unwanted advertising, it would create an

⁶ The test proposed by the Commission to determine an e-mail “sender” is a person or entity who (1) “controls the content of such message,” (2) “determines the electronic mail addresses to which such message is sent,” or “is identified in the ‘from’ line as the sender of the message.” 70 Fed. Reg. at 25428.

unmanageable burden to define an e-mail sender so broadly as to effectively encompass each and every ordinary advertiser.

IV. THE TEN-DAY PERIOD FOR PROCESSING OPT-OUT REQUESTS SHOULD NOT BE SHORTENED

NEPA submits that shortening the ten-day period for complying with an opt-out request from an e-mail recipient is unwarranted. As noted by the Commission, the principal justification for this proposal is the concern “that under the current ten-business-day time frame, senders would legally be allowed to ‘mail-bomb’ recipients for ten business days during the opt-out period.” *Id.* at 25443. However, the FTC acknowledges that these “concerns were not supported by factual evidence that such practices actually occur.” *Id.* In the absence of demonstrable evidence for such concerns, NEPA believes that shortening the time to respond to opt-out requests to three business days will impose a significant regulatory burden on marketers, particularly small businesses, without reducing the phenomenon of “mail bombing.”

To begin with, legitimate marketers (among them, newsletter publishers) do not bombard individuals with e-mails over and over again, whether within a ten-day period or otherwise. Such a practice is counterproductive to establishing a continuing business relationship with an e-mail recipient. Instead, such tactics are the staple of spammers who of course are not likely to comply with any opt-out request, regardless of the time frame established by the Commission for processing it. Thus, tightening the opt-out processing window as contemplated by the FTC will likely achieve the undesirable result of failing to deter the problem of mail bombing while forcing marketers to scramble to process opt-out requests. At bottom, NEPA believes that the burden should be squarely on those who advocate stricter regulation of opt-out processing to demonstrate how it will result in addressing the ill the proposed regulation purports to cure.

In any event, it bears emphasis that, particularly for small publishers, the opt-out processing process may not be entirely automated. And the individual employee tasked with ensuring compliance with the Act's opt-out requirements likely has many other duties. In the marketing realm alone, employees tasked with compliance responsibilities at small publishers are confronted with an often confusing array of federal obligations with respect to facsimile, phone and e-mail marketing. With respect to larger publishers, who may have more resources to devote to legal compliance issues, these businesses may have multiple e-mail marketing campaigns occurring at once, sometimes facilitated by more than one outside e-mail advertising distribution vendor. The process of coordination required in such circumstances necessitates that marketers be given a reasonable period of time to facilitate the processing of opt-out requests, especially where the Act imposes severe penalties on those who fail to timely comply with such requests.⁷

Respectfully submitted,

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⁷ For much the same reason, NEPA believes it unnecessary to expand the definition of an "aggravated" violation of the Can-Spam Act to encompass the "manual harvesting of e-mail addresses." *Notice of Proposed Rulemaking*, 70 Fed. Reg. at 25447. In contrast to "automated harvesting," manual harvesting of e-mail addresses simply does not have the potential to contribute "substantially to the proliferation of commercial e-mail messages that are prohibited" under the Act. *Id.* See also S. Rep. No. 108-102, at 4 (2003) (explaining that automated e-mail address harvesting "is often done by automated software robots that scour the Internet looking for and recording posted e-mail addresses").