CAN-SPAM Act Rulemaking, Project No. R411008

Comments by:
The United States Chamber of Commerce
1615 H St., NW
Washington, D.C. 20062

TO:
The Federal Trade Commission
CAN-SPAM Act
PO Box 1030
Merrifield, VA 22116-1030

CAN-SPAM comments to FTC

The United States Chamber of Commerce, the world's largest business federation, representing more than 3 million businesses of every size, sector and region of the country, is pleased to offer the following comments to the Federal Trade Commission regarding the CAN-SPAM Act Rulemaking, Project No. R411008.[1]

The vast majority of the Chamber's membership are small businesses: more than 96% of our members have fewer than 100 employees. In addition, there are 97 American Chambers of Commerce located in 85 countries around the world.

This broad membership base gives the Chamber world-wide reach and expertise to advocate on behalf of businesses ranging from small operations all the way to multi-nationals operating around the globe.

---

[1] The Chamber would also like to incorporate by reference comments submitted by the United States Chamber of Commerce and other trade associations.

SUPPORT FOR FEDERAL LEGISLATIVE EFFORTS TO STOP SPAM

The U.S. Chamber, along with a broad group of businesses and trade associations, strongly supported federal legislative efforts to stop the proliferation of spam.[2] However, the challenge both throughout the legislative process and in the continuing role of the Commission is to provide consumers with the maximum control over their own in-boxes, eliminate unwanted, false, misleading and pornographic email and do so in ways that minimize the effects on legitimate e-mail communications and e-commerce.

In the CAN-SPAM Act, Congress passed a statute that carefully balances these goals. Specifically, the Act provides the FTC and others with significant and powerful enforcement tools against those who attempt to use email and email communications to mislead or defraud consumers, while providing significant latitude to legitimate e-commerce participants to follow very straightforward rules in order to minimize the impact on email and e-commerce.[3]

Therefore, in implementing this statute, the Chamber urges the Commission first and foremost to focus its efforts and resources on enforcement activity against those, identified by the Commission in earlier studies, who send emails that contain some indicia of falsity. The Commission has studied this issue extensively, and has found that 67% of all commercial email contains some indicia of falsity. Weeding out the purveyors of this material would benefit everyone, and should be the over-arching goal of the Commission's enforcement efforts and

---

[2] *See* Appendix 1, Joseph Rubin's testimony on behalf of the U.S. Chamber of Commerce before the House Judiciary Committee, as well as the U.S. Chamber's "Key Vote" letter to the U.S. Senate in support of the CAN-SPAM Act.

[3] To stay on the safe side of the CAN-SPAM Act, businesses must not undertake a prohibited act, such as using false and misleading header information, must provide and honor consumer opt-outs, must not mislead consumers either in the text or subject line of an email, must identify that a particular message is an advertisement or solicitation, and must provide a valid physical postal address.

activity. These are the real problems in the email and e-commerce worlds, and is an area where strong enforcement can make the most difference.

Second, in issuing the Rules and Regulations contemplated by the Advanced Notice Proposed Rulemaking (ANPRM), the Commission should provide legitimate companies with clear guidance as to what constitutes a prohibited act. Legitimate companies, those who do not fall into the 67% of false email discussed earlier, will comply with the Act, but require clear rules and guidance to ensure that they do not unintentionally run afoul of the Act.

Therefore, in proposing and implementing the CAN-SPAM Act, the Commission should seek to mirror the balance drawn by Congress:

- Strong and swift enforcement against those who send false, misleading, unwanted and pornographic email; and
- Maximum flexibility with minimal interference with email and e-commerce for companies and consumers who do not violate these broad rules.

I) <u>Primary Purpose:</u> The "But For" test is the most appropriate standard

In determining what the "primary purpose" of an email is, the Commission should first look to the intent of the Act, which is to provide maximum flexibility to the consumer to control his own in-box, to weed out any unwanted, false, misleading and pornographic email, and to impose minimal disruption on the operation of legitimate email and e-commerce. Given those standards, the Chamber believes that determining whether a particular email is "commercial" is a multiple step process.

The first step is to apply the "but for" test, as articulated by the Commission in the ANPRM, and ask whether the email in question would have been sent in the absence of ("*but for")* the commercial purposes of the email. If the email would have been sent *regardless of the*

other commercial content of the email, then the primary purpose of the email should NOT be considered commercial. In other words, under this test, any commercial content contained within an email, like the ads in a printed newspaper or magazine, should be considered incidental to the email if the email would have been sent without the particular commercial content.

However, while the "but for" test is useful in determining whether a message has a primary purpose that is "commercial," if an e-mail does not pass that test it should not necessarily end the inquiry over whether the email is intended to advertise or promote. Instead, additional steps must be taken to determine the full extent of the intent. For example, a message with editorial content may not have been sent "but for" payment by a particular advertisement, but that still does not make the email itself fall into the commercial category.

This proposal generally establishes an objective, easy-to-follow test for legitimate companies, which requires minimal guidance by the Commission and most effectuates Congressional intent in implementing the CAN-SPAM Act.

II) "<u>Multiple Sender</u>": A single email should not require multiple opt-outs

The Commission should exercise its authority in § 13 to clarify that there is a <u>single</u> "sender" under the Act, for the purposes of the opt-out, where multiple advertisements or solicitations appear in a single email, and that each advertiser in such a context is not required to provide an individual opt-out. Significant problems could arise from both the consumer and business perspectives if businesses are required to provide and consumers are required to indicate individually which parts of an email advertisement they wish to receive and which they do not.

More than any other provisions of the Act, the uncertainty pertaining to the multiple sender issue could make it difficult for careful companies to engage in routine marketing practices, even in connection with those customers with whom the companies have a prior relationship. The interpretation of "sender" permeates nearly every aspect of the Act, and getting the definition wrong could have significant detrimental effects on businesses and consumers.

Additionally, if the Commission were to construe the Act to read that each participant in a particular email should receive an individual opt-out, such a finding would not only prove nearly impossible to administer, but would diminish the email experience of consumers, potentially requiring consumers to opt out of each and every advertisement – a negative result that Congress clearly did not intend.

Additionally, a multiple sender opt-out could essentially preclude the transmission of emails containing multiple paid advertisements -- clearly not a result intended by Congress. First, as in the newspaper context, advertisers purchase advertising space, and do not "send" or "procure" emails in that context.[4] Simply put, the CAN-SPAM Act would be entirely unworkable if a company could not sell advertising space to advertisers without being forced to adopt each and every advertiser's entire opt-out list. Such a restriction would be tantamount to prohibiting the publisher of a free newspaper from distributing the paper to any consumer who had ever asked any of the newspaper's advertisers to stop sending catalogs through the mail. This cramped reading of the Act improperly conflates the notion of initiating unwanted mail with buying advertising space in an electronic circular.

---

[4] Although the McCain Amendment, Section 6, requires marketers to exercise some due diligence with regards to ensuring that emails solicitations sent on their behalf do not violate the CAN-SPAM Act, such modest requirements do not rise to the level of "send" and "procure."

Second, it would require advertisers to monitor who a particular email is sent to, which is contrary to the intent of the Act (for example, the McCain amendment, Section 6, would require an advertiser to determine that the firm who sends emails out on their behalf is not breaking the law, NOT to determine who is receiving those emails.) Such a requirement would be unduly burdensome and runs counter to the intent of Congress. This would actually harm the consumer, because many senders would cease operation, rather than risk running afoul of the Act.[5]

Third, requiring that an opt-out be tailored to particular recipients may be an impossible burden for senders to meet. This may therefore result in an inability of a particular sender to send an email, *even if the customer opted-in to receive it*. This unintended result undermines the intent of Congress and therefore should be minimized.

A) <u>"Forward to a Friend"</u>: The original sender should not be required to process opt-outs from consumers who have received the email from a friend

In the "forward-to-a-friend" context, which relies upon customers to refer or forward email messages to third parties, the decision whether to forward messages is completely discretionary with the original recipient. Therefore, because the link in the causal relationship between the original sender and any subsequent recipient is broken, the original sender should not be liable to the consumer for the actions of a third party. Some clarification may be required to ensure that spammers are not using this mechanism as a tool to avoid respecting opt-outs, but

[5] However, such an outcome would only affect e mail from legitimate companies who follow the law, and would make email LESS enjoyable from a consumer perspective. This is because those spammers who do not currently follow the law would continue to ignore legal requirements. Thus, the percentage of "legitimate" email would decline, while the amount of spam would at best stay the same. Bottom line, consumers would receive more spam and less email that they want, further reducing the benefits of email and the Internet.

that can be carefully constructed, and should not wipe out a pro-consumer program without carefully considering all alternatives.

III) <u>"Transactional and Relationship" Messages</u>: Definition should be expanded to include email circulars and opt-in situations

Given the goal of the CAN-SPAM Act, to punish and deter bad actors while providing legitimate companies and consumers continued access to email and e-commerce, the Chamber would urge the Commission to *expand* the "transactional and relationship" category, not to contract it. Specifically, there are a number of different examples of how this category should be expanded, and the Chamber urges the Commission to examine other ideas raised by other industries and trade associations for guidance on this issue. For example, the Commission should expand this category to clarify that goods or services that consist *entirely* of emailed discounts, offers or promotions, may qualify as transactional or relationship messages, and that the initial transaction that creates the "relationship" may be established simply through a consumer indication to receive future electronic mailings or newsletters or the agreement for the use of online services.

IV) <u>10-business-day time period for processing opt-out requests:</u> Should be expanded to 31 calendar days in most circumstances, with additional time allowed for more complex situations.

As a preliminary matter, the Chamber would urge the Commission to expand the 10-day period to a 31-day period, along the lines of the Telemarketing Sales Rule. This is generally a fair time frame that will not inconvenience consumers, and yet generally provides companies with a fair time frame that they are used to implementing in other contexts.

However, even the reasonableness of a 31-day period cannot be ascertained without knowing how a number of factors, such as the multiple sender issue and how franchisees and independent agents are treated, will be resolved.

In the "multiple sender" context, for example, as discussed above, if the Commission determines that an email physically delivered by one sender that includes ads from several different companies requires multiple opt-outs, then even a 31-day time period for processing opt-out requests may be unreasonable, if not impossible, to meet.

The Commission must also take into account the relationship that franchisees/franchisors and independent agents may have between their own lists and the parent company when determining the appropriateness of even a 31-day opt out. The most appropriate way to handle this issue is to provide that each franchise and agent are indeed independent, and that an opt-out to one agent or franchise does not bind all of the franchisees and agents.

V) <u>Rewarding Those Who Supply Information About CAN-SPAM Violations:</u> CAN-SPAM should be given a chance to work before this provision is implemented

As suggested by the Commission, the evolution of technology and on-line integrated marketing render comments on this matter premature at present. Further, the extensive challenges involved in determining whose "tip" may be eligible for the reward are daunting. Additionally, in the real world, there is already cooperation between ISPs and other appropriate parties to sue and stop spammers, and the Commission should examine how such a "reward" system could undercut the progress already being made.

Additionally, the Chamber has very serious concerns regarding the possibility of such a system becoming a lawsuit proxy for consumers, which could be used to threaten companies with lawsuits and other costly discovery. Consumer rights of action were explicitedly rejected in

the CAN-SPAM Act, and this type of system threatens to reinstate such an overwhelmingly rejected outcome.

Therefore, we urge the Commission to postpone any Notice Proposed Rule Making (NPRM) until other regulations are completed, and until the real-world cooperation and remedies are given a chance to work, all affected parties have had a reasonable period of time to adjust their practices and procedures to evaluate the practical effects of the Act. Otherwise, discussion of this item will necessarily be incomplete and potentially counter-productive.

VI) <u>Study of the Effects of the CAN-SPAM Act:</u> Has the amount of "bad" spam been reduced, and what are the possible unintended consequences on consumers and businesses

Congressional intent with regards to CAN-SPAM is very clear – increase the ability of consumers to control what email reaches their inbox, and from whom, and to control the sending and receipt of unwanted, misleading and pornographic email. Therefore, the first measure of success should be the extent to which unwanted, misleading, and pornographic email has been stopped. This can be measured in a number of different ways, and should constitute the primary measure of success of the Act.

The Commission should also consider the extent to which the provisions of the CAN-SPAM Act may have unintended consequences on the ability of consumers to obtain email communications that either benefit them (such as incentive and "forward to a friend" programs that may be abandoned as a result of CAN-SPAM), or that they may have specifically requested (for instance, if a multiple sender rule limits the ability of consumers to obtain emails that they opt-in to receive), as well as the burdens that a multiple sender opt-out program may impose on businesses, and how those adversely effect businesses and consumers.

VII) Effects on Small Businesses: The Regulatory Flexibility Act

The Chamber generally believes that the required disclosures - company name and address, and the inclusion of an opt-out (with the caveat that the multiple sender opt-out, as well as the issues that relate to franchisees and agents, is resolved as discussed above) - should have a minimal impact on small businesses.

However, the details of how these Rules are implemented could have significant effects on small businesses, and these concerns permeate the issues raised by the ANRPM.

First and foremost, the most positive effect that the Commission's implementation of the CAN-SPAM Act can have on small businesses is to concentrate its resources on enforcing the Act, swiftly and forcefully, against bad actors. Weeding through all of the spam, and differentiating the "good" email from the "bad," drains significant resources from small businesses, particularly those who do not have separate technology departments that can set up their own filtering system.

However, how the rules under CAN-SPAM are developed and implemented could have severe impacts on small businesses. These concerns permeate all of the questions raised in the ANPRM, and should be taken into account every step of the way in implementing the Act.

The U.S. Chamber, and the 3 million businesses that we represent, strongly encourages the Commission to consider the impact that its rules in this area will have on small businesses. As described above, the Chamber believes that inappropriate or ill-conceived rules in this area could have severe unintended consequences on small businesses.

Small businesses make extensive use of the Internet and e-mail for legitimate business purposes, and ill-advised rules can quickly undermine a small company.

The United States Chamber of Commerce therefore respectfully submits these comments for the Record, and looks forward to assisting the Commission in implementing this important responsibility.