

BEFORE THE FEDERAL TRADE COMMISSION

CAN-SPAM Act Rulemaking

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Project No. R411008

**Comments of American Business Media on the CAN-SPAM Act Rulemaking,
Advance Notice of Proposed Rulemaking**

The following comments are submitted on behalf of American Business Media in response to the Advance Notice of Proposed Rulemaking (the “ANPR”) issued by the Federal Trade Commission (the “Commission” or the “FTC”) soliciting comments on proposed regulations to be enacted pursuant to various provisions of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the “CAN-SPAM Act” or the “Act”), 16 C.F.R. § 315 et seq., 69 Fed. Reg. 11776 (March 11, 2004).

American Business Media, which submitted comments on the undesirability of a Do-Not-E-mail registry on March 31st, is an association representing more than 200 business-to-business information providers such as publishers, producers of print and other publications and websites, and organizers of trade shows and similar events. For members of American Business Media, and the Association itself, e-mail has become a crucial means of communication with existing and potential subscribers, advertisers and other customers. Much of the e-mail sent by American Business Media and its members consists of transactional or relationship messages that are exempt from nearly all provisions of the Act. Some American Business Media members advertise their products and services, such as publications, seminars or trade shows, via e-mail. These messages are targeted to those in the specific industries covered by the publication or other media of the sender. Although these messages are arguably within the definition of

commercial e-mail, they are almost always welcome, and as a result, relatively few recipients routinely opt out of further e-mail communication from American Business Media Members.

Because e-mail is an integral aspect of the communication and advertising practices of its members, American Business Media encourages the Commission's efforts to develop rules aimed at eliminating unsolicited "spam." American Business Media supports rules that will protect businesses making legitimate use of e-mail communications while serving as an effective deterrent to spammers.

A. Criteria for Determining Whether "The Primary Purpose" of an Electronic Mail Message is Commercial

Most prohibitions and requirements contained in the CAN-SPAM Act apply to e-mail messages where the "primary purpose" is commercial. The Commission, in the ANPR, has suggested several criteria to determine whether the "primary purpose" of an e-mail message is commercial. Among the Commission's proposed criteria, the "net impression" standard provides the most viable primary purpose test, at least as a starting point. Several of the other proposed criteria should constitute additional factors to consider in a determination of whether or not an e-mail's primary purpose is commercial. Evaluating the "net impression that the material as a whole makes on the reasonable" e-mail recipient ensures that an e-mail's primary purpose will be measured against a relatively objective, common-sense standard.

The most important factor should be whether "an e-mail's commercial advertisement or promotion is more important" than the e-mail's other purposes. If the elements of the e-mail consisting of "commercial advertising or promotion" materials would be perceived by reasonable recipients as "more important" than the e-mail's other contents, then the e-mail should be considered a commercial e-mail message subject to the Act. On the other hand, e-mail messages with significant editorial content intended to inform or educate the recipient (without endorsing

or promoting a particular product in the manner of an advertisement) would not be considered a commercial e-mail message under this standard.

An additional factor that should bear on whether an e-mail is a commercial e-mail message is whether the purpose of the advertising is to support the other, non-advertising content of the message. American Business Media members may send trade-related newsletters, articles, and other informative material via e-mail. Sometimes, products or services of potential interest to recipients may be advertised alongside the informative material as a means of financing the newsletter or article. In this instance, the primary purpose of the e-mail is clearly not to advertise or solicit, but to inform. When the advertising material contained in an e-mail message is, according to a reasonable recipient, merely ancillary to the message's informative or editorial contents, then the message should be outside the scope of commercial e-mail. On the other hand, if the editorial content appears contrived, is *de minimis*, or consists of a lengthy "article" that clearly promotes the products or services that are advertised alongside the supposedly editorial content of the message, the primary purpose of the message is likely commercial, and the e-mail should be subject to the Act.

Finally, if an e-mail contains transactional or relationship content, the e-mail should be presumed not to have a primarily commercial purpose, even if it also contains advertising material. The sender of such an e-mail has a legitimate reason to send a transactional or relationship message, independent of whatever advertisements are or are not also contained in the message. Whether or not the combination of editorial and advertising material earns, or is intended to earn, a profit for the sender should not be relevant. No one could argue successfully that any of the 1,200 or so business-to-business publications of American Business Media Members (such as *Ad Age*, *Oil & Gas Journal*, *Women's Wear Daily*, etc.) has advertising as its

“primary purpose,” yet each is advertiser-supported and is intended by the publisher to be profitable; we also expect that this e-mail would be deemed non-commercial under an appropriate “primary purpose” test.

B. Modifying What Is a “Transactional or Relationship Message”

As provided in the Act, transactional and relationship messages are excluded from the definition of commercial e-mail and, as a result, are exempt from all but one provision of the Act. Although the CAN-SPAM Act describes with relative particularity the specific types of e-mails that fall within this category, the Commission should clarify the definition to provide expressly that members of associations are entitled to receive information related to association products or services, even when there is a charge for such goods or services, and that such messages are transactional or relationship messages.

Currently, the following e-mail messages are among those considered to be transactional and relationship messages: “Email messages that deliver goods or services, including product 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.” (*See* Section 3(17)). Because receipt of information about association products, services, events, or activities is a membership benefit that members intentionally pay for as component of their membership in an association such as American Business Media, e-mail messages that pertain to these topics should be specifically included within this definition of transactional or relationship e-mail. Members are “entitled” to receive this information under the terms of their “transaction” of joining the association. Indeed, members of an association would have legitimate objections if they did not receive announcements of an upcoming seminar or of the results of a survey offered for sale by their association.

The definition of transactional and relationship messages should also be expanded to include e-mail messages that are sent in response to a specific request for information, regardless of whether a recipient has previously opted-out of commercial e-mail messages from the sender. Since the CAN-SPAM Act has gone into effect, members of American Business Media have received requests for information from individuals who previously opted out of commercial e-mail. Responding to specific requests for information should be considered a transactional or relationship e-mail to ensure that businesses can still adequately respond to the needs of existing or potential customers who may be interested in products or services, but who previously chose to opt out of advertising material.

Additionally, as stated in Section A above, the regulations should be clarified to confirm that e-mails consisting of both transactional or relationship content and advertising material arguably within the definition of commercial e-mail are presumed to be transactional or relationship messages.

C. Modifying the 10-Business Day Time Period for Processing Opt-Outs Requests

Currently, the CAN-SPAM Act specifies that opt-out requests must be processed within ten business days. This deadline is not reasonable in light of the communication with third-parties that is often necessary to ensure that a recipient's e-mail address is removed from e-mailing lists. A reasonable time period for businesses to process opt-out requests is thirty-one days.

A longer processing period for opt-outs is needed because businesses often employ one or several third parties to send commercial e-mail messages on their behalf. Processing an opt-out request is not as simple as deleting a name from a list of the e-mail transmitter. If a recipient opts out of commercial e-mail from a particular sender, the third party e-mail service provider

must first communicate that opt-out to the sender—that is, the party who “initiated” the commercial e-mail message and whose product or service was being advertised—and then the sender is responsible for cleansing its own list and notifying all other e-mail service providers that it uses of the recipient’s opt-out.

D. Issuing Regulations Implementing the Act

1. Defining who is the “sender” of an e-mail message

The Act’s definition of sender should be clarified. Currently, the sender of an e-mail is defined as “a person who initiates [a commercial e-mail message] and whose product, service or Internet website is advertised or promoted by the message.” (Section 3(16)). The objective, reasonable recipient standard should be used in evaluating who is the sender (or who are the senders) of an e-mail. Such a standard would allow for the application of different factors to determine the senders’ identity. Commercial e-mail messages can be composed in a variety of ways. Single-sender, “plain vanilla” e-mail messages are common, but commercial e-mail messages may also be sent by multiple senders, may be sent by a single sender but contain advertising material for several unrelated companies, or may be transmitted by a third party on behalf of any number of senders. The identity of the sender should be determined based on the nature of the e-mail and the perception of a reasonable recipient as to who is the sender of the e-mail.

In the case of e-mails that contain advertising material pertaining to multiple businesses that specifically sought to have their advertisements included in the e-mail, each of the businesses whose products are advertised should be considered a sender of the e-mail (because each business would have initiated the transmission of the e-mail), provided that they are truly

“initiators” and that a reasonable recipient would perceive each of the businesses equally as a sender of the e-mail.

In the case of an e-mail that from a single sender who is advertising his particular product, such as a buying service or a retail store by featuring the products of others, the sender of the e-mail is the individual whose product is primarily advertised. For example, the organizer of a trade-related seminar might feature, in his e-mail advertising the seminar, books by several authors scheduled to attend. The regulations under the CAN-SPAM Act should clarify that, in this situation, the sender of the e-mail is the organizer of the seminar, and not the featured authors, assuming that it was the organizer only who initiated the transmission of the e-mail. Presumably, a reasonable recipient would perceive the sender as the organizer, and not the authors. As another example, an electronic supply store sending an e-mail catalog of television sets it carries is the sole sender. The television manufacturers did not “initiate” the e-mail.

The regulations should also be clarified to specifically permit e-mail messages consisting of advertising material from several senders to contain a drop-down opt-out menu so that recipients can choose whether to opt-out from future commercial e-mail from all, one, or several senders. The CAN-SPAM Act already contemplates the use of drop-down menus for commercial e-mail opt-outs in Section 5(a)(3)(B), and extending the use of drop down menus in this situation is consistent with the terms of the Act.

2. “Valid physical postal address” of the sender

To be effective against spammers, who are unlikely to disclose their valid physical postal address, regulations under the Act should not permit post office boxes as a substitute for disclosure of the sender’s physical address.

E. Subject Line Labeling

Inclusion of a subject line label such as the term “ADV” will harm senders of legitimate commercial e-mail, but will not serve as a deterrent to spammers, who will be unlikely to comply with such a regulation. Filters blocking “ADV” subject lines will block legal e-mail, while illegal spam continues to be received. Before this requirement is further considered, Congress and the Commission should allow the existing provisions of the CAN-SPAM Act and developing anti-spam technology to operate. Only after a reasonable time period has passed, giving the Commission an adequate opportunity to evaluate the effectiveness of the Act, should Congress and the Commission consider imposing a labeling requirement on commercial e-mail, beyond the “clear and conspicuous” identification information already required.

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