

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

Comments of the International Council of Online Professionals

**Definitions, Implementation and Reporting Requirements
Under the CAN-SPAM Act**
Project No. R411008

Federal Register Notice dated August 13, 2004
(16 CFR Part 316)

The Federal Trade Commission, in the above referenced Federal Register Notice, has requested public comment on its proposed rules, in accordance with the requirements of Sections 7702(2)(C) and 7711(a) of the CAN-SPAM Act, that define “the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message and to make such other modifications that the Commission deems appropriate to implement the provisions of the Act.” The International Council of Online Professionals is pleased to participate once again in the formulation of these important regulations with the submission of our comments below.

We believe the rules proposed by the Commission do a commendable job of creating a definition of the primary purpose of an electronic mail message in such a way as to balance the needs of commercial communicators and the desires of consumers equitably, and we support them as drafted. In addition, we are particularly pleased to note that the Commission has acknowledged the existence of a third category of electronic mail message, one that is neither a commercial nor a transactional or relationship message as those terms are defined in the CAN-SPAM Act.

As the Commission notes, bona fide email newsletters that combine editorial or informational content with commercial advertisements are unlikely to meet the criteria for an email message the primary purpose of which is commercial. Depending on whether there is a transactional relationship, this would seem to place email newsletters that do not meet this criteria outside the scope of all the provisions of the CAN-SPAM Act, both those pertaining to commercial electronic messages and those pertaining to transactional or relationship electronic messages.

Accordingly, we believe the Commission may want to consider recommending some guidelines for email newsletter publishers, whether their publication falls within the scope of the transactional category or the proposed informational category.

With respect to a set of guidelines for publishers of email newsletters, we submit the following suggestions:

1. Bona fide publishers of electronic mail newsletters should have the recipient's express consent before sending mailings, which the recipient may withdraw at any time.

2. Publishers of electronic mail newsletters should verify subscription requests ("verified opt-in") as outlined in MAP's Guidelines for proper list management. At a minimum, email newsletter publishers can confirm subscription requests in accordance with the Internet Architecture Board's RFC 3098. However, email newsletter publishers must understand this standard may not satisfy all Internet access services in case of dispute.

3. Electronic mail newsletters that are supported by advertisements should place a clear and conspicuous notice to consumers at the point of subscriber acquisition, advising the potential subscriber that the publication routinely contains advertisements.

4. Email newsletter publishers should include their company name, postal address and telephone number in each issue of the publication sent by electronic mail.

5. Email newsletter publishers should post a comprehensive Privacy Policy on their web sites that accurately reflects their company practices.

6. Publishers of electronic mail newsletters should not use falsified or misleading information in either the headers or the subject line of any issue of said newsletter, nor otherwise seek to misrepresent the purpose and the content of their newsletters.

7. All messages sent to subscribers of newsletters delivered by electronic mail should include a functioning opt-out mechanism. The publisher should honor opt-out requests as expeditiously as is technically feasible.

As evidenced by this last suggestion, we concur with the premise that consumers should have the opportunity to decline to receive further mailings from any sender. At the same time, the opt-out criteria for commercial messages, which according to some commentators impose a burden of maintaining a do not email list upon merchants, with the need for list scrubbing by affiliates and others, should not apply to email newsletter

publishers who meet the criteria of sending a transactional message or a bona fide newsletter. In making this comment, we reiterate the reasons outlined in our earlier submission found at <http://www.ftc.gov/os/comments/canspam/OL102020.pdf>.

The International Council of Online Professionals again wishes to express our appreciation of this opportunity to comment on the regulatory proposal by the Commission with respect to defining the “primary purpose” of an electronic mail message. We trust these comments will aid the Commission in determining a reasonable set of definitions and reporting requirements in order to implement the CAN-SPAM Act.

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