

**Comments to the Federal Trade Commission  
From Consumer Action, Consumer Federation of America,  
the National Consumers League and Privacy Times  
Regarding the CAN-SPAM Act Rulemaking  
Project No. R411008  
April 20, 2004**

**Introduction**

The above-named consumer organizations and privacy experts are pleased to comment on some of the important issues that the Federal Trade Commission (FTC) has raised in connection with this rulemaking proceeding. We believe that strong rules are needed pursuant to the CAN SPAM Act of 2003 (the Act) in order to protect consumers from fraud, deception, and violations of their rights to privacy.

**Determining whether the “primary purpose” of an email is commercial**

We are concerned about the potential for marketers to solicit consumers under the guise of doing something else, such as providing educational information.

A hypothetical example may help to illustrate this concern. The manufacturer of a weight-loss product, No-Flab, sends unsolicited emails to consumers containing general advice about how to lose weight – proper diet, daily exercise, etc. – and including a link for more information. The link brings recipients to the Web site for its product. Should this be considered a “commercial electronic message?” We would argue that it should. Under the Act, providing a link to a commercial entity does not make an email “commercial” per se. However, taking the situation as a whole it is clear that the company is not primarily engaged in an altruistic public education campaign about obesity. Rather, the “primary purpose” of the electronic message is obviously to sell No-Flab.

In the example that the FTC posited, where a professional sports league sends consumers unsolicited electronic messages about its charitable activities, we would view the messages as commercial in nature because the underlying purpose appears to be to promote the league.

The FTC should be careful not to define “primary purpose” so narrowly that it cannot take the full context of the message into account in determining whether it falls within the definition of “commercial.” The “net impression” standard may be the best one to use in

determining the “primary purpose” of unsolicited electronic messages. Perhaps FTC guidelines with examples would be helpful.

### **“Transactional” or “relationship” messages**

We are also concerned about the potential for abuse of “transactional” or “relationship” messages when they include advertisements for products or services that the recipients haven’t already agreed to purchase or that are not for “updates” or “upgrades” of previously purchased goods or services. “Transactional” or “relationship” messages are not considered to be commercial electronic messages under the Act precisely because they are not intended to be used as vehicles for marketing. Using the “net impression” standard, an email that has six pages of advertisements for products or services should not be considered a “transactional” or “relationship” message just because it also contains the recipient’s account balance. The FTC should reinforce this point in the regulations.

### **Ten-business-day time period for processing opt-out requests**

We are unaware of any problems with the ten-business-day time period and would strongly oppose lengthening it. Entities that send commercial electronic messages should have the capacity to remove email addresses pursuant to opt-out requests within this reasonable time period.

### **“Forward-to-a-friend” and similar marketing campaigns**

We believe that “forward-to-a-friend” and similar marketing campaigns must be limited by regulation to prevent them from violating the privacy rights that are provided by the Act. Encouraging anyone to forward a commercial message is clearly “inducement” to initiate it on behalf of the marketer. If the marketer has no control over who will receive the message, it cannot ensure that the rights of recipients who have opted out of receiving commercial electronic messages from it will not be violated.

“Referral” marketing, where people are asked to provide personal information about other prospects, poses less potential for violating consumers’ rights. Because the marketer controls the process, it can (and we believe that the regulations should require it to) cross-check the information to determine whether those prospects have opted out of receiving commercial

electronic messages from it before it sends the solicitations. All “forward-to-a-friend” and similar marketing campaigns should be required to follow this model. For instance, on its Web site and in its email solicitations, a marketer could provide a link to a Web page where people can enter the addresses of friends to whom they would like commercial messages to be sent. The marketer would check those addresses against its existing remove list (and the national do-not-email registry, if one exists) before sending the solicitations.

FTC regulations should require marketers to clearly disclose to people who are asked to provide information about prospects that the information will be used for marketing purposes. Marketers should also disclose, before the information is collected, whether or not it will be shared with others and under what circumstances.

The first messages from the marketers to the referred parties should clearly disclose that their information has been provided by someone else and provide the names and contacts information of the people who referred them. This would enable the recipients to ask the people who referred them not to do so again if they don’t want their information to be provided for marketing purposes. Obviously these messages are subject to all of the other requirements for unsolicited commercial emails.

#### **Definition of “valid physical postal address of the sender”**

Since the only mailing address that some people have is a post office box, the definition of a “valid postal address of the sender” should include it. However, we do not believe that private mail box addresses should be included in the definition. These are usually additional mailing addresses, not the primary addresses of mail recipients, and are often used to obscure their real physical locations.

#### **Conclusion**

While many of the unsolicited commercial emails that people receive at present may be fraudulent, we believe that legitimate companies will increasingly use electronic messages for marketing purposes, as the Act allows. Therefore, it is crucial for the FTC to set firm rules for how marketing by email can be conducted in order to ensure that the privacy rights of individuals are respected. We appreciate the opportunity to share our views with the FTC on these issues.

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