Before the Federal Trade Commission
Washington, D.C. 20580

Comments of the International Council of Online Professionals

Definitions, Implementation and Reporting under the CAN-SPAM Act
Project No. R411008

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The International Council of Online Professionals is pleased to be presented this opportunity to comment on behalf of our members on the proposed rulemaking contemplated by the Federal Trade Commission under the Controlling the Assault of Non-Solicited Pornography And Marketing (CAN-SPAM) Act. The International Council of Online Professionals is a membership organization composed of the owners of very small enterprises (primarily non-employer businesses) whose business operations are conducted entirely or predominantly on the Internet. The mission of the organization is to promote the legal, ethical and responsible operation of business enterprises among its members.

We applaud the efforts of Congress to address the problem of unsolicited commercial e-mail through this legislation. However, we are concerned about the possibility of unintentionally burdensome regulations that will have a particularly egregious impact on the millions of very small businesses online. In recent years, the number of non-employer businesses has grown dramatically. The number of non-employer businesses in the U.S. grew by 10% between 1997 and 2001, and they comprised 75% of all U.S. businesses in 2001, up from 70% in 1997 (U.S. Census Bureau). Much of that growth has been a result of new Internet-based firms being launched by low-income micro-entrepreneurs moving from Welfare to work, disabled individuals, single parents with child care issues, and the very large numbers of people (particularly those close to retirement age) who desperately need to augment their income.

Not only are these small online businesses pervasive, they are also successful. According to a report published by Forrester Research in 2002, unbranded “Mom and

Pop" small businesses (composed primarily of micro-businesses) had captured 31% of online retail market share, holding their own as they went toe-to-toe with powerhouse companies like Amazon.com, eBay and the online incarnations of Wal-Mart and Target.

There can be no denying that the economic activities of all these citizens are good for the economy and for the country, in terms of increased flow of cash into distressed communities, increased federal tax revenues, and decreased dependence on public assistance. We do not believe it is the intention of Congress to interfere with the ability of these firms to operate legitimate commercial enterprises online, but we are concerned about the exigencies to which they will be put by some of the provisions of the CAN-SPAM Act.

Clarify the Status of E-mail Newsletters under CAN-SPAM

We believe the Commission needs to clarify and specify exactly what will be required for compliance with CAN-SPAM particularly with respect to publishers of content-based e-zines, newsletters, or journals (newsletters) that are delivered through electronic mail. To the extent that these newsletters are typically delivered to consumers who have asked to receive them (and, in many cases, have been asked to confirm that request, i.e., "confirmed opt-in" subscribers), they should be considered transactional or relationship messages as defined by the CAN-SPAM Act. Since the legislation does not specify electronic newsletters in any way, the regulations should make that point clear.

However, there are other issues in connection with e-mail newsletters that need serious consideration. Most of those e-mail newsletters are ad-supported publications, using a business model that is almost universal in the world of periodical publications. Some of the advertisements appearing in e-mail newsletters promote goods or services offered by the publisher of the newsletter, while other advertisements appear through the media buys of businesses that are not affiliated with the publisher.

According to the provisions of the CAN-SPAM Act, a company that has received a request from a consumer not to receive further promotional e-mail may not initiate "a commercial electronic e-mail that falls within the scope of the request." The CAN-SPAM

Act also prohibits anyone acting on behalf of that company from doing so. The question in the minds of many e-mail newsletter publishers is this: what happens if such a company buys ad space from me?

As matters currently stand, the solution that has been proposed to deal with this involves the use of suppression lists. At the time of making the media buy from the newsletter publisher, the advertiser would be required to provide the publisher with a list of the e-mail addresses of consumers who have asked to be removed from their e-mail marketing list. The publisher would then have to cross-reference his or her own subscriber list to ascertain whether any of their subscribers must be blocked from receiving that ad. This would generate a sub-list for the publisher of subscribers who would receive their regular e-mail newsletter sans the ad from the subject company.

In addition to the privacy issues involved here, it isn't difficult to perceive how such a system could easily get out of hand. Imagine a non-employer business that publishes a weekly newsletter in which they typically place three advertisements per issue. This publisher would be required to check his own subscriber list against the removal lists of each of his advertisers, and create sub-lists to accommodate the wishes expressed by those consumers. If any of those consumer e-mail addresses reside on more than one advertiser list, the publisher would be required to further segment that weekly mailing. It is entirely possible that this one-person business would have to create eight different versions of his newsletter, and send it out to eight different sub-lists, every week, in order to be sure he is in compliance with CAN-SPAM (see chart below).

The Weekly Widget: E-mail Newsletter Lists

List 1	List 2	List 3	List 4	List 5	List 6	List 7	List 8
Ad A	Ad A	Ad A		Ad A			
Ad B	Ad B		Ad B		Ad B		
Ad C		Ad C	Ad C			Ad C	

While it is reasonable to ask newsletter publishers to confirm that consumers are willing to receive an ad-supported publication at the time they subscribe, it is not reasonable to ask them to have to go through these sorts of contortions for every issue of

their newsletter. For a one-person publishing operation, such CAN-SPAM compliance chores would easily double the amount of time it takes to prepare each issue of their newsletter for publication.

In addition to the lost productivity, newsletter publishers would stand to lose significant advertising revenue from this scenario. It is unlikely that any company or individual purchasing ad space in an e-mail publication would willingly pay for anything more than the reach of the particular sub-lists in which their advertisement will appear, which will inevitably reduce these publishers' advertising revenues. To make up for those lost revenues, they would be required to sell more ad space in their publications, thereby adding to their compliance burden.

Another point in urgent need of clarification has to do with the requirement imposed by the legislation that the "sender" of commercial electronic mail include the company name and a physical address in the e-mail in question. In the case of ad-supported newsletters sporting multiple advertisements, the e-mail in question would have multiple senders, as that term is defined in the legislation. Thus, compliance would entail the publisher providing the required contact information for own their company and for the company of each of their advertisers. In the event that a determination is made that e-mail newsletters are subject to these provisions of the CAN-SPAM Act, any regulations the Federal Trade Commission writes should specify that newsletter publishers are only required to include contact information for their own firms.

According to the report filed on this legislation by the Senate Committee on Commerce, Science and Transportation, the purposes of the CAN-SPAM Act are very specific. The legislation seeks to create "a Federal statutory regime that would give consumers the right to demand that a spammer cease sending them messages, while creating civil and criminal sanctions for the sending of spam meant to deceive recipients as to its source or content."

As a general rule, legitimate electronic newsletter publishers operating their publications according to current industry standards neither attempt to deceive their subscribers about the origins of their publications (quite the contrary, in fact) nor hold them hostage when they ask to unsubscribe. Thus, it would appear that such publications are not the actual target of the CAN-SPAM Act. As e-mail newsletters are delivered to

consumers who subscribe to them (i.e., ask to receive them), we believe the Commission, in accordance with its mandate, should issue rules confirming these messages are not commercial messages and are to be treated as transactional or relationship messages.

Assessment of the Effectiveness of CAN-SPAM

It seems clear that the CAN-SPAM Act does not seek to halt all unsolicited commercial e-mail but, rather, to establish the "rules of the road" for the purposes of making such e-mail easier to identify and to end the various deceptive business practices of many of those who send it. It seems equally clear that part of the task of both legislators and regulators is to accomplish these ends without impairing the ability of legitimate business owners to do business online. We believe that any assessment of CAN-SPAM would be profoundly incomplete if it did not include an evaluation of its failure to protect the online small businesses the way it protects giant ISPs such as Microsoft and America Online.

Recently published research reports that 19% (or possibly more) of requested electronic mail is not being delivered, becoming the so-called "collateral damage" of the war on spam. Since ISPs have no statutory obligation to deliver electronic mail, including electronic mail that consumers have paid to receive, online micro-business owners often experience considerable difficulty in getting necessary transactional e-mail past the ISP spam filters and block lists.

Payment receipts and newsletters regularly trip spam filters faster than ads for Viagra. As often as not, the senders of these transactional messages are not notified of a bounced or blocked e-mail, and have no idea that their message was not delivered. There are also countless stories of online micro-business owners who have been unjustly and sometimes maliciously reported as spammers and were summarily added to the block lists maintained by private companies such as SpamCop and SPEWS.

No attempts are made to verify the validity of these complaints. In fact, these private anti-spam companies often add an IP address to their block lists solely because it is numerically close to that of an alleged spammer.

The result of such interference is vastly more serious than mere inconvenience. Publishers of digital products need to be able to deliver those products to purchasers and subscribers. Online retailers and service providers need to be able to contact customers about their purchases on a regular basis. Non-delivery of products or services purchased by consumers is a federal offense under the Federal Trade Commission Act, subjecting the merchant to fines, incarceration or both.

In addition to possible criminal and civil liability, micro-business merchants face frozen accounts and charge-back fees when consumers complain to merchant account banks and payment processing providers about non-delivery of product. If enough of those complaints are made against a particular firm, that firm will lose their payment processing capabilities altogether, making it almost impossible for them to continue operating their business online.

When one adds the loss of good will to this scenario, it is crystal clear how reputable online micro-business owners (regardless of how ethical their business operations are) can be and are being damaged by activities and circumstances over which they have absolutely no control. They have no defense against such an onslaught.

It would be difficult to overstate the seriousness of the non-delivery problem, and it is a problem that should have been addressed with this legislation. Now that the federal government has elected to regulate electronic mail, there is no further need for vigilantes with block lists. There can be only one sheriff in town. At the very least, block list operators should be held accountable for their actions. Legitimate business senders of transactional or relationship messages that are denied delivery face considerable criminal and financial consequences, but have no legal remedy available to them under CAN-SPAM.

This is one of the most serious oversights in the legislation. We believe that newsletter publishers and online retailers of other goods and services should have some form of recourse or remuneration when ISPs prevent them from delivering product or otherwise communicating with customers. Alternatively, online publishers and retailers should be granted some form of immunity from legal and financial liability if they are unable to deliver product or to communicate with customers due to circumstances beyond their control.

We note that Congress crafted CAN-SPAM in such a way as to specifically protect the ability of ISPs to continue to do business without suffering any risk of liability or culpability from the activities of spammers, providing only that ISPs not knowingly condone or support the activities of spammers. But if Congress is going to protect ISPs from the consequences of delivering electronic mail, then Congress should also protect micro-businesses from the consequences of non-delivery of electronic mail. The legislators have written these rules and asked us to abide by them, and we are perfectly willing to do so. We ask only for a level playing field.

Comments Regarding a "Do-Not-E-mail" Registry

The Commission requests comments regarding the implementation of a "Do-Not-E-mail" registry that would be similar to the "Do-Not-Call" registry recently inaugurated by the Commission.

We believe that such a registry, in addition to being ineffective, would be overly burdensome to online micro-businesses. The constant list-scrubbing requirements of the registry would be beyond the technological capabilities that most online micro-businesses would possess or could hire.

Perhaps more to the point, we believe that modeling a "Do-Not-E-mail" registry after the "Do-Not-Call" registry is faulty logic. The concept, as applied to telemarketing calls, is not so easily transferable to electronic mail. Telemarketers have only one reason for calling consumers. The uses of electronic mail, for both businesses and consumers, are so widely varied that a blanket prohibition against sending e-mails from a business to any given e-mail address is not rational.

For these reasons, we believe the "Do-Not-E-mail" registry would be ineffective against unsolicited commercial e-mail, as well as being a waste of Commission resources.

Recommendations for Compliance with Regulatory Flexibility Act

In the context of the Federal Trade Commission's statutorily mandated obligations under the Regulatory Flexibility Act, clearly the situation in which the opt-out provisions of the CAN-SPAM Act places e-mail newsletter publishers constitutes an unreasonable burden on small businesses, as the illustration above demonstrates. For the purposes of regulating the activity of these publications to accomplish the ends of the CAN-SPAM Act while reducing the regulatory burden on those small businesses, we submit the following suggestions:

1. Publishers of electronic newsletters delivered by e-mail should be required to have subscribers confirm the granting of affirmative consent (the method of confirmation in accordance with RFC 3098 as published by the Internet Engineering Task Force) as their method for subscriber acquisition
2. E-mail newsletter publishers of ad-supported publications should place a clear and conspicuous notice to consumers advising them that the publication routinely contains advertisements, at the point of acquisition of consumer e-mail addresses. Publishers can have the option of maintaining two separate lists (one for an ad-free publication and one for the regular publication), but they should not be required to do so.
3. E-mail newsletter publishers of ad-supported publications should be required to include their company name and contact information as specified in Section 5(a)(5) of the CAN-SPAM Act, but should not be required to include the contact information for each of their advertisers for every issue of their publication.
4. E-mail newsletters should be considered transactional or relationship messages and should be exempted from the provisions of the CAN-SPAM Act that concern commercial electronic mail, provided they are published in accordance with the rules suggested above. In the event the Commission does not find that free e-mail newsletters should be considered transactional or relationship messages, the Commission should recognize that paid subscription e-mail newsletters are transactional messages under the CAN-SPAM Act.

Conclusion

The International Council of Online Professionals believes it is important for the Federal Trade Commission, in formulating its rules for the implementation of the CAN-SPAM Act, to avoid making unreasonable and overly burdensome demands of small business owners operating their firms online. Electronic newsletter publishers, in particular, stand to suffer an extraordinary regulatory burden if the Federal Trade Commission does not take the appropriate steps now to clarify the status of the e-mail newsletter in the context of the CAN-SPAM regulatory regime. We trust the recommendations above will help the Federal Trade Commission to formulate its regulations in a way that will accomplish the desired ends of the CAN-SPAM Act while maintaining a climate in which online micro-businesses can continue to thrive.

J.L. Scott, Ph.D., Director
International Council of Online Professionals
http://www.i-cop.org
1327 Hernandes Drive
Orlando, FL 32808
407-523-0689

John Glube
Founding Member
Legal Analyst

Dawn Rivers Baker
Founding Member
Government Relations