

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

**COMMENTS OF
TIME WARNER INC.**

**on the
CAN-SPAM ACT RULEMAKING, PROJECT NO. R411008
Advance Notice of Proposed Rulemaking**

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I. Background

Time Warner Inc. thanks the Federal Trade Commission (“FTC” or “Commission”) for this opportunity to submit these comments in response to its Advance Notice of Proposed Rulemaking (“ANPRM”) on the regulations to be enacted under the Controlling the Assault of Non-Solicited Pornography and Marketing Act, Pub. L. No. 108-187 (“CAN-SPAM” or the “Act”) 16 C.F.R. Part 316; 69 Fed. Reg. 11776, March 11, 2004. The Commission’s ANPRM raises important questions with respect to the proper interpretation and application of the Act’s requirements.

Time Warner’s divisions, including America Online (AOL), Home Box Office (HBO), Time Inc., Time Warner Cable, Turner Broadcasting System, and Warner Bros. Entertainment, are committed to reducing spam and providing consumers with choice and control over the types of commercial e-mail messages they receive. Our research and development teams provide consumers with software solutions and customer support systems to combat unwanted e-mail, and we respect consumers’ choices not to receive commercial e-mail from us.

AOL, in particular, has been at the forefront of the battle against spam. To confront spammers who do not respect consumer choice and privacy, AOL has developed sophisticated technologies to filter and block spam from reaching AOL customers, has an around the clock operations team devoted to this task, and is developing more secure e-mail technologies to thwart spam. AOL also has sued well over 100 spammers, and assists law enforcement officials in criminal investigations of spammers. AOL is investing in new technologies to provide more secure e-mail service, and is working with other ISPs on a variety of technology and enforcement initiatives to reduce spam.

All of the Time Warner divisions share the common goal of reducing spam so that consumers find e-mail a more useful medium. Our company strongly supported passage of the CAN-SPAM Act, and we will continue to support new policy initiatives that build on existing technology and enforcement efforts. As the Commission moves forward with implementation of the new law, we would like to offer our suggestions for areas in which we believe further clarification would help make the law more effective.

Our comments regarding this ANPRM focus on the following issues:

- (1) The definition of “primary purpose”;
- (2) The definition of “transactional or relationship” e-mails;
- (3) Establishing criteria for multiple senders and joint marketing activities;
- (4) Treatment of “forwarded” or “tell-a-friend” messages; and
- (5) The time frame for honoring opt-out requests.

II. “The Primary Purpose” of a Commercial Electronic Mail Message Should Be Determined Based on an Evaluation of the Totality of the Objective Circumstances.

The Commission suggests various criteria that could be used to determine whether the “primary purpose” of an electronic mail message is commercial and, therefore, whether a particular message constitutes a “commercial electronic mail message” subject to the CAN-SPAM Act’s requirements and prohibitions.

Time Warner believes that in interpreting this requirement, the FTC should provide for a standard that evaluates the totality of the objective circumstances. It is important that the Commission adopt objective standards that provide clear guidance as to how to determine a message’s primary purpose to enable companies to ascertain their obligations under the Act. However, we believe that the Commission should not adopt an overly formulaic approach. Rather, it should provide a list of factors that can be weighed in making such a determination, allowing for flexibility to accommodate diverse business models. These factors could include, for example, the percentage of the message that is dedicated to advertisement or promotion and an evaluation of the contents of the subject line. This totality of the circumstances test could be supplemented by a “safe harbor” for messages that meet certain clear standards, in order to provide both certainty and flexibility for legitimate marketers within predetermined boundaries.

Moreover, the Commission should clarify that certain categories of messages do not have a primary purpose of commercial promotion of a product or service, regardless of the test set forth above. These categories should include e-mails that contain editorial content, such as the breaking news alerts that our Turner division sends to subscribers through its CNN.com Web site. E-mails that contain editorial content are subject to First Amendment protections, and should be categorically exempted from the CAN-SPAM requirements, even though they might include advertisements. As is the case with editorial content found in other media, such as newspapers, magazines, and on television, the primary purpose of such e-mail messages is to provide constitutionally protected speech. The Commission also should clarify that e-mail surveys whose primary purpose is to improve products or services are not “commercial e-mail.”

III. The Definition of Transactional or Relationship E-mails Should Be Clarified.

The Commission seeks comment on modifications to the categories of messages that should qualify as transactional or relationship messages and thus warrant exclusion from the requirements for commercial electronic mail messages. Time Warner believes that the Commission should not contract the definition of transactional or relationship e-mails.

The Commission should clarify that billing statements and similar transactional messages, such as account balance updates, subscription confirmations, or announcements about improvements made to a service or subscription (including updates or announcements sent to previous subscribers who had not otherwise opted out), do not have a commercial primary purpose, even when they might include advertising, because these messages would have been sent irrespective of the inclusion of any advertisement.

Moreover, we believe that the Commission should create an additional category of transactional or relationship e-mails where the recipient has affirmatively requested or consented to receive the e-mail. This should be a limited exception where a consumer has affirmatively asked for information or a specific product or service, such as an e-mail newsletter. In this case, an e-mail used to deliver the information requested would fall under the “transactional” definition.

Such an exception would be consistent with the Act’s requirements and purposes, and is a natural extension of the current exceptions, listed within the definition of “transactional or relationship” message, for messages that facilitate or complete a transaction the recipient has agreed to enter into with the sender and messages that deliver goods or services that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender. Where consumers affirmatively request such communications, they should not be subject to the Act’s opt-out requirements.

To this end, the Commission should clarify that newsletter subscriptions and subscription renewals fall within the definition of transactional or relationship e-mails, as well as messages used to deliver digital magazines. Moreover, the inclusion of ads within these publications should not undermine qualification of these messages for the transactional or relationship exception.

IV. Establishing Criteria for Determining Which Entities Are “Senders.”

The Commission seeks comment on which entities are “senders” with respect to commercial electronic mail with attendant notice and opt-out obligations. 69 Fed. Reg. at 11778 (Questions E.1, 2). In clarifying which entities are “senders” under the Act, the Commission should ensure that its interpretation is true to the statutory language and congressional intent, is consistent with consumer expectations, and does not unnecessarily burden, or effectively foreclose, legitimate joint marketing activities that can benefit consumers.

Under the Act, a “sender” is defined as an entity that: (i) *initiates* a commercial electronic mail message, *and* (ii) whose product, service, or Internet Web site is advertised or promoted by the message. Section 3(16). The term “initiates” is defined to include those who originate and transmit commercial e-mail messages, as well as companies that *procure* the origination or transmission of commercial e-mail messages. The statute in turn defines the term “procure” to mean “intentionally to pay or provide other consideration to, or induce another person to initiate such a message *on one’s behalf*” (emphasis added). Thus, interpretation of the phrase “on one’s behalf” is central to any determination of who is a “sender.”

The Commission should clarify that the Act’s opt-out requirements are not applicable to an entity when the message is not originated or transmitted by or *on behalf of* that entity, despite the inclusion of advertising for that entity within the message. This would include, for example, a situation where there are multiple advertisements or promotions within an e-mail communication, or certain co-promotion situations where a message would be sent irrespective of whether promotional content from a third party was included.

We do understand and agree that situations exist where there are multiple “senders” who are subject to the Act’s requirements. This could be the case, for example, where two companies combine marketing efforts and send out joint e-mail messages to promote their respective products. In this case, both partners might be considered “senders” and, therefore, be subject to opt-out obligations under the Act.

Generally, however, in the case of a message containing multiple offers, an opt-out should apply only to the company that originates or transmits the message. For example, if Time Warner Cable were to send out a promotional e-mail that included advertisements from several stations, only Time Warner Cable would be required to provide an opt-out, and not each station. Similarly, if a Harry Potter DVD is advertised in a Circuit City e-mail circular along with many other products offered by Circuit City, only Circuit City would be required to provide the opt-out. The company that originates or transmits the message usually is the company that owns and manages the list of recipients and, therefore, is the party best situated to ensure that the opt-out request is fully honored, both in terms of the content and frequency of e-mail desired by the consumer.

This approach is consistent with congressional intent and is important for several reasons: first, to avoid overwhelming consumers with notices from a large number of entities whose products are advertised or promoted in a commercial e-mail message; second, to protect consumer privacy by reducing the need to share e-mail opt-out lists among senders in joint marketing or advertising situations; and third, to avoid the expense and attendant delays of scrubbing the originating sender’s e-mail list against opt-out lists maintained by each advertiser.

Congressional Intent. Clarifying that multiple advertisers or content providers within a message do not each need to provide consumers with opt-outs is fully consistent with purpose of the Act, which states in section 2(b)(3), as one of three congressional policies advanced by the statute, that “recipients of commercial electronic mail have a right to decline to receive additional commercial electronic mail *from that same source*” (*i.e.*, the entity that sends or procures the message). This interpretation is consistent with inclusion of the term “procure” within the definition of “initiate,” which prevents spammers from hiding behind other senders when they otherwise would be prohibited from sending messages because they have received opt-outs. Congress intended to prevent evasion of opt-out requirements, not to disrupt legitimate marketing activities by requiring a list of mere advertisers to undertake opt-out obligations.

Consumer Expectations and Meaningful Opt-out Right. Consumers expect to opt out of receipt of e-mail from the entity responsible for sending the e-mail to them, not to opt out of e-mail from every company whose products may be advertised, featured, or mentioned in that e-mail. Consumers expect to opt out of mailing lists, rather than products or services. For example, when consumers opt out of HBO’s mailing lists, they do not expect to never see ads about HBO products and services in other communications, such as e-mail newsletters (or newspapers or magazines) to which they are subscribed. It is possible, for example, that they may continue to receive product and service announcements through e-mail subscriptions to monthly newsletters from a video rental store or a magazine promoting the release on DVD of a season of “Curb Your Enthusiasm.” In fact, if the Commission were to require advertisers to

offer opt-outs and senders to scrub their lists against all advertisers' suppression lists, the end result would be that many consumers would not receive regular communications to which they have subscribed and that they want to receive, such as a weekly newsletter from their video rental store. Again, there may be circumstances where there are multiple senders that would require multiple opt-outs.

Equally importantly, in e-mails that contain advertisements from many entities, consumers would be presented with a long list of opt-out notices at the end of an e-mail message. This likely would overwhelm consumers with information, and actually undermine, rather than advance, a meaningful consumer opt-out right.

Privacy and Security Concerns. Requiring an opt-out from multiple advertisers also would create security and privacy concerns. Prior to the CAN-SPAM law, when a consumer requested to opt out of a mailing list, many of the Time Warner companies would simply delete that consumer's name from its database altogether and would keep no record of the consumer ever having requested the communications. If companies now would be required to maintain a master suppress list, they would have to store information regarding consumers that they otherwise would not maintain. Moreover, in an attempt to address potential list scrubbing requirements in a joint marketing context, companies could be required to turn over what, in many instances, are very extensive lists of e-mail addresses of people who do not want to hear from them to all their marketing partners, or to neutral third-party vendors, which raises security issues. In addition, we have been advised that sharing the customer lists of names and e-mail addresses may be inconsistent with company policies and representations in privacy policies regarding sharing information with third parties.

Burdens on Businesses/Viability of Co-Promotional Activities. An interpretation that would require separate opt-outs from multiple advertisers would render legitimate communication more costly and less efficient. Scrubbing compliance costs could have the effect of strongly discouraging legitimate partnership e-mails. Take, for example, an offer by Spiegel to send a subscription offer, among other offers, for *Real Simple* magazine to its catalogue buyers. The CAN-SPAM Act could be interpreted to require Spiegel to scrub its subscription list against *Real Simple's* suppression list. Since the *Real Simple* suppression list is comprised of more than 8.3 million e-mail addresses, our cost estimates indicate that it would have cost \$12,000 simply to select the list and send it to Spiegel. Prior to CAN-SPAM, there would have been little or no cost for *Real Simple* to engage in these types of activities. As such, consumers ultimately would lose the benefits of these types of legitimate joint marketing activities that are not the types of messages that Congress sought to reach and restrict.

- *Factors to Consider in Determining Who the Sender is with Respect to a Commercial E-mail Message*

Time Warner believes that for purposes of defining the term "sender," the FTC should develop factors to assist companies in situations where there might be multiple senders. The following are the types of factors the FTC could consider:

- *Whether the message would have been sent “but for” the inclusion of content that advertises a product or service.* This analysis would involve a “but for” test that asks whether the message would have been sent without the advertisement or promotional content. As part of this inquiry, advertisers would not be deemed senders if their ads or promotional content were part of an ongoing or regular e-mail communication with customers by a third party that rotates advertisers (*e.g.*, on a daily, weekly, or monthly basis).
- *The primary source of the message—whom the message appears to be from.* For example, if *People* magazine were to send out digital copies of its print magazine, *e.g.*, a Webzine, that includes ads or promotions for various products and services, the source of the e-mail communication would be *People*. The companies whose products or services were mentioned within the communication would not be considered separate senders with independent opt-out requirements.
- *Control over the content, form, and sending of the commercial e-mail message.* For example, Turner may send out communications that include rotating or variable banner ads that are placed by a third-party provider. In this instance, there is no relationship between the advertiser and Turner, and it cannot be said that the message is being sent on behalf of the advertiser. The advertiser has no control over the content, form, or sending of these types of messages that Turner is sending. Similarly, independent third parties that sell magazines and take orders for subscriptions should be considered “senders” of the commercial e-mails they send, instead of the actual magazine. For example, if a distributor sends commercial e-mail communications that include an offer for *People* magazine, that distributor should be considered the sender and not *People* magazine. In that instance, the communication is not being sent on behalf of *People* Magazine, but on the distributor’s own behalf.

V. Messages that Allow Consumers to Share Online Content with Their Friends Should Not Be Regulated Under the Act.

The Commission requests comment on the different types of “forwarding” or “tell-a-friend” campaigns and how these types of messages should be treated under the Act. 69 Fed. Reg. at 11781, Question E.3.

At the outset, we note that these types of communication have become very popular with our Web site users and are used at many of our division’s Web sites, affording users the ability to share online content with friends in the form of Web cards (*e.g.*, birthday or holiday cards, get well cards, or friendship cards); game challenges (inviting users to beat their scores in an online game); sharing news articles (*e.g.*, links to breaking news articles from CNN); links to movie clips or cartoons, wish lists, and gift grams (*e.g.*, a birthday, holiday, or wedding wish list); clips from a television show or movie; and contests and promotions.

Where companies have not provided payment or consideration to induce a consumer to send a message to a friend, we believe that e-mails forwarded from one friend to another through

technology made available on a Web site should not be subject to the Act's requirements with respect to commercial e-mail messages.

Additionally, the Commission could clarify that these types of messages fall within the statutory carve out for "routine conveyance" where messages are sent through an automated technical process for which another person has identified the recipients. *See* Section 3(16). Currently, these types of messages are not routed through our databases and systems, but rather are facilitated through a peer-to-peer functionality. Our Web sites do not store the names and e-mail addresses of recipients of these tell-a-friend messages beyond the time necessary to fulfill the consumers request (*e.g.*, we may, in certain instances, store e-mail addresses in connection with electronic cards until the card is opened). Further, these e-mail addresses are not added to any of our mailing lists. Rather, we simply offer the tools or functionality to enable consumers to share content with their friends. Under these circumstances, the provider of that functionality is not a sender.

We believe that only the transmitting friend is the sender of these messages. These types of messages are being sent by consumers who do not meet the statutory definition of "senders" under the Act because they are not advertising their own products or services. In addition, they are not being sent *on behalf of* the company whose products or services may be promoted within the message, as long as no payment or consideration is provided to the person sending the message.

Clarifying that these messages are outside the scope of the Act is consistent with consumer expectations. Consumers want to use these tools to share these messages with their friends, and the recipients of these messages want to receive them. Indeed, consumers using these tools would be surprised to be told that they cannot forward a message to their own friend.

VI. The Period of Time in Which to Comply with Unsubscribe Requests Should Be Extended to a Period of at Least 15 Business Days.

In response to ANPRM section C, 69 Fed. Reg. at 11780, Time Warner believes that the 10-business-day opt-out time frame should be extended to at least 15 business days. For marketers who have complex systems with multiple databases and complicated compliance processes, 10 business days is an insufficient amount of time to ensure that all opt-outs received from all sources are properly tracked and updated.

The 10-day opt-out time period presents additional challenges when service providers and fulfillment houses are factored into the equation. Moreover, this time frame is simply impracticable where joint marketing activities could require multiple parties to scrub their respective lists. A 15-business-day time frame will enable companies to meet their obligations under the Act and ensure that they are properly processing consumer opt-out requests.

VII. Conclusion

Time Warner appreciates the opportunity to provide the Commission with comments on the ANPRM. We would like to reiterate that these comments represent the areas where we believe clarification will aid in implementation of the CAN-SPAM Act, and should not take away from our strong support of this important new law. We believe that the CAN-SPAM Act provides valuable tools to combat spam, and we look forward to working with the Commission on anti-spam enforcement initiatives that will help to reduce the amount of unwanted commercial e-mail in consumers' inboxes.

Respectfully submitted,

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