UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSSION

In the Matter of Advance Notice of Proposed Rulemaking and Request for Comments Relating to the CAN-SPAM Act	:	CAN-SPAM Act Rulemaking Project No. R41108

COMMENTS OF THE ELECTRONIC RETAILING ASSOCIATION

Introduction

On behalf of the Electronic Retailing Association ("ERA"), we are pleased to submit comments to assist in the Commission in connection with the CAN SPAM Act (the "Act") Rulemaking Project No. R411008. 16 CFR Part 316;69 Fe Reg 1176 (March 11, 2004).

The ERA is the leading trade association representing the electronic retailing industry. Its mission is to foster the use of various forms of electronic media - television, Internet, telephone, radio - to promote goods and services to consumers. The ERA has over 450 member organizations throughout the world, approximately 275 of which are domestic companies. Members include a wide range of entities, such as advertising agencies, direct response marketers, telemarketers, Internet and "brick and mortar" retailers, fulfillment service providers and television shopping channels.

Executive Summary

Although ERA believes that both the government and the industry must respond to the growth of unwanted commercial e-mail messages, it also believes that such actions must be carefully calculated to permit for the continued online transmission of desired commercial e-mail messages and editorial content. Accordingly, any regulation promulgated by the Commission pursuant to the Act must carefully balance the Congressional intent to curb unwanted and

fraudulent e-mail messages against the interests of industry and consumers to preserve the e-mail channel as an efficient and convenient mode of communication. ERA believes that the Commission's primary objective in crafting rules pursuant to the Act should be to provide clear objective standards that will make it easy for the vast majority of legitimate marketers to comply with the Act and create reasonable expectations among consumers. In particular, as discussed in greater detail below, ERA believes that:

A. The "primary purpose" of an e-mail message should be determined using a "but for" test, in which an e-mail message would only be deemed to be a commercial e-mail message if the message would not have been sent but for the inclusion of the advertising and/or promotional materials contained therein.

B. The definition of "transactional or relationship message" should be expanded to include additional categories of messages, such as e-mail messages sent in response to consumer inquiries, e-mail messages sent with consumer consent and e-mail messages sent to existing customers regarding the products or services purchased by the consumer from the sender.

C. The ten business day requirement to honor opt-out requests should be extended to thirty one days to lighten the burden imposed on senders and to decrease the security and privacy risks that may be created by the frequent transfer of consumers' e-mail addresses.

D. Forward to a friend e-mail messages should not be considered to be commercial e-mail messages.

E. The Commission should clarify the obligations of multiple senders of a single e-mail message. In particular, where a single e-mail message contains advertising or promotional materials for multiple parties, the Commission should clarify that not every advertiser should

be required to comply with the obligations imposed upon "sender" under the Act, including the obligations to post its valid physical postal address and honor opt-out requests.

F. The use of a valid post office box or commercial mail drop should be allowed to satisfy the Rule's valid physical postal address requirement.

G. The Commission should adhere to the "clear and conspicuous" standard for disclosing the commercial nature of an e-mail message and should not impose a fixed labeling requirement such as ADV.

H. The Commission should establish a time period of no longer than three years during which opt-out requests should be honored.

Comments

1. Primary Purpose Standard

As the Commission is aware, e-mail has become an extremely important and popular means of communication. Because of its low cost and high speed, it is an efficient and effective tool to disseminate information, whether factual, editorial or commercial. These benefits must be carefully weighed against the annoyance of unwanted e-mail messages which threaten the very efficiency and effectiveness of this medium. We, therefore, believe that the "primary purpose" criteria used by the Commission to determine what constitutes a commercial e-mail message should be narrowly tailored and clearly articulated to avoid stifling legitimate communications.

In the ANPR, the Commission set forth five proposed tests to determine the primary purpose of an e-mail message. We are concerned that these proposed tests are too vague and too subjective to provide meaningful advice to the industry or consumers. For example, reasonable people can differ as to the net impression conveyed by any communication or which elements of

an e-mail message are more important than others. We are also concerned that such imprecise and open-ended tests will create further confusion in the marketplace and scare legitimate companies from fully communicating with its customers via e-mail.

For these reasons, we recommend that the Commission adopt a clear-cut standard to determine the primary purpose of an e-mail message. In addition to the extent that Congress has adopted a "primary purpose" test for determining whether e-mail communications will be subject to the Act, Congress has evidenced a clear intent to have the standard based on the intent of the sender rather than on the perspective of the recipient. Accordingly, ERA would suggest that an appropriate standard for the Commission to consider, which would be consistent with the Congressional purpose, and provide clear guidance to the industry would be a "but for" test. The but for test is simple. Under this standard, the e-mail would not be deemed to be primarily for a commercial purpose unless if would not have been sent but for the advertising component. Under this standard, an informational or editorial e-newsletter which includes advertisements and/or promotions would not be considered to be a commercial e-mail message if the e-newsletter would have been sent irrespective of whether any particular advertising and/or promotional materials were included. If, however, the e-newsletter would not have been sent without the particular advertisements and/or promotions therein, then, under the but for standard, it would be considered to be a commercial e-mail message. It is important to note that the mere fact that advertiser support is needed to cover the costs of administering and sending the newsletter would not be sufficient under the "but for" test to render the communication primarily commercial in nature. The test would be whether the newsletter would be sent irrespective of any particular advertiser's marketing messages.

The same analysis should apply to e-mail messages that would not be sent but for the transactional or relationship nature of the message. For example, an e-mail message to existing customers regarding billing or account information, or the product or service that was ordered, or for bona fide customer service purposes may also contain advertising messages to help cover the costs of the communication. The mere presence of those advertisements in an otherwise transactional or relationship message should not render that message primarily commercial in nature. Again, the test should be whether the e-mail message would not have been sent "but for" the advertising component. If the e-mail message would have been sent irrespective of the advertising component, it would not meet the "primary purpose" test.

We believe that this bright line test could be easily applied by both the Commission and marketers to determine whether their e-mail messages must comply with the Rule's commercial e-mail requirements. As noted in the ANPR, e-mail messages often include advertisements or messages from multiple parties. These parties are typically not involved with the creation of the e-mail message and, thus, would likely not have the opportunity to assess the net impression or balance the various elements of the message. Being so removed from the content development, it also difficult for these parties to comply with the Act if the e-mail message is later determined to be a commercial e-mail message. These parties, however, would be in a position to determine whether the e-mail message would be sent without their advertisement and, thus, easily apply the but for standard.

2. Transactional Or Relationship Message

Five categories of e-mail messages are designated as "transactional or relationship messages" in the Act. These specifically include messages to facilitate, complete or confirm a transaction; to provide warranty, product recall, safety or security information; to notify about a

change in terms or features, standing or status, or account balance; to provide information related to an employment relationship or related benefits; and to deliver goods, services and product updates and upgrades.

These types of e-mail messages, all of which relate to prior transactions or established and ongoing relationships, are considered to fall outside of the scope of commercial e-mail messages and, thus, are exempt from most of the Act's substantive requirements. While ERA agrees with the identified categories of transactional or relationship messages, ERA believes that additional types of messages which relate to previously established relationships or transactions should be created.

We believe that responses sent to consumer's requests or inquiries should be excluded from the definition of a commercial e-mail message. A seller should be able to respond to a customer who has contacted the seller and requested specific information without being subject to the substantive provisions of the Act. Clearly, such an e-mail is neither unwanted nor unsolicited.

We believe that sellers should also be able to communicate with consumers who have opted in to receive such communications. Again, such communication are neither unwarranted nor unsolicited. Finally, we believe that the category of transactional or relationship messages should be expanded to include any e-mail communications relating to the product or service which formed the basis of the relationship between the consumer and the sender. While the Act recognizes certain categories of communications which would be considered transactional or relationship in nature, the ERA believes the intent of the statute would be to expand the definition of transactional or relationship messages to all such communications rather than simply those specified in the Act.

3. Time-Frame To Honor Opt-Out Requests

The Act currently requires that opt-out requests be honored within ten (10) business days. In light of the burden imposed on senders and the possible security and privacy risks to consumers of frequents transfers of their e-mail addresses, ERA request that the period to honor opt-out requests be extended to thirty one (31) days.

When sending commercial e-mail messages, companies typically send them directly to consumers or through a third-party publisher which sends the messages on their behalf. Companies often use a third-party to send e-mail messages on their behalf because they do not have the resources and/or personnel to perform these services internally. Where third-parties are used, opt-out requests are usually submitted to those third parties who must then transfer the requests to the companies.

The requirement that opt-out requests be transferred and honored within ten (10) business days imposes a significant financial and logistical burden on companies, especially on companies which hire third-parties to provide e-mail services because the companies do not have such capabilities themselves. In particular, many companies do not have e-mail lists and rely on third-party affiliates programs' lists. In order to comply with the Act's opt-out requirement, these companies now need to create an e-mail suppression list and hire personnel to maintain and update this list and scrub it against future proposed mailing lists. For these reasons, ERA believes that thirty one (31) days is a much more practical and cost-effective time frame for marketers and a reasonable time frame for consumers.

In addition, ERA notes that the Telemarketing Sales Rule provides a thirty day time period for honoring do-not call requests. ERA believes that providing a consistent time period for opt-out requests will create greater consumer understanding and certainty in the marketplace.

4. Forward To A Friend E-Mail Messages

Forward to a friend e-mail messages are messages which one individual sends to another. Sometimes these messages are forwarded because people think that their friends would be interested in the advertised products or services. Other times these messages are forwarded because the advertiser provided an incentive for people to forward the message to friends and family who they reasonably believe would be interested in the advertised products or services. Regardless of the motivation, ERA believes that forward to a friend e-mail messages should be specifically excluded from the definition of a commercial e-mail message.

The Act defines a commercial e-mail message as a message "the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet web site operated for a commercial purpose)." Unlike a commercial e-mail message, which is sent by or on behalf of a company to a consumer, a forward to a friend e-mail message is sent directly from one individual to another. The primary purpose of a forward to a friend e-mail message is to benefit a friend by alerting them to a product or service in which they are likely to be interested or to take advantage of an offered incentive. As such, a forward to a friend e-mail is most analogous to a personal e-mail which includes a link to a web site or web page.

Deeming the underlying advertiser as the sender of the forward to a friend e-mail message raises a number of logistical issues. First, the advertiser has no control over the recipients to whom each consumer forwards the messages. It would, therefore, be impossible to check each recipient's e-mail address against the company's internal opt-out list. Second, the individuals that forward the e-mails to their friends do not have technological systems in place to provide for an opt-out mechanism. Third, recipients who receive an e-mail message from an

individual, as designated in the "from" line, would likely be confused by the inclusion of a company's opt-out and physical postal address in a personal e-mail from a friend.

In addition to the confusion and logistical hurdles described above, the application of the Act's substantive requirements to forward to a friend e-mail messages does not address the purpose of the Act. The purpose of the Act is to protect consumers from unwanted e-mail messages. A specially selected message sent from one friend to another is, however, likely not unwanted. In fact, it appears that such a message would presumably be more targeted to an interested audience based on the friends' personal knowledge of one another. Not only do recipients of a pre-screened forward to a friend e-mail message benefit from receiving information in which they are interested, but marketers also benefit by having the message sent to targeted customers in a highly economical and effective manner.

5.Obligations Of Multiple Senders Of A Single E-Mail Message

In light of the mass confusion regarding the obligations of multiple senders of a single e-mail message, we request that the Commission issue clear guidance to the industry on this matter.

The Act defines a "sender" as the "person who initiates such a message and whose product, service or Internet web site is advertised or promoted by the message." "Initiate" is defined as "to originate or transmit such message or to procure the origination or transmission of such message." The Act states that "more than one person may be considered to have initiated a message," but does not expressly state whether there can be more than one sender per message. The Act, however, appears to contemplate that more than one person can be the sender of a single e-mail message without specifically addressing each sender's obligations in such a scenario.

As the Commission noted in its ANPR, it is common industry practice to send a commercial e-mail message on behalf of multiple parties, such as an advertisement for a conference which includes advertising for the conference's sponsors. Similarly, a company may send an electronic newsletter which includes multiple advertisements. According to the Act's definitions, all of these parties (i.e., conference promoter, conference sponsors, newsletter company and business partners) could be deemed senders and, thus, subject to the opt-out and valid physical postal address provisions of the Act.

We believe that it would be extremely burdensome on industry and potentially confusing for consumers to treat each of the multiple advertisers within a singe e-mail message as a "sender. The e-mail message would have to be scrubbed against multiple suppression lists and each advertiser would be bound by the internal opt-out list of each of the other advertisers in the e-mail. Additionally, including multiple opt-outs in a single message would likely be very confusing to consumers. Additionally, ERA is concerned that frequent sharing of suppression lists could create privacy concerns. For example, if multiple companies are deemed to be senders of a commercial e-mail message, consumers will be forced to wade through long, and possibly confusing, opt-out menus and consumers might inadvertently submit an opt-out request to an unintended party. Alternatively, consumers may be forced to submit a general opt-out request to all participating companies which may include companies from which they actually wish to receive e-mail communications. Commercial e-mail messages would also be required to include a lengthy and cumbersome list of physical postal addresses, which is distracting for consumers.

Likewise, if multiple companies are deemed to be senders of a commercial e-mail message, the e-mail address mailing list would have to be scrubbed against each participating

company's suppression list prior to sending the e-mail message. The e-mail message could not be sent to potential recipients whose e-mail addresses appears on even one of such companies' suppression lists. Not only is this scrubbing of multiple lists very costly and burdensome for advertisers, but they would incur additional costs communicating and honoring the opt-out requests of other affected marketers. In addition, such a broad scrubbing would prevent consumers from receiving communications from parties to whom they had not sent opt-out requests.

Accordingly, we believe that the sender, as defined by and subject to the provisions of the Act, should be limited to the primary sender of each message, i.e., the entity whose message predominates and which is primarily responsible for creating and controlling the message. Using a standard similar to the "primary purpose" test discussed above would provide much needed guidance to the industry. Criteria to determine the primary sender should include: (a) whose goods or services are predominantly advertised in the e-mail message; (b) who initiated or procured the initiation of the e-mail message; (c) whose name appears in the "from" field of the e-mail message; and (d) who was responsible for selecting the list of recipients to receive the e-mail message. Once determined, the primary sender would be the only entity required to provide an opt-out mechanism and physical postal address, and to honor opt-out requests.

To illustrate by using the examples discussed above, only the conference promoter and newsletter company would be deemed to be the primary senders of their respective conference announcement and newsletter e-mail messages using this test. The incidental advertising for the conference sponsors and business partners would not raise them to the level of senders. Therefore, only the conference promoter and newsletter company would be subject to the Act's requirements. Similarly, an affiliate program which sends e-mail on behalf of Company X to

advertise Company X's products or services would not be deemed to be the sender. Rather Company X would be the primary sender and solely responsible for complying with the provisions of the Act.

It is possible, however, that there could still be situations – such as a true joint-promotion – where multiple parties actively participate in the creation of the e-mail campaign in which both parties would be deemed to be the "sender."

6. Valid Physical Postal Address

ERA does not believe that the disclosure of the actual addresses of companies' places of business in commercial e-mail messages would provide consumers with more benefits than those provided by the disclosure of companies' post office boxes and commercial mail drops, and fears the potential costs, interruptions to everyday work, and privacy and security risks which such disclosures could bring. ERA, thus, believes that post office boxes and commercial mail drops should be expressly added to the definition of the valid "physical postal address" which must appear in every commercial e-mail message.

As customers often call or write to companies in response to advertisements, it is not unlikely to expect that consumers would go a company's place of business to inquire about an advertisement in a commercial e-mail message. Many companies which advertise via commercial e-mail messages are not set up to receive in-person customer visits. These companies would be forced to hire additional employees and conduct extensive customer training for employees in anticipation of potential customers' visits, at a potentially significant financial cost and risk of disruption to everyday operations.

Moreover, many small companies are operated from the owners' homes. For privacy and security reasons, it is understandable that these owners would be reluctant to disclose their home addresses in every commercial e-mail sent on behalf of their business.

The provision of a post office box or commercial mail drop provides consumers with an additional method to contact businesses without raising the financial, privacy and security risks discussed above. We believe the potential risks associated with disclosing a companies' actual place of business clearly outweigh the lack of customer benefits associated with such disclosures and, thus, support the use of a post office box or commercial mail drop instead.

7. ADV Label

The ERA strongly opposes a requirement that an ADV or similar label be required on the subject line of a commercial e-mail message. Such a requirement is not likely to reduce spam sent by fraudulent marketers but could severely impede the efforts of legitimate marketers to communicate with consumers via the e-mail channel. The ERA notes that the Act already requires the advertising nature of the message to be clearly and conspicuously disclosed to consumers. The "clear and conspicuous" standard is a familiar standard to the industry and one with which they can easily comply. ERA is concerned that if the ADV or any other identifier is required on a label, ISP's will simply establish a mechanism to block all messages containing such a label. This will effectively block consumers from receiving numerous e-mail messages that they may actually find welcome and desirable. Conversely, experience with state laws containing a similar requirement has shown that fraudulent marketers do not adhere to these labeling requirements. Thus, imposing such a labeling requirement on a nationwide basis will

severely impede the free flow of e-mail communications while likely resulting in little consumer benefit.

8. Length of Maintaining Opt-Out Requests

ERA would urge the Commission to consider a time limit for maintaining opt-out requests. Due to the ease and low cost of obtaining e-mail addresses, such addresses change frequently. ERA is concerned that without a reasonable time limit for maintaining opt-out requests, the size of the opt-out list against which e-mails will have to be scrubbed will grow exponentially, increasing the burden on industry. It is likely, however, that with the passage of time, the list will be increasingly populated by e-mail addresses that are no longer in use or functional. Thus again, absent some reasonable time limit such as two or three years, the industry will be faced with a severe burden without any corresponding benefit to the consumer.

Conclusion

We appreciate the opportunity to submit these comments on behalf of our members. ERA looks forward to working with the Commission to make sure that the Rules fairly balance the interests and needs of both the recipients and senders of e-mail messages. If you have any questions or concerns regarding these comments or would like additional information about our organizations, please do not hesitate to contact us.

Respectfully submitted,

Barbara Tulipane
President & CEO
Electronic Retailing Association
2101 Wilson Boulevard, Suite 1002
Arlington, VA 22201

Counsel:

Linda A. Goldstein, Esq.
William M. Heberer, Esq.

Lindsay Schoen, Esq.
Manatt, Phelps & Phillips LLP
1675 Broadway
New York, NY 10019

80300171.2