

Response by
LashBack, LLC

To the request by the
Federal Trade Commission

For comments regarding the
Controlling the Assault of Non-Solicited Pornography and Marketing Act
(the “CAN-SPAM Rule”)

CAN-SPAM Rule, 16 CFR part 316, Project No. R711010

Submitted August 30, 2017

Peter Wilson
President and CEO
LashBack, LLC
1017 Olive Street, 4th Floor
St. Louis, MO 63101
314-754-0999
www.lashback.com

I. Introduction, Summary, and Background

LashBack, LLC (“LashBack”) is pleased to submit these comments in response to the Federal Trade Commission’s (“FTC”) request for public comment regarding its rule implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act (the “CAN-SPAM Rule”) under the CAN-SPAM Rule, 16 CFR part 316, Project No. R711010 (the “Request”), as of August 30, 2017.

LashBack has been focused on best practices in email marketing for more than a decade. We provide several services including a blacklist focused on email unsubscribe practices and an email compliance service which enables advertisers to monitor email marketing messages being sent on their behalf. Our services are unique, well-regarded and widely-used by major brands and their partners. We are a member of multiple online and marketing industry organizations and have been recognized as part of the Online Trust Alliance’s Audit & Honor Roll for multiple consecutive years.

We believe that email marketing, when done well and in compliance with all legal requirements, results in a good consumer experience and is a very effective channel for advertisers. We are a strong advocate for quality email marketing and anything that advances best practices and enhanced transparency. As part of LashBack’s work with its clients, it reviews millions of email marketing messages to assess their compliance with both legal and corporate policy requirements. As such, we have a deep and unique perspective on the CAN-SPAM Rule and trends in the marketplace.

We believe that the CAN-SPAM Rule and its enforcement, when combined with the other laws that are in place (in various states and internationally) and market forces, has been effective. That said, there are several opportunities to update and enhance the CAN-SPAM Rule which do not require major revisions.

II. Responses to Issues Posed

LashBack is responding to select questions posed in the Request (A-1,2,3,4,7,8,11 and B-1,2,3). The responses refer to the sections and numbers used in the Request.

A. General Issues

1. Is there a continuing need for the Rule? Why or why not?

Yes. Spam is an ongoing issue for consumers and Federal regulation is an important deterrent and tool to reduce its incidence.

2. What benefits has the Rule provided to consumers? What evidence supports the asserted benefits?

The rule has deterred certain senders from “spamming” and helped to establish clear standards. Hard data regarding the impact of the Rule is difficult, if not impossible, to obtain. There are multiple forces at work which reduce the incidence of unwanted commercial email and the term “spam” is often used too loosely. For example, an email that a consumer doesn’t recall authorizing is not spam (even if labeled as such by the consumer). Global spam statistics are of limited significance in the context of this project. We believe that there is an important distinction between emailers that take steps to ensure their operations are compliant with the law and those that are intentionally operating in violation of the law. The CAN-SPAM Rule and related laws primarily impact the former and the majority of spam comes from the latter. The filtering of email by internet

and email service providers has been the most effective tool at dealing with the worst, most-deceptive, highest-volume spam.

3. What modifications, if any, should be made to the Rule to increase its benefits to consumers? (a) What evidence supports the proposed modifications? (b) How would these modifications affect the costs the Rule imposes on businesses? (c) How would these modifications affect the benefits to consumers?

Our proposed modifications, none of which materially impact the costs the CAN-SPAM Rule imposes on businesses, can be summarized as:

- *Revise and promote the penalties*
- *Clarify what is meant by “deceptive” content and a “clear and conspicuous” opt-out*
- *Prohibit the use of image-based opt-outs and postal addresses*

A. Revise and promote the penalties:

- a. It is our understanding that the potential penalty per message was increased from \$16,000 to \$40,654. This is a meaningful change, but it has not been significantly publicized and is not well-known.*
- b. We believe that the requirement to identify a marketing message as an advertisement is frequently disregarded. In order to increase the visibility and impact of this simple and clear requirement - and likely drive greater compliance and better disclosures to consumers - we would suggest classifying it as an “aggravated violation”.*
- c. While the above would help to strengthen the CAN-SPAM Rule as a deterrent, we suggest the addition of an explicit reduction in liability for a sender that has demonstrated a commitment to good practices. Such a reduction is a component of the relevant California code and is an effective incentive for businesses to invest in good practices. The California code includes the following language: “If the court finds that the defendant established and implemented, with due care, practices and procedures reasonably designed to effectively prevent unsolicited commercial e-mail advertisements that are in violation of this article, the court shall reduce the liquidated damages recoverable under subdivision (a) to a maximum of one hundred dollars (\$100) for each unsolicited commercial e-mail advertisement, or a maximum of one hundred thousand dollars (\$100,000) per incident.” This amounts to an explicit ninety percent (90%) reduction in potential liability if there is evidence of overall due care and good practices.*

- B. The CAN-SPAM Rule defines “deceptive” as “likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.” The CAN-SPAM Rule does not include examples, which would help to strengthen and clarify the requirement. We propose the addition of language such as the following: “Examples of deceptive messages include those that falsely imply guarantees, approvals, or previous correspondence (such as ‘Approval Department’ or ‘FWD:’); convey a false sense of urgency (such as ‘Urgent – update your information’); or falsely appear to be transactional or from another entity (such as ‘About your recent purchase’ or ‘You have (4) new Facebook messages’).”*

C. *The CAN-SPAM Rule states that commercial email messages must have a "clear and conspicuous notice of the opportunity under paragraph (3) to decline to receive further commercial electronic mail messages from the sender". There should be a clearer requirement with regard to the language, color, and size of the unsubscribe mechanism. It is too often small, hidden, and/or confusingly worded. Each unsubscribe mechanism should use the term "opt-out" or "unsubscribe" to remain clear and consistent, the color should clearly contrast from the background, and the font should be the greater of the largest font used in the body of the message or 10 point font to ensure that it can be easily identified by an average consumer, and meets the "clear and conspicuous" requirement.*

D. *Providing the consumer with at least one working opt-out mechanism and at least one postal address are fundamental parts of the CAN-SPAM Rule. These components of the message should not be permitted to be included as part of a remotely-hosted image. These images often stop working shortly after the message is sent and thus the consumer lacks the information and/or tools necessary to opt-out or contact the sender. The best and simplest resolution to this issue is to require that both pieces of information are present in the message in plain text (i.e., non-HTML text).*

4. What impact has the Rule had on the flow of truthful information to consumers and on the flow of deceptive information to consumers?

The standards included in the CAN-SPAM Rule and its enforcement have resulted in better, clearer, and less misleading information being sent to consumers.

7. What benefits, if any has the Rule provided to businesses, including small businesses? What evidence supports the asserted benefits?

The CAN-SPAM Rule has established basic standards and penalties for non-compliance. In general, this has provided a base set of requirements for businesses and helped to ensure that all businesses are held to consistent standards.

8. What modifications, if any, should be made to the Rule to increase its benefits to businesses, including small businesses? (a) What evidence supports the proposed modifications? (b) How would these modifications affect the costs the Rule imposes on businesses, including small businesses? (c) How would these modifications affect the benefits to consumers?

Certain requirements under the CAN-SPAM Rule should be clarified (see 3 B. & C. above) and an explicit reduction in potential liability should be added for businesses that can demonstrate their use of good email practices. The CAN-SPAM Rule currently states that the court may consider a reduction of damages if the court finds the defendant established and implemented practices and procedures designed to effectively prevent spam, but the reduction is not specified. A ninety percent (90%) reduction provides a significant incentive for businesses to adopt good practices, further aligns the CAN-SPAM Rule with the prominent California code, and has been time-tested as part of the California code.

11. What evidence is available concerning the degree of industry compliance with the Rule?

The answer to this question depends on the scope of what the Rule is attempting to address. Spam continues to be a major issue in the U.S. and globally, but it is primarily impacted by security

measures and filtering. Our belief is that the CAN-SPAM Rule sets important standards for the senders of commercial email that are attempting to operate within the U.S. legal framework. We can say that it is possible for advertisers to effectively manage email compliance issues. We cannot say more than that given the large quantity of variables that impact the sending and receipt of, and reaction to, business-to-consumer email marketing messages.

B. Specific Issues

- 1. Should the Commission modify the Rule to expand or contract the categories of messages that are treated as transactional or relationship messages? (a) Why or why not? (b) What evidence supports such a modification? (c) How would this modification affect the costs the Rule imposes on businesses, including small businesses? (d) How would this modification affect the benefits to consumers?**

While we understand that classifying messages is becoming more challenging as marketers work to maximize the return on messages sent and interactions with consumers, we do not believe that this issue is at the crux of the problems in email. We believe that the focus should remain on misleading messages that are sent solely or primarily for marketing purposes.

- 2. As discussed above, the Rule tracks the CAN-SPAM Act in prohibiting the sending of commercial email to a recipient more than ten business days after the recipient opts out. Should the Commission modify the Rule to reduce the time-period for processing opt-out requests to less than ten business days? (a) Why or why not? (b) What evidence supports such a modification? (c) How would this modification affect the costs the Rule imposes on businesses, including small businesses? (d) How would this modification affect the benefits to consumers?**

We do not believe that a change is needed. The market has evolved so that there is a heavy incentive (delivery impact) for senders to promptly remove consumers that want to be unsubscribed. The ten (10) business day standard remains reasonable and reducing it would be challenging for businesses and not meaningfully benefit consumers. Data from the Online Trust Alliance confirms that the vast majority of advertisers surveyed (those working to operate within the U.S. legal framework) already remove consumers faster than the ten (10) business day requirement.

- 3. Should the Commission modify the Rule to specify additional activities or practices that constitute aggravated violations? (a) Why or why not? (b) What evidence supports such a modification? (c) How would this modification affect the costs the Rule imposes on businesses, including small businesses? (d) How would this modification affect the benefits to consumers?**

Yes, we believe that noncompliance with the requirement to identify a marketing email as an advertisement should be classified as an aggravated violation. This component of the CAN-SPAM Rule seems to be often ignored and increasing the penalty for this required disclosure would likely drive greater compliance and better disclosures to consumers.