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

In the Matter of	)	
	)	
Definitions, Implementation, and	)	RIN 3084-AA96
Reporting Requirements Under the	)	
CAN-SPAM Act	)	

COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION ON THE CAN-SPAM ACT RULEMAKING, PROJECT NO. R411008

Daniel L. Brenner
Loretta P. Polk
Counsel for the National Cable & Telecommunications Association
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20554

June 27, 2005

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

In the Matter of	)	
	)	
Definitions, Implementation, and	)	RIN 3084-AA96
Reporting Requirements Under the	)	
CAN-SPAM Act	)	

COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association ("NCTA"), by its attorneys, hereby submits its comments in the above-captioned proceeding on the implementation of provisions of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act"). NCTA is the principal trade association of the cable television industry in the United States. Its members include cable operators serving over 90 percent of the nation's cable television subscribers. In addition to providing multi-channel video programming services, NCTA's cable operator members provide high-speed Internet services and other broadband services. NCTA also represents over 200 cable programming networks and suppliers of equipment and other services to the cable industry.

INTRODUCTION

The CAN-SPAM Act imposes new requirements on the use of commercial electronic mail messages whose primary purpose is the commercial advertisement or promotion of a commercial product or service. The Commission has adopted final rules with regard to the labeling of sexually-oriented commercial e-mail and criteria for determining when the primary

purpose of an e-mail message is commercial.[1] In the Notice of Proposed Rulemaking ("NPRM"), the Commission seeks comment on issues related to certain definitions and other provisions and proposes regulations pursuant to its discretionary authority under the Act.

NCTA's interest in this proceeding emanates from some of our member companies who periodically conduct e-mail marketing to their customers and, in some cases, to potential customers to interest them in the company's products or services. Some cable companies, for example, send their customers a monthly newsletter via e-mail containing some marketing content. Others periodically send out discount coupons or other promotional material by e-mail. Cable operators have a long tradition of respecting consumer privacy, having operated under federal privacy rules and regulations since 1984 pursuant to the Communications Act.[2] Unlike true "spammers," who engage in false and misleading activities, or otherwise flood consumers' in-boxes with unsolicited or deceptive commercial content, cable companies have acted responsibly in their on-line communications with customers.

We applaud the Commission's effort to combat illegal spam, but urge it to be continually mindful of the potential burden of such rules on legitimate businesses, such as cable television systems, which recognize the importance of honoring consumers' privacy concerns.

NCTA's comments address four distinct issues in response to the Commission's NPRM: (1) the need for the full ten-business-day period prescribed in the Act for honoring a recipient's opt-out request, as opposed to shortening it to three business days; (2) the expiration of opt-out requests after five years; (3) the "forward-to-a-friend" mechanism as a routine conveyance, unless payment is made to the recipient or there is other consideration involved; and (4) debt

---

1 70 Fed. Reg. 3110 (Jan. 19, 2005).

2 47 U.S.C. § 551.

collection messages as either non-commercial messages or transactional or relationship messages, and therefore not subject to CAN-SPAM requirements.

I. THE TIME FRAME FOR PROCESSING OPT-OUT REQUESTS SHOULD BE TEN DAYS, AS COMPLIANCE WITH A THREE-DAY WINDOW IS BURDENSOME FOR MANY COMPANIES AND PROVIDES LITTLE OR NO CONSUMER BENEFIT

As noted by the Commission, the record in the earlier Advance Notice of Proposed Rulemaking proceeding regarding the appropriate deadline for effectuating a consumer's opt-out request, was divided between industry members, who favored maintaining the ten-business-day opt out period or lengthening it, and consumers, who favored shortening the period. The parties who urged a shorter deadline for compliance argued that the Act's ten-business-day time frame is "unnecessarily generous, given the advanced state of technology used to process opt-out requests."[3] Some commenters expressed concern that under the current ten-business-day rule, senders would be able to "mail bomb" recipients for ten days during the opt-out period.

The Commission found no factual evidence that such practices actually occur, or that they would be avoided by a shorter opt-out processing period. It nevertheless concluded that "the fact that many commenters already are able to process opt-out requests virtually instantaneously supports the conclusion that the opt-out period can and should be shortened."[4] It proposes adopting a three-business-day opt-out period in the interest of protecting consumers' from unwanted commercial e-mail.

The Commission recognizes that some entities' business practices or technology may not allow for instant removal of e-mail addresses, but it finds that a three-day processing window is adequate time to allow for processing opt-out requests without undue burden. This assumption

[3] NPRM, 70 Fed. Reg. 25426, 25443.

[4] Id. at 25444.

fails to take into account that compliance costs will be quite burdensome for some companies. Some cable companies, for example, rely on third party vendors.[5] These vendors handle all e-mail marketing for the companies, process opt-out requests and manage the suppression list. The cable operator may be able to input a customer's opt-out request in one to two business days in its own internal database but the third party vendor that provides a variety of targeted marketing and advertising services may take up to 8-10 business days to complete the processing.[6]

As the Commission notes, the technology is available to shorten the ten-day turnaround but modifying contractual arrangements to speed up the process, at this time at least, is costly. As Charter Communications explains in its comments, the cost to Charter for altering its contract with its vendor for the processing of data consistent with a three-business-day opt-out rule would amount to over $100,000 a year. We also understand that other companies have installed equipment and put systems in place to conform to a ten-business-day time frame. They too would incur significant costs if required to meet a three-day deadline.

Moreover, as the record demonstrates, some commercial e-mail involves multiple parties in which three business days is an impractical amount of time to ensure compliance across-the-board.

The cost to synchronize multiple e-mail databases, potentially involving third party vendors, in order to accommodate a three-day opt-out period seems particularly unwarranted given that most legitimate businesses do not, or rarely, send e-mail to customers more than once in a ten-day period. The entities engaging in real "spam", particularly those devising schemes to

---

[5] See e.g., Comments of Charter Communications, Inc. filed in this proceeding.

[6] For a more detailed description of the opt-out process involving third party marketing vendors, see e.g. Comments of Charter Communications, Inc.

disguise their identity and providing false or misleading subject headings, are not likely to adhere to opt-out time frames regardless of what deadline is adopted by the Commission.

Moreover, there is no evidence that the ten-day period has been abused or that legitimate companies see it as an opportunity to bombard customers with more e-mails before the door closes.

The statute speaks in terms of no more than "ten business days" for honoring opt-out requests.[7] Given Congress' acceptance of this time frame and the challenge for many responsible companies to meet a less than ten-day window for a variety of legitimate business reasons, the FTC should provide for the full ten business days.

If the Commission were to find that the ten-day opt out period is abused or otherwise interferes with consumer's privacy rights in a meaningful way, it could modify the rule. But with very little benefit to consumers and substantial cost to businesses to meet a three-business-day opt-out period, it is reasonable for the Commission to implement the statute's permissible ten-business-day window. This would effectively balance the interests of consumers in protecting their privacy and desire not to receive unsolicited commercial messages with the legitimate business needs of many companies who lack the capability to process opt-out requests in less than 10 business days.

II. COMPANIES SHOULD BE REQUIRED TO MAINTAIN OPT-OUT REQUESTS FOR ONLY A MAXIMUM OF FIVE YEARS

In the Notice, the Commission decided not to propose a time limit on the retention of opt-out requests. Under this approach, companies would be required to keep opt-out e-mail addresses on their suppression lists indefinitely. We urge the Commission to reconsider this

[7] 15 U.S.C § 7704(a)(4)(A).

approach, and instead limit how long opt-out requests remain in effect to no more than five years.

As the Commission notes in a similar context, the national do-not-call registry, the rules limit the duration for registration to five years.[8] The Commission distinguishes a commercial e-mail marketer's suppression list from the do-not-call registry because the marketer's list has "far fewer entries than the 91 million numbers on the National Do Not Call Registry" which makes the prospect of scrubbing defunct or changed addresses "far less daunting." While a company's e-mail opt-out list is not as large as the national do not call registry, it will continue to grow over time and the same reasons for limiting the duration of do not call registrations apply to e-mail suppression lists regardless of size.

Since e-mail addresses often change, or become inactive, over time (like telephone numbers), it is more efficient to permit companies to periodically purge e-mail addresses on the suppression list, such as at five-year intervals. This will help ensure that the lists are as up-to-date as possible. It will also make them more manageable and avoids the time-consuming expense of scrubbing lists against non-functional addresses. And given that some e-mail addresses that become inactive are re-assigned (similar to telephone numbers), this ensures that individuals with re-assigned e-mail addresses are not unknowingly opted out of receiving commercial messages. Recipients who maintain the same e-mail address after five years could simply renew their opt-out request with the company if desired.

As the Commission acknowledges, the administrator of the National Do Not Call registry has access to databases with defunct telephone numbers but no similar databases exist for e-mail addresses. Even with this information, the Commission deems five years an appropriate time for

[8] NPRM at 25444, citing 68 Fed. Reg. 4640 (Jan. 29, 2003).

the expiration of do-not-call opt-out requests. The lack of such information for e-mail suppression lists is all the more reason that periodic purging of e-mail addresses – at least every five years – makes sense.

III. FORWARD-TO-A-FRIEND E-MAIL MECHANISMS ARE PROPERLY CLASSIFIED AS "ROUTINE CONVEYANCES" AND NOT THE INITIATION OF A COMMERCIAL E-MAIL MESSAGE UNDER THE ACT

Although the Commission does not propose rules, it elaborates and seeks comment on the applicability of the CAN-SPAM Act's definition of "sender" in "forward-to-a-friend" e-mail scenarios. It concludes that when a company makes available the means for forwarding a commercial e-mail message, such as using a Web-based "click-here-to-forward" mechanism, this constitutes a "routine conveyance" and not an initiation of a commercial e-mail message under the Act.[9]

Specifically, the term "sender" means a person who "initiates" a commercial e-mail message for the purpose of advertising or promoting a product or service, and the term "initiate" in turn means "to originate or transmit such message or to *procure* the origination or transmission of such message, but shall not include actions that constitute routine conveyance of such message."[10] "Procure" means "intentionally to pay or provide other consideration to, or induce, another person to initiate such a message on one's behalf."[11] In interpreting these definitions in the context of the "forward-to-a-friend" scenario, the Commission concluded that a person does not "intentionally induce" another to initiate a commercial e-mail message by simply making available a Web-based "click-here-to-forward" mechanism, unless the sender

---

[9] "Routine conveyance" is defined as 'the transmission, routing, relaying, handling or storing, through an automatic technical process, of an electronic mail message for which another person has identified the recipients or provided the recipient addresses." 15 U.S.C. § 7702(15).

[10] 15 U.S.C. § 7702 (16) and § 7702 (9).

[11] 15 U.S.C. § 7702 (12).

affirmatively acts or makes an explicit statement that is designed to urge another to forward the message.

We generally support the Commission's analysis of "forward-to-a-friend" e-mail marketing under the Act. However, we believe the Commission is taking far too broad a reading of the term "procure" as Congress intended. The Commission states in the NPRM that language in a commercial e-mail, such as "Tell-A-Friend --- Help spread the word by forwarding this message to friends!" likely satisfies the Act's definition of "procure," i.e., intentionally inducing another person to send a message on one's behalf. The Senate Report on CAN-SPAM made clear that the intent of the definition of procure "is to make a company responsible for e-mail messages that it hires a third party to send . . .."[12] Thus, Congress was concerned with *procurement* from the standpoint of a company paying, hiring or offering other consideration to another to send commercial messages on its behalf. It did not intend that language, such as the text set forth above, would taken alone constitute the initiation of a commercial e-mail message subject to other CAN-SPAM requirements. It is simply a forward-to-a-friend mechanism – a technological shortcut for anyone interested in forwarding a message – and hence a routine conveyance.

NCTA also urges the Commission to clarify that commercial e-mail messages containing such items as coupons or sweepstakes entries directed to the recipient can be forwarded without invoking the CAN-SPAM requirements that are applicable to the original sender, provided the coupons, sweepstakes entries or the like are not used to procure the forwarding of the message. In other words, as long as the recipient of the message is entitled to receive the items whether or

[12] S.Rep. 108-102 at 15.

not he or she forwards the message to a friend, it is still a routine conveyance not subject to CAN-SPAM requirements.

IV. DEBT COLLECTION E-MAIL MESSAGES SHOULD NOT BE CONSIDERED COMMERCIAL E-MAIL AND ARE AT MOST TRANSACTIONAL OR RELATIONSHIP MESSAGES

The Commission asks whether debt collection e-mails should be considered commercial or "transactional or relationship" messages. We urge the Commission to be guided by its Telemarketing Sales Rule ("TSR"). Under that rule, telemarketing consists of a telephone call made with the purpose to induce the sale of goods or services.[13] Debt collection calls are not considered telemarketing under the rule, as they are not made to induce the purchase of goods or services. Similarly, "commercial electronic mail messages" consist of any e-mail whose primary purpose is the commercial advertisement or promotion of a commercial product or service. Debt collection e-mails do not have advertising or promotion of commercial products or services as their primary purpose, and hence should not be covered by CAN-SPAM requirements.

In addition to falling outside the scope of CAN-SPAM as non-commercial messages, debt collection e-mail messages sent by a company to its own customers could also be categorized as "transactional or relationship" messages under the Act. As with non-commercial e-mail, the CAN-SPAM requirements, other than the prohibition on false or misleading headers, do not apply to such messages. E-mails are considered "transactional or relationship" messages if they, among other things, have the primary purpose of completing a commercial transaction that the recipient has previously agreed to enter into with the sender.[14] They also fit under this definition if they have the primary purpose to notify a recipient of a change in standing or status with respect to the purchase or use of products or services, or are part of a notification at periodic

[13] 16 C.F.R. § 310.2(c).

intervals of account balance information or other type of account statement with respect to the purchase or use of products or services.[15]

With respect to debt collection messages sent by third parties on behalf of a company, we submit that they fall outside of CAN-SPAM altogether as neither commercial nor transactional or relationship messages.

CONCLUSION

For the foregoing reasons, NCTA urges the Commission to adopt rules that (1) permit ten days for compliance with opt-out requests; (2) limit the retention of opt-out requests to a maximum of five years; (3) classify "forward-to-a-friend" mechanisms as "routine conveyances;" and (4) classify debt collection e-mails as non-commercial e-mail messages or at most "transactional or relationship" messages.

Respectfully submitted,

Daniel L. Brenner
Loretta P. Polk
Counsel for the National Cable &
Telecommunications Association
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20554

June 27, 2005

[14] 15 U.S.C. § 7702(17)(A)(i).

[15] 15 U.S.C § 7702(17)(A)(iii)(III).