



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

**COMMENTS  
of the  
DATA & MARKETING ASSOCIATION**

**on the**

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

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The Data & Marketing Association (“DMA”) is pleased to provide the following comments in response to the Federal Trade Commission’s (“FTC” or “Commission”) Request for Comments on its rule implementing the Controlling the Assault of Non-Solicited Pornography and Marketing (“CAN-SPAM”) Act. Providing consumers with notice and the opportunity to opt-out, as required under CAN-SPAM, preserves the appropriate balance in providing choice to consumers and ensuring that they can receive offers that may be of interest to them. Consumers and businesses alike understand and appreciate the benefits of the existing framework. DMA believes that the current CAN-SPAM framework, in combination with self-regulation, has provided effective protections for consumers as well as consistent and meaningful guidance for email marketers and should be maintained in its current form.

#### **I. Background on the DMA**

DMA is the community that champions deeper consumer engagement and business value through the innovative and responsible use of data-driven marketing. DMA is comprised of today’s leading tech companies, data innovators, brand marketers, agencies, data service providers, and media companies from across the marketing ecosystem. DMA members also include hundreds of non-profits and service organizations that promote charitable work throughout the world. These companies and non-profits include some of the most well-known and respected household organizations in the country. These organizations understand the significance of data, and the role it plays in the economy. The DMA and its members take responsible data use seriously and are supportive of efforts to ensure that data is used appropriately. Our members deeply value consumer trust and understand that responsible data practices are critical to building and maintaining customer relationships over the long term.

DMA is a long-time proponent of responsible email marketing practices. DMA supported passage of the CAN-SPAM Act in 2003 and has consistently provided comments on the corresponding regulatory framework since its promulgation, including comments on: the FTC's request for public comment on its discretionary rulemaking, 70 Fed. Reg. 25426, May 12, 2005; the primary purpose notice of proposed rulemaking, 69 Fed. Reg. 50091, Aug. 13, 2004; and the advance notice of proposed rulemaking, 69 Fed. Reg. 11776, March 11, 2004. The DMA supports CAN-SPAM because spam negatively impacts the ability of DMA members, legitimate businesses that send email for commercial purposes, to communicate with consumers.

## **II. Marketing Provides Value for Consumers and the Economy**

Data fuels today's economy. Every day consumers' lives are enriched by data-driven resources, including an unprecedented array of high-quality information and entertainment. Thanks to innovative applications of data, consumers benefit from more tailored and timely access to the goods and services they desire at competitive prices.

A recent study commissioned by DMA's Data-Driven Marketing Institute ("DDMI") and conducted independently by Harvard Business School Professor John Deighton and Adjunct Columbia University Professor Peter Johnson, entitled "The Value of Data: Consequences for Insight, Innovation, & Efficiency in the U.S. Economy" ("Value of Data"), quantifies the concrete economic benefits of data.<sup>1</sup> The Value of Data study found that the Data-Driven Market Economy ("DDME") generates vital revenue and jobs for the U.S. economy. Specifically, the study found that the use of data-driven marketing added \$202 billion in revenue to the U.S. economy and fueled more than 966,000 jobs in 2014.<sup>2</sup> In addition to increasing

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<sup>1</sup> JOHN DEIGHTON & PETER A. JOHNSON, THE VALUE OF DATA: CONSEQUENCES FOR INSIGHT, INNOVATION & EFFICIENCY IN THE U.S. ECONOMY (2015).

<sup>2</sup> *Id.* at 19.

revenue, the study noted that the U.S. DDME catalyzed growth in the U.S. economy. For instance, according to the study, since 2012, the contribution of data-driven marketing to the U.S. economy grew by 35% and the jobs generated and sustained by data-driven marketing grew by 49%.<sup>3</sup> Email marketing in particular contributes approximately \$1.2 billion to the U.S. economy.<sup>4</sup>

Data-driven marketing is essential to the success of start-up companies and other small businesses that drive innovation. The Value of Data study found that the sharing of data across the DDME enables small and innovative businesses to compete effectively with big players. The responsible use of data gives all companies, and especially small businesses, the ability to effectively and responsibly match products to customers both online and offline, thereby lowering barriers to market entry for specialized or niche offerings that previously could not have succeeded.

The Internet is important to the personal and working lives of individual Americans, and is creating new kinds of jobs. The revenue generated by online advertising supports the creation and entry of new businesses, communication channels (*e.g.*, micro-blogging sites and social networks), and free or low-cost services and products (*e.g.*, email, photo sharing sites, weather, news, and entertainment media). Online advertising and marketing enables consumers to compare prices, learn about products, and find out about new and local opportunities.

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 62.

### III. The Existing System of CAN-SPAM, Supported by Self-Regulation, Is Effective

#### A. Existing Law

The Internet-based economy has flourished under the existing CAN-SPAM regime, which allows for appropriate flexibility for both businesses and consumers while giving robust enforcement authority to state and federal law enforcement. Under the statute, the FTC and the U.S. Department of Justice have authority to investigate and penalize bad actors.<sup>5</sup> Certain violations are subject to criminal penalties, including imprisonment. The FTC can, and does, impose civil fines of up to \$40,654 per email in violation of the Act.<sup>6</sup> The Commission has brought enforcement actions against numerous companies for CAN-SPAM violations and has issued guidance to help businesses comply with the law.<sup>7</sup> As a result, legitimate businesses are aware of CAN-SPAM's requirements and work diligently to comply—not only to mitigate legal risk, but to maintain positive relationships with consumers.

#### B. Self-Regulation

CAN-SPAM is supported by self-regulatory programs that supplement, and provide additional enforcement for, responsible email marketing practices. For instance, the DMA Guidelines for Ethical Business Practice (“DMA Guidelines”)<sup>8</sup> provide meaningful transparency, controls, and accountability to help ensure the responsible use of data in marketing. In particular, Article 40 of the DMA Guidelines addresses “Commercial Solicitations Online,” including requirements to allow consumers to opt out of such solicitations as well as to opt out of

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<sup>5</sup> 15 U.S.C. § 7705(d)(5); 15 U.S.C. § 7706.

<sup>6</sup> FTC, *CAN-SPAM Act: A Compliance Guide for Business*, <https://www.ftc.gov/tips-advice/business-center/guidance/can-spam-act-compliance-guide-business>.

<sup>7</sup> See, e.g., *FTC v. SaleSlash, LLC*, No. CV15-03107 PA (AJWx) (C.D. Cal. Feb. 2, 2016), [https://www.ftc.gov/system/files/documents/cases/160205sales\\_slashstip.pdf](https://www.ftc.gov/system/files/documents/cases/160205sales_slashstip.pdf); *FTC v. Philip Flora*, No. SACV 13-00381 AG (JEMx) (C.D. Cal. Nov. 25, 2013), <https://www.ftc.gov/system/files/documents/cases/140529floraorder.pdf>.

<sup>8</sup> DATA & MKTG. ASS'N, GUIDELINES FOR ETHICAL BUSINESS PRACTICES (2016), <https://thedma.org/wp-content/uploads/dma-guidelines-2016.pdf>.

the rental, sale, or exchange of the consumer's email address. Consistent with CAN-SPAM, the DMA Guidelines also require that commercial emails include a valid postal address for the sender and prohibit misleading subject and transmittal, or "from," lines. In many circumstances, companies contact DMA proactively for compliance advice to help maintain consumer satisfaction with the company's email practices and avoid complaints.

As is true for the CAN-SPAM Act itself, the DMA Guidelines are subject to robust enforcement. For more than four decades, DMA has proactively enforced the DMA Guidelines against both DMA members and non-member companies across the DDME. Such enforcement of the DMA Guidelines by the DMA has occurred in hundreds of data-driven marketing cases concerning deception, unfair business practices, personal information protection, commercial email practices, and other ethical issues.<sup>9</sup>

DMA receives matters for review in a number of ways, including from consumers, member companies, non-members, and consumer protection agencies. DMA's Ethics Operating Committee reviews complaints that it receives against the DMA Guidelines and if the Committee finds a potential violation, the Committee contacts, investigates, and advises the offending organization on how to come into full compliance. Most companies work with the Ethics Operating Committee voluntarily to cease or change the questioned practice. However, if a company declines to cooperate and the Ethics Operating Committee believes ongoing violations of the DMA Guidelines exist, the Committee can recommend that DMA's Board of Directors take action, including making case results public and referring cases to federal and state law enforcement authorities for review when appropriate.

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<sup>9</sup> DATA & MKTG. ASS'N, DMA ANNUAL ETHICS COMPLIANCE REPORT JANUARY – DECEMBER 2016, <https://thedma.org/wp-content/uploads/Jan-Dec-2016-Ethics-Compliance-Report.pdf>.

The existing CAN-SPAM framework, coupled with robust enforcement authority, has already proven successful in balancing consumer protections with the need for flexibility and innovation. Amending the CAN-SPAM Rule would serve only to disrupt this balance and jeopardize benefits to businesses and consumers alike.

#### **IV. The FTC Should Retain the Ten-Day Timeframe for Processing Opt-Outs**

The Commission specifically requests comments regarding whether the timeframe for processing opt-outs should be shortened from ten days—the timeframe currently called out by the CAN-SPAM Act itself.<sup>10</sup> DMA supports keeping the opt-out processing requirements as they are currently written.<sup>11</sup> The existing rules have been working effectively for over a decade. A ten-day time period provides adequate consumer protection and allows businesses a reasonable time to comply. Consumers understand that email opt-outs cannot be processed instantaneously. There is no record of consumer harm that would support any adjustment to this window.

#### **V. Conclusion**

The DMA appreciates this opportunity to comment on the important issues raised in the Request for Comments. We look forward to continuing to work with the Commission on issues relating to email marketing in the future.

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<sup>10</sup> 15 U.S.C. § 7704(a)(4)(A)(i) (“[I]t is unlawful . . . for any person acting on behalf of the sender to initiate the transmission to the recipient, more than 10 business days after the receipt of such request[.]”).

<sup>11</sup> *Id.*