



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

**COMMENTS OF
THE INTERNET COMMERCE COALITION**

**CAN-SPAM ACT RULEMAKING
Project No. R411008**

(Notice of Proposed Rulemaking)

I. Introduction

The Internet Commerce Coalition (“ICC”) submits these comments in response to the Commission’s NPRM on various topics related to the CAN-SPAM Act, (Pub. L. No. 108-187), published in the Federal Register on May 12, 2005. ICC members include leading Internet and e-commerce companies and trade associations, including Amazon.com, AT&T, BellSouth, Comcast, eBay, MCI, SBC Communications Inc., TimeWarner/AOL, Verizon, the U.S. Telecomm Association, CompTel, and the Information Technology Association of America.

Our members work very hard to protect consumers from spam, suing more than 150 spammers, operating 24x7 response teams to respond to spammer attacks, implementing a wide

range of spam filtering technologies, working on more secure e-mail systems of the future and, in many cases, offering consumers flexible self-help filters to combat spam.

Our comments relate to five issues in the NPRM:

- Although we are largely supportive of the Commission’s proposal to apply a three-part test to identify the single “sender” responsible for a message when more than one person’s products or services are advertised or promoted in a single message, we request clarification of the term “control” in the first portion of the three-part test.
- The Commission’s proposal to shorten the time interval for honoring an opt-out request from ten business days to three business days should not be adopted, given the complexity of many companies’ systems, their use of e-mail service providers and fulfillment houses, the time needed by companies with large existing customer bases to send an email campaign to those customers given network volume constraints, and the continued likelihood that some messages will have multiple senders.
- The definition of “transactional or relationship” messages should be expanded to include narrowly-defined provisions related to “one-to-one business relationship messages,” “subscription messages” and “confirmation messages.”
- The Commission should clarify that “transactional or relationship” messages include e-mail messages regarding “service updates or upgrades” 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.
- The Commission’s proposed requirement that opt-outs be effectuated on a single webpage without providing any information beyond an e-mail address should not be adopted in its current form. Businesses should be permitted to use reasonable means to authenticate opt-out requests, provided that links to other web pages are clear and conspicuous and that the opt-out process is simple and efficient.
- Opt-out requests should expire after a set period, such as five years, unless renewed. E-mail addresses, like telephone numbers, become outdated and may be reused. For this reason, a lifetime opt-out would not only create enormous suppression lists that would need to be shared broadly among companies sending e-mails (creating increased security problems) but also risks permanently disqualifying some e-mail addresses.

II. Comments

A. Clarifying the Meaning of the Term “Sender” When a Message Advertises or Promotes More Than One Person’s Products or Services

In the NPRM, the Commission lists three elements, any one or more of which may ordinarily be the deciding factor in determining who is the “sender.” A “sender”:

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

In response to comments that CAN-SPAM compliance gives rise to undue burdens when more than one person’s products or services are advertised or promoted in a single message, the Commission proposes to permit multiple advertisers to designate a single entity as the only “sender” of a multiple-advertiser message if that entity satisfies any of the three enumerated elements, provided that none of the other potential “senders” satisfy any of the elements.

ICC members generally support the Commission’s three-element test, and believe that permitting the designation of a single “sender” through application of that test would substantially reduce the obstacles to multi-advertiser messages without contributing to an increase in spam.

However, we request clarification regarding the definition of “control” in the context of a multiple-advertiser message to simplify the burdens on legitimate senders of e-mail posed by CAN-SPAM compliance. Even though some potential senders may “control” some portions of the content of the message (e.g., the use of their marks, the quantity of advertising space they paid for, and the content of their insert into the message), their exercise of this limited degree of control should not be deemed sufficient to vitiate the applicability of the three-element test for designation of a single sender.

We propose that the “control” prong of the single sender test be modified as follows: **If a single entity has *final editorial control* over the message and whether it should be sent, then it should qualify as the sole entity “controlling the content” of the message,**

notwithstanding other advertisers' control over some ingredients of the message or their respective portions of the multiple-advertiser message.

B. The Time Frame for Honoring Opt-Out Requests Should Not Be Reduced to Three Business Days.

Section 7704(c)(1) of the Act empowers the Commission to “modify” the statutory ten-day period for honoring opt-out requests if it determines that a different time frame would be more appropriate. In the NPRM, the Commission proposes to shorten the time that a sender has to honor a recipient’s opt-out request from ten business days to three business days.

As we indicated in our prior comments, the period of time in which to comply with unsubscribe requests should be extended, not reduced. Small businesses and most industry members submitting comments on the ANPRM, even several cited in the NPRM in support of the conclusion to shorten the time period,¹ favored either maintaining the opt-out interval at ten business days or lengthening it. While it is true, as noted in footnote 189 of the NPRM, that thirty-eight percent of respondents to the web-based questionnaire favored shortening the time period, a clear majority (more than 2300 of the 3818 respondents to the web-based survey) either felt that the ten-day period should be retained or that it should be extended. Therefore, the record developed to date does not support the Commission’s proposed change.

Three business days is operationally impractical, particularly for companies that have complex systems with multiple databases, companies that use service providers and fulfillment houses to send e-mail, companies that have many sales people sending one-to-one email

¹ Compare ANPRM comments of NetCoalition (“strongly object to any efforts to shorten the time frame”) with NPRM at 25443 n. 210. Even GoDaddy, whose comments the NPRM repeatedly cites, called for the 10-day period to be maintained whenever a third party service provider sends out the emails on the advertiser’s behalf.

messages, or companies that send a high volume of commercial e-mail messages to existing customers over several days in a single e-mail campaign.

- **Multiple databases:** One ICC member reports that many opt-out requests must be processed through a minimum of three of its own distinct databases.
- **Use of service providers:** Another ICC member company reports that its e-mail service provider, DoubleClick, uses an outside vendor to manage its opt-out databases. This too requires an opt-out request to pass through three companies.
- **Non-conforming opt-out requests:** The same ICC member company reports that it receives and responds to opt-out requests from three sources that must be processed differently: (1) recipient clicks on the opt-out link in the company's e-mail; (2) recipients' hitting the reply button in response to e-mails, some of which come from sales people who must then forward the opt-out message for processing; and (3) consumer phone calls to a call center.
- **One-to-one e-mail messages:** These almost never result in opt-out messages, but when they do, there is no way to ensure that the request will be duly forwarded to centralized opt-out databases.

The NPRM assumes that handling opt-out requests is highly automated and therefore can be effectuated in three business days. NPRM at 25444. However, updating all relevant customer records in all databases to reflect the opt out preference is only the first step in the process of honoring the opt out. E-mail marketing lists must also be screened against the updated opt-out list and the e-mail campaign itself must not have been launched yet.

The sheer volume of messages in a single e-mail marketing campaign can make it impractical for an opt-out to be effectuated within three days, even for companies that "already

are able to process opt-out requests virtually instantaneously.” *See* NPRM at 25444. A commercial e-mail message intended to be sent to tens of millions of people simply cannot, consistent with industry best practices, be sent out on a single day. The practical limit is about four million messages per day per sender; any higher volume risks overloading the filters and servers of downstream ISPs carrying the message. Messages over the limit are far more likely to be bounced back, and never delivered. Accordingly, for example, a campaign to send to 50 million e-mail addresses takes ten or twelve days to carry out, starting from the date the first message is sent, and system constraints prevent (or at least strongly discourage) any faster throughput of the messages. If a particular address is in the queue for a message to be sent on Saturday in a campaign that began on Monday, an opt-out request received on Tuesday, while it can be immediately effectuated for all future mailings, cannot practically be honored for the mailing that is already underway. This technological constraint, which is a fact of life over which no single sending company has control², provides another compelling reason for at least maintaining, if not increasing, the existing ten-business-day rule.

A three-business-day, or even ten-business-day, requirement presents challenges in the context of joint marketing relationships that require multiple parties to scrub their respective lists. Criteria for designating a single sender, particularly if the term “control” is clarified as requested, will be helpful in some contexts.³ However, the single sender criteria do not entirely

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The 4 million/day limit assumes that the sender has access to sufficient server capacity to send that many messages; many senders do not and thus the queue for sending could proceed even more slowly. But even if the sender had the capacity to initiate all 50 million messages in a single day, the limited capacities of ISPs and other network participants further downstream would make it doubtful that many of the messages would be delivered.

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Consider, for example, a hypothetical multiple-advertiser message for which a state or city tourism council is identified as the sender, selects the list of recipients and exercises final editorial control. In addition to a travel guide published by the council, the message might advertise or promote theme parks and other attractions, discounted resort accommodations and clothing items with a customized theme or logo. Even though the other advertisers exercise some degree of control over their specific

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eliminate the concerns about a short time frame for honoring the opt-out, given the fact that many messages may not qualify for the single sender criteria, still requiring cross-scrubbing of lists.

Some parties commenting on the ANPRM asserted that a ten-day or longer opt-out period would provide additional opportunities for spammers to bombard recipients with additional messages without violating the Act. We expect that the comments submitted to the Commission in response to the questions posed in paragraph B. 4. b. of Section VII of the NPRM will demonstrate that few, if any, legitimate commercial e-mailers engage in such practices. Moreover, the length of time for honoring opt outs does not make much difference from an enforcement perspective. Spammers who send large amounts of commercial e-mail during the opt-out window will almost invariably violate other provisions of the CAN-SPAM Act (by failing to provide required inclusions or falsifying information regarding the source or route of the messages). This means that there are ample other bases under which the Commission, State AGs and ISPs may bring enforcement actions against them if they continue to send commercial e-mail during that period.

We recommend that the Commission maintain at least a ten-business-day opt-out period. Because we expect that database compatibility and technologies for implementing opt-out requests will improve over time, we suggest that the Commission adopt an extended opt-out period on an interim basis and consider shortening the period at a later date.

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advertisements (e.g., control of the use of their respective marks), the local tourism council is responsible for the sending of the message and is the proper entity to handle opt-out requests expeditiously.

C. Transactional or Relationship Messages; Subscription-Related Messages

1. "Business relationship messages"

As we stated in our comments, the categories of transactional or relationship messages should be expanded to add limited exceptions for what some have described as "business relationship" messages and "subscription-related" messages.

Business relationship messages should be included in the definition of "transactional or relationship" messages where the sender has a pre-existing business relationship with the recipient involving payment for a product or service provided by the sender. In such situations, the sender has an incentive to expand that relationship by offering additional products or services, but no countervailing incentive to disregard the customer's preferences regarding receipt of commercial e-mail. Senders have found that glossy mass e-mails are less effective, particularly in the business-to-business context, than individualized contacts initiated by a vendor employee who is familiar with the customer's needs and who will be available to provide additional information if the customer has questions or concerns regarding a product or service. Established customers likewise appreciate receiving individualized messages from their account representative, informing them of the availability of additional products or services, and offering to answer any questions the customer may have.

Because the account representative's role is the maintenance and nurturing of the customer relationship, there is a built-in disincentive to offend customers by sending repeated, intrusive or unwanted solicitations. The legislative history of the Act clearly recognizes the propriety of including "some promotional information about other products or services" within

transactional or relationship messages.⁴ If such messages are not classified as “transactional or relationship” messages, their use may be precluded due to the extreme expense of providing interfaces between each account representative’s desktop and the enterprise’s opt-out database.⁵

ICC recognizes that classification of all “business relationship” messages as “transactional or relationship” messages might give rise to abuse by entities who would use this as an invitation to send identical messages to large numbers of recipients. ICC submits that an appropriate balance – one that allows account managers to fulfill their traditional role using e-mail as another means of communication with customers, and at the same time protects recipients from large quantities of unwanted commercial e-mails – can be achieved by expanding the definition of “transactional or relationship messages” to include one-to-one business relationship messages.

2. Future newsletters or electronically delivered content based resulting from a transaction

The Commission, in Section VII B.1.j., seeks comments on whether, where a recipient entered into a transaction with a sender that entitles the recipient to receive future newsletter or other electronically delivered content, e-mail messages the primary purpose of which is to deliver such products or services should be deemed “transactional or relationship” messages. Implicit in the question is the suggestion that neither catalogs nor other periodicals consisting exclusively of advertising or promotional materials, even when delivered as part of a

⁴ Senate Commerce Committee Report on S.877, “CAN-SPAM Act of 2003,” S. Rep. No. 108-102 at 16.

⁵ One ICC member company has suggested that the need to create interfaces between individual account representative work stations and the opt-out list could be eliminated by establishing a numerical ceiling on the number of substantially identical messages generated by a customer account representative to existing customers over a period of time. The ceiling could be set at 100 messages to allow for both one-to-one customization and one-to-a-few campaigns (e.g., those targeted toward customers in a narrow geographic area or a specific occupation). This would avoid the expense and security risk inherent in making information concerning opt-outs available to large numbers of customer service representatives.

subscription, fall within the “transactional or relationship” exception. We do not believe this is consistent with the Commission’s treatment of such periodicals in the Primary Purpose final rule

When a recipient subscribes to a periodical delivered via email, then transmission of that periodical to the recipient falls within one of the “transactional or relationship message” categories. Specifically, it constitutes delivery of “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.”

70 Fed. Reg. at 3118.

There is no inherent reason for treating a recipient’s subscription to a catalog delivered periodically via e-mail any differently than any other subscription. Many professional organizations and trade associations sponsor conventions and conferences, and they may send to members, as part of their “journal” subscription, a “special edition” identifying the sponsors and exhibitors of the event along with paid advertisements and relatively little editorial or informational content. Delivery of such periodicals via e-mail to association members or other “journal” subscribers, constitutes “delivery of 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” and therefore falls within the statutory definition of “transactional or relationship message.”

Any potential for abuse could be limited by incorporating a requirement that the sender obtain express written or electronic consent within the narrow terms set forth in the statute.

3. Confirmation messages

The Commission has requested comment on the number of confirmation messages a sender should be permitted to send pursuant to a single transaction and the use of a third party to send confirmation messages. Because e-mail is used in a wide variety of commercial relationships and across a broad range of technology platforms, the Commission should not

adopt a single numerical standard at this time. While one or two e-mail messages will typically suffice to confirm that an order has been received and that a single item has been shipped from the vendor's warehouse, the number of confirmation messages appropriate to a given transaction may increase exponentially if multiple items, shipped from different locations, are included in a single order, or if (as in the case of airlines), e-mail is used both to confirm a flight reservation and to provide periodic updates of departure and arrival times, which may vary markedly based upon weather, congestion and other matters beyond the sender's control.

D. "Service Update or Upgrade" Messages

At 70 Fed. Reg. 25438, the Commission addressed comments recommending, among other things, that it expand the category of "transactional or relationship messages" contained in section 7702(17)(A)(v) of the Act by inserting the words "or service" following "product" in the phrase "including product updates or upgrades." This proposed change was included among several related changes proposed by one commenter responding to the ANPRM.⁶ The Commission, stating that no evidence was provided that the proposed change is necessary to accommodate changes in e-mail technology or practices and accomplish the purposes of the Act, said that it is not inclined to adopt the changes.

ICC is of the view that the Commission's proposed rule reads the Act too narrowly, and urges the Commission to use its discretionary authority to clarify that e-mails delivering "service updates or upgrades" fall within the class of "transactional or relationship" messages, even without any showing of changes in e-mail technology or practices. By its terms, Section

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As proposed by the commenter, the category of transactional or relationship messages would include e-mail messages "to deliver goods or services, including product or service updates or upgrades, 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.

7702(17)(A)(v) already encompasses the delivery of “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.” The Commission appears to read the words “including product updates or upgrades” appearing between the two portions of the preceding quote as a limitation, excluding the delivery of “service updates or upgrades” from the statutory definition of “transactional or relationship” messages. ICC submits that treating words of inclusion as words of limitation is not required by principles of statutory construction. This is especially true considering the overall context in which the phrase “including product updates or upgrades” appears. The phrase appears immediately following the words “to deliver goods *or services*” (emphasis added) and within a multi-part definition that clearly includes e-mail messages to “provide... notification concerning a change in the terms or features of...the ongoing purchase or use by the recipient of *products or services* offered by the sender.”

The interpretation the Commission proposes makes no sense as a matter of policy and would arbitrarily treat service updates and upgrades differently from product updates and upgrades. In the absence of any statutory language to the contrary, or any legislative history manifesting a different intention, the Commission should exercise the broad authority granted by Congress to adopt rules implementing the Act to clarify that messages that deliver “service updates or upgrades” are included within the category of “transactional or relationship” messages.

E. Opt-out Requirement

Proposed rule §316.5 prohibits senders or persons acting on their behalf from requiring any recipient to pay a fee, provide any information other than his or her 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 in order to submit an opt-out request or have such a request honored by the sender.

ICC member companies do not object to the proposed rule insofar as it is intended to bar senders from frustrating consumer choice by creating needless barriers to opting out. Likewise, we do not object to the prohibition on the imposition of any fee on e-mail recipients wishing to opt out. However, we are concerned that the other proposed limitations are overly restrictive, because they limit senders' ability to authenticate opt-out requests (including from their customers) and to manage the opt-out process efficiently. For example, with sophisticated businesses that aim to offer consumers considerable choice, a customer sometimes signs into a "my account" page and submits a password, then visiting the preferences page to choose their specific opt-out preferences. The proposed rule would require companies to eliminate password protection for this preferences page, thus enabling third parties – including competitors, disgruntled colleagues, or simple vandals – to tamper with at least this aspect of account information provided by customers. This hardly seems consistent with the obligation of companies, frequently stressed by the Commission, to safeguard customer information against unauthorized access and manipulation. In particular, the portion of the proposed rule that specifies that opt-out must be effectuated by visiting a single webpage should be replaced by a requirement that, if the opt-out process requires visiting other pages to fill out information, the links to those pages must be clear and conspicuous. The Commission should recognize the need on the part of businesses to utilize appropriate measures to verify the identity of the sender of an opt-out message, lest the opt-out process be exploited by third parties for improper purposes, including phishing. Companies have a legitimate need to obtain adequate information (which may include some further information in addition to the recipient's e-mail address) to

authenticate customers and efficiently process opt outs. The collection of such information should not be prohibited, as long as senders do not engage in practices that needlessly restrict recipients' ability to efficiently and expeditiously opt out.

E. Duration of Opt-Outs

In the NPRM, the Commission declined to propose a time limit for how long an opt-out request will remain in effect. Nonetheless, it indicated that it is receptive to submissions of information or data that would show that such a time limit would be useful in implementing the provisions of the Act.

Data from various industry sources, including providers of e-mail change of address services such as Return Path and YesMail, indicate that between 20 and 30 percent of all e-mail addresses are abandoned every year. Over time, maintenance of large and rapidly growing suppression lists creates an increasing cost burden on legitimate e-mail marketers. The exchange of suppression lists among numerous parties also creates an inviting opportunity for spammers to intercept them and use the lists for unlawful purposes. ICC would welcome the Commission's adoption of a rule allowing opt-outs to expire, if not renewed, after a specified period of years. To the extent the Commission is not prepared, based on the current record, to adopt such a rule at this time, we encourage the Commission to continue to monitor this issue and take action when the situation warrants.

We thank you for considering our views, and would be pleased to answer any questions you may have.

Respectfully submitted,

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