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<sup>1</sup>The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request.





history for the theory that CAN-SPAM provides for only one sender. For example, IAC, MBNA, and Microsoft pointed out that the statute, throughout, refers to a singular entity: "the sender" or "that sender."<sup>26</sup> By comparison, CAN-SPAM's definition of "initiate" expressly provides that more than one person may initiate a message.<sup>27</sup> These commenters also noted that the Senate Report cited immediately above refers exclusively to messages with one sender.<sup>28</sup> The Commission is not persuaded by these arguments. The Act's definitions of "initiate" and "sender" are intertwined and must be read together. Every "sender" must also satisfy the "initiate" definition, so the Act's provision for multiple initiators can apply to multiple senders as well. Moreover, based on the Senate Report excerpt cited above, the Commission believes that CAN-SPAM's drafters apparently had only one scenario in mind—a single seller hiring a third party to transmit messages on its behalf. It is not uncommon, however, for a particular commercial e-mail message to include promotions or advertisements from more than one seller. Under the Act's definition of "sender," each advertiser in an e-mail message may be a "sender" of the message because each: (1) "Initiates" the message<sup>29</sup> (i.e., has "procured" the initiation of the message by paying, providing consideration to, or inducing another person to initiate the message on its behalf);<sup>30</sup> and (2) has products or services that are promoted or advertised in the message.<sup>31</sup>

Responding to the possibility that multiple senders in a single message may have to comply independently with CAN-SPAM, commenters claimed that implementation of the Act may be impeded in single message/multiple advertiser scenarios because of four significant problems the commenters identified regarding a regime that holds more than one party responsible for being the sender of a single e-mail: the difficulty of providing multiple opt-out mechanisms and valid physical postal addresses in a single message; the burden of maintaining multiple suppression lists; the possible violation of the possibility that

<sup>26</sup> SAA, et al., 15 U.S.C. 7704(a)(3), 7704(a)(5), 7702(17)(a).

<sup>27</sup> SAA 15 U.S.C. 7702(9).

<sup>28</sup> IAC; MBNA; Microsoft. SAA S. Rep. No. 108-102.

<sup>29</sup> 15 U.S.C. 7702(9).

<sup>30</sup> 15 U.S.C. 7702(12).

<sup>31</sup> 15 U.S.C. 7702(16)(A).

<sup>32</sup> SAA, et al., Bankers; DMA; ERA; IAC; MPAA; Microsoft; PMA; Time Warner.

<sup>33</sup> IAC.

<sup>34</sup> SAA, E. et al., Bankers; ASTA; DMA; MPAA; Microsoft; SBA pointed out that this would be particularly injurious to small businesses.

<sup>35</sup> SAA, et al., DMA; ERA; Microsoft; PMA.

<sup>36</sup> SAA, et al., Microsoft.

<sup>37</sup> SAA, et al., Bankers; DMA; ERA; MPAA; Microsoft.

<sup>38</sup> SAA, et al., NAA; OPA; Time Warner.

<sup>39</sup> SAA, et al., NAA; Time Warner.

<sup>40</sup> SAA, et al., Bankers; ASTA; ACB; DMA; IAC; MPA; Microsoft; Time Warner. Of course, to the extent permitted by law, an advertiser could change its privacy policy to reflect the need to share opt-out information with other advertisers. Such a change, however, would not necessarily be in the best interests of consumers who do not want their e-mail addresses shared among third parties.

<sup>41</sup> SAA, et al., DMA; IAC; MPAA; Microsoft; Time Warner.

<sup>42</sup> ABM; DMA; Time Warner.

<sup>43</sup> AMB; Microsoft; Midway; Time Warner.

<sup>44</sup> SAA, et al., Time Warner. Arguments regarding consumers' opt-out expectations are complicated by the fact that, in some situations, the party to whom consumers would expect to submit an opt-out request would not be a "sender" under the Act. For example, commenters raised the case of an email address list owner who sends commercial messages on behalf of others but does not advertise any products or services of its own. SAA, et al., IAC; Microsoft (also arguing that the Act's regulation of this arrangement decreases consumer choice and control). If consumers have asked the list owner to send them commercial messages, they may expect to be able to opt out of that party's messages. This party would not be a "sender" under the Act and thus would not have to honor opt-out requests if its own products or services are not advertised in the message. List owners who send messages on a seller's behalf, however, may satisfy the Act's "initiate" definition. 15 U.S.C. 7702(9). Persons

b. Proposal To Modify Definition of "Sender"

Based on the arguments discussed above, the Commission believes there is merit in the argument that an interpretation of "sender" that would not allow multiple advertisers in a single message to designate one as the "sender" could impede implementation of CAN-SPAM by placing undue compliance burdens on businesses and endangering the privacy of consumers' personal information. Therefore, the Commission believes that to implement CAN-SPAM's changing definition of "sender" (16 C.F.R. § 640.92-49 consumers) businesses and

who "initiate" commercial e-mail must comply with the Act. *Sno, et al.*, 15 U.S.C. 7704(a) and (b).

<sup>45</sup> Nevertheless, a small group of commenters recommended that the Commission use a "but for" test. *Sno, et al.*, Bankers; ASTA; DMA; Discover; IAC; MPAA; Microsoft; Time Warner. Under such a test, if an e-mail message would have been sent regardless of whether a particular advertisement was included, then the advertiser would not be a sender. The Commission does not believe that such a test is workable from the perspective of law enforcement because it relies on gauging the intent of the sender, an approach that is contrary to the Commission's traditional analysis of advertising or marketing claims. In its final primary purpose criteria, the Commission similarly declined to adopt a "but for" test for determining a message's "primary purpose," instead opting to look at the message from the recipient's perspective. 70 FR at 3118. The Commission noted that its decision to use the recipient's perspective is based on the analytical approach the Commission traditionally has taken with advertising, where claims are judged from the consumer's perspective not the marketer's. *I* . Therefore, the Commission declines to adopt a "but for" test, or any other approach that focuses on a sender's intent, in determining the identity of the "sender."

<sup>46</sup> Bankers; DMA; ERA; Experian; Go Daddy; MPAA.

<sup>47</sup> *Sno, et al.*, ABM; AeA; ACB; ERA; Experian; Go Daddy; IPPC; MMS; NAR; Coalition; Time Warner; USTOA.

<sup>48</sup> *Sno, et al.*, DMA; Experian; ERA; IAC; IPPC; Microsoft; Moerlien; Time Warner. IAC and Microsoft also recommended that the list owner or broker be required to identify itself and the role it plays in sending the e-mail.

<sup>49</sup> *Sno, et al.*, Bankers; AeA; DMA; ERA; MPAA; IAC; IPPC; MPAA.

<sup>50</sup> *Sno, et al.*, AeA; DMA; ERA; Go Daddy; NAR.

<sup>51</sup> *Sno, et al.*, AeA; Experian; IAC; Coalition.

<sup>52</sup> *Sno, et al.*, Coalition (suggesting one test would be who derives the primary value from the message); USTOA.

<sup>53</sup> *Sno, et al.*, ABM; IAC; Microsoft; NAR; Coalition; USTOA.

<sup>54</sup> See "from" line discussion in this NPRM, below, for explication of the requirements of CAN-SPAM and section 5 of the FTC Act with respect to the "from" line.

<sup>55</sup> 15 U.S.C. 7702(16)(B).

<sup>56</sup> *Sno, et al.*, DSA; IFA; Go Daddy (suggesting that "sender" should not include affiliates unless companies are so closely intertwined that a reasonable person would conclude they were the same entity); IPPC; MMS; USTOA; Weston.

marketing. These commenters argued that third-party list providers or e-mail services should be considered akin to separate lines of business or divisions and asked that the Commission incorporate the concept of “third-party advertising service” or list provider into the definition of “sender.”<sup>57</sup> These commenters expressed concern that the definition of “sender” does not encompass third-party advertising services, e-mail list service providers, or similar services that compile lists of e-mail addresses, have an established relationship with the recipients, and often use their own lists of e-mail addresses to transmit messages on behalf of advertisers.<sup>58</sup> Some commenters disagreed, urging the Commission to hold responsible the entity whose products or services are advertised or promoted in an e-mail, not the facilitators of the transaction such as list owners/brokers/managers, broadcast services, and other entities not promoting their own products and services in the e-mail.<sup>59</sup>

The Act is quite clear that the definition of “sender” includes two elements: one must initiate a message advertise one’s own product, service, or Web site in order to be a “sender.”<sup>60</sup> Thus, the Act reflects Congress’s determination that the obligations of the “sender” will fall only on an entity whose products or services are advertised in the message, even though other parties may also transmit or procure the transmission of the message. The Act’s definition of “sender” simply does not apply to entities that do nothing more than provide a list of names or transmit a commercial e-mail message on behalf of those whose products or services are advertised in the message. Of course, if an e-mail service provider or list compiler or owner initiates messages that advertise or promote its o product or service as well as the products or services of others, the list owner may be considered to be the sender. Given this framework, the Commission is not inclined to expand CAN–SPAM’s regulation of who must honor opt-out requests to entities whose products or services are o advertised or promoted in a message. However,

pursuant to section 7709, which requires the Commission to report to Congress on its analysis of the effectiveness and enforcement of the Act, the Commission ast

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<sup>57</sup> SAA, A. ., Experian; Coalition (suggesting the Commission could interpret the Act as providing that a “third party advertising service” which “holds itself out to the recipient throughout the message as that particular [third party advertising service] rather than as the [advertiser itself], shall be treated as the sender of such message for purposes of this Act”).

<sup>58</sup> SAA, A. ., Experian.

<sup>59</sup> SAA, A. ., MMS.

<sup>60</sup> S. Rep. No. 108–102.

<sup>61</sup> SAA, A. ., ACB; IFA MPAA; Time Warner; Weston.

<sup>62</sup> SAA, A. ., 310.4(b)(3)(v) of the Telemarketing Sales Rule, which requires sellers and telemarketers to monitor and enforce compliance with the do-not-call policy and procedures. SAA so U.S. v. R. P b o , No. 1:02–CV–917–JOF (N.D. Ga. June 9, 2003).

<sup>63</sup> 15 U.S.C. 7704(a)(1)(B).

<sup>64</sup> SAA, A. ., Experian; Go Daddy; Jaffe; ValueClick. On the other hand, NFCU considered the Act’s language to be perfectly clear. Several commenters asked that the Rule prohibit deceptive or misleading routing or “reply to” information. SAA Bahr; K. Krueger. The Commission believes that this practice is already prohibited by section 7704(a)(1) and no further prohibition is needed.

<sup>65</sup> SAA, A. ., Bahr, Giambra; Potocki; SIAA.

<sup>66</sup> SAA, A. ., ASTA; EDC; EFF; Experian; Gilbert; Go Daddy; Jaffe; MBNA; NetCoalition; Richardson; SIAA; ValueClick.

<sup>67</sup> SAA, A. ., ASTA; EFF; Experian; Gilbert; Go Daddy; Mead; NetCoalition; SIAA; ValueClick.

<sup>68</sup> SAA, A. ., ASTA; Bank; Calvert; Countrywide;

EDC; EFF; Experian; K. Krueger; MBNA; NetCoalition; Reed; Richardson; SIAA.

<sup>69</sup> 15 U.S.C. 7704(a)(1)(B).

- Whether the “from” line has been altered or concealed in a manner that would impair the ability of an ISP or a law enforcement agency to identify, locate, or respond to the person who initiated the message; and

- Whether the “from” line “accurately identifies any person who initiated the message.”

The first element of this analysis

(iii) To provide—

(I) Notification concerning a change in the terms and features of;

(II) Notification of a change in the recipient’s standing or status with respect to; or

(III) At regular periodic intervals, account balance information or other type of account statement with respect to—

A subscription, membership, account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender;

(iv) To provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or

(v) To deliver goods or services, including product updates or upgrades, 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.”

<sup>71</sup> The Act defines a “commercial electronic mail message” as one “the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet Web site operated for a commercial purpose).” 15 U.S.C. 7702(2)(A).

<sup>72</sup> One provision, section 7704(a)(1), which prohibits false or misleading transmission information, applies equally to “commercial electronic mail messages” and “transactional or relationship messages”; otherwise, CAN-SPAM’s prohibitions and requirements cover only “commercial electronic mail messages.”

<sup>73</sup> 15 U.S.C. 7702(17)(B).

<sup>74</sup> 69 FR 21024 (Apr. 19, 2004); 70 FR 3110 (Jan. 19, 2005).

<sup>75</sup> I .

<sup>70</sup> Section 7702(17)(A) of the Act defines a “transactional or relationship message” as “an electronic mail message the primary purpose of which is—

(i) To facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender;

(ii) To provide warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient;

<sup>76</sup> 15 U.S.C. 7702(2)(A). See Rule Provisions Establishing Criteria for Determining When the Primary Purpose of an E-mail Message is Commercial, 70 FR 3110 (Jan. 19, 2005).

<sup>77</sup> 15 U.S.C. 7704(a)(5)(A)(i)–(iii).

<sup>78</sup> 15 U.S.C. 7704(a)(1); (a)(2); (a)(3); and (a)(4).

<sup>79</sup> 15 U.S.C. 7704(a)(1).



standpoint), to provide an opt-out mechanism and to honor opt-out requests received. These requirements do not prohibit transmission of “transactional or relationship” content. Even if a recipient opts out of receiving messages with a commercial primary purpose from a particular sender, that sender may continue to transmit other types of messages. Therefore, recipients who invoke their rights under the opt-out mechanism required by CAN-SPAM will continue to receive valuable “transactional or relationship” messages. This is important because transactional or relationship messages are communications that Congress has determined to be valuable to recipients. Nevertheless, to ensure that the protection from unwanted commercial e-mail CAN-SPAM affords recipients not be eroded, the Commission believes the partial exemptions from the Act’s provisions established in the definitions of “commercial electronic mail message” and “transactional or relationship message” should be interpreted narrowly.

b. CAN-SPAM’s Standard for Expanding or Contracting the Categories Designated as “Transactional or

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<sup>80</sup> A smattering of other commenters discussed technological changes that do not necessitate modification of the transactional or relationship definition. For example, a few commenters noted that new spam-blocking techniques used by ISPs to filter spam should not be allowed to filter out transactional or relationship messages. Jaffe; CMOR. Another commenter noted that “the use of ICQ, IM and text messaging via phone and blackberry has increased the source of UCE.” Shaw. (ICQ is a type of instant messaging program. Instant messaging is defined by Webopedia.com as “a type of communications service that enables you to create a kind of private chat room with another individual in order to communicate in real time over the Internet, analogous to a telephone conversation, but using text-based, not voice-based, communication.”)

<sup>81</sup> Discover.

<sup>82</sup> Discover cited a purportedly “recent” development in online marketing whereby “companies increasingly use e-mail to facilitate or complete transactions as to which the recipient has made an inquiry or application, but has not yet entered into a contract.”

<sup>83</sup> Lenox; Visa. In fact, Go Daddy opined that there were no technological changes of which it was aware that would necessitate modification of this definition. Go Daddy.

<sup>84</sup> Marzuola.

<sup>85</sup> A variety of commenters claimed that some e-mail messages are neither commercial nor “transactional or relationship,” and therefore should be considered exempt from the Act and the proposed Rule. *See, e.g.*, CBA; CMOR (messages sent to conduct marketing and opinion research); BMI (copyright infringement notices). *See also* ACA (claiming that debt collection e-mail messages are not commercial, and are “at most, ‘transactional or relationship messages’”). The Commission agrees that certain types of messages may not satisfy either the “commercial” or “transactional or relationship” definitions, and thus are not regulated by CAN-SPAM. The Commission has posed questions in this NPRM asking whether certain types of messages are beyond the scope of the Act, and whether CAN-SPAM should be modified to address these messages.

<sup>86</sup> 15 U.S.C. 7702(17)(A)(i).

(a) What Constitutes a “Commercial Transaction” Under Section 7702(17)(A)(i)?

IAC urged the Commission to opine that a “commercial transaction,” as used in section 7702(17)(A)(i), need not involve the exchange of consideration.<sup>87</sup> IAC noted that in the definition of “commercial electronic mail message” the term “commercial products or services” includes “content on an Internet Web site operated for a commercial purpose.” Based on this, IAC argues that registering for a free Internet service such as Evite (a Web site through which registrants may send electronic invitations to events) constitutes a commercial transaction. Microsoft also advocated this position, raising the specter that if the Commission does not adopt this view, it would only encourage “many more online businesses to charge for their services.”<sup>88</sup>

The Commission believes that this reading of section 7702(17)(A)(i) is unnecessary because the types of e-mail messages that prompt the concern of IAC and Microsoft would likely be deemed “transactional or relationship messages” under a separate subparagraph of section 7702(17)(A). Specifically, under section 7702(17)(A)(v), it seems likely that a message sent from Evite or a similar entity to one who had registered to use its services would be considered a message “to deliver goods or services \* \* \* that the recipient is entitled to receive under the terms of a transaction” between the recipient and Evite. The Commission believes that the modifier “commercial” has been deliberately omitted from this provision of CAN-SPAM to accommodate just the sort of scenario that IAC and Microsoft raise. The Commission seeks comment on whether messages sent pursuant to a relationship in which no consideration passes may be considered to be a “commercial transaction” under section 7702(17)(A)(i), or would more appropriately be considered a transactional or relationship message under section 7702(17)(A)(v), or under some other theory.

(b) How Many Confirmation Messages Under Section 7702(17)(A)(i) May a Sender Transmit Pursuant to a Single Transaction?

IAC also requested that the Commission expressly allow each confirmation message pursuant to a single transaction to be a transactional or relationship message, even if more

than one such message is sent. As an example, IAC cited a scenario in which one confirmation is sent immediately after a consumer completes an online transaction (such as booking an airline flight or hotel room) and another is sent in close proximity to the travel time to remind a recipient of her reservation.<sup>89</sup> The Act is silent as to the number of times a sender may transmit to a particular recipient a message to facilitate, complete, or confirm a single commercial transaction. Nevertheless, the Commission believes that, given the purposes of the Act, a standard of reasonableness is implied, and that senders must meet that standard.<sup>90</sup> IAC’s scenario would appear to meet this standard, but other scenarios would not. As an extreme example to illustrate the point, if a company sent hourly confirmations of a transaction that warranted merely a single such notice—particularly if the message also contained content advertising or promoting products or services—the Commission would likely view such messages as commercial and not transactional.

(c) May an E-mail Sender Use a Third Party To Send Messages Under Section 7702(17)(A)(i) on Its Behalf?

IAC also urged the Commission to opine that when an entity with whom a recipient has done business uses a third party to send a message confirming a transaction, the message would still be considered a transactional or relationship message.<sup>91</sup> By way of example, IAC argued that when a consumer books an airline reservation using Expedia, the consumer should be considered to have entered into a transaction not only with the airline, but also with Expedia.<sup>92</sup> NAIFA asked that the Commission opine that e-mail messages from an insurance agent to a customer should be considered transactional or relationship messages even though the customer pays the premium to the insurer, not the agent.<sup>93</sup>

These comments raise the question of whether the language of section 7702(17)(A)(i) supports allowing such transactional or relationship messages only from the sender, or also from

<sup>89</sup> IAC.

<sup>90</sup> See Go Daddy (advocating requiring contact via transactional or relationship messages to be reasonable).

<sup>91</sup> IAC.

<sup>92</sup> According to IAC, absent such an interpretation, if a consumer were to forward an opt-out request to Expedia pursuant to section 7704(a)(3)(A)(i) prior to the time Expedia had transferred the customer’s e-mail address to the airline, such transfer could be considered a violation of section 7704(a)(4)(A)(iv).

<sup>93</sup> NAIFA.

affiliated third parties if they are facilitating, completing, or confirming a transaction. In the examples cited—when Expedia processes sales on behalf of an airline, and when an insurance company uses agents to sell policies—a message confirming the transaction would qualify as a transactional or relationship message under section 7702(17)(A)(i) whether, in the first example, it came from either Expedia or the airline, and whether, in the second example, it came from either the insurance company or the selling agent. These examples seem fairly straightforward; the Commission seeks comment on whether other situations involving transactional or relationship messages from an entity purporting to be acting on behalf of a sender might be more problematic for consumers or cooperating sellers, or present opportunities for evasion of CAN-SPAM’s consumer protections.

(d) Do Messages Negotiating a Commercial Transaction Satisfy Section 7702(17)(A)(i)?

Some commenters asked that the Commission ensure that e-mail messages sent to negotiate a transaction be included in the definition of transactional or relationship message.<sup>94</sup> The Commission believes that, to the extent that negotiation may be considered a “commercial transaction” that a recipient has previously agreed to enter into, it would seem that such messages likely would be considered transactional or relationship as long as they were sent to facilitate or complete the negotiation. On the other hand, the Commission would not interpret the term “transactional or relationship message” to include an initial unsolicited message that proposes a transaction and attempts to launch a negotiation by offering goods or services. Rather, such a message would likely be categorized as a commercial e-mail message, and would be required to comply with all prescriptions of the Act. The Commission seeks more information about whether e-mail messages sent to effectuate or complete a negotiation might be considered “transactional or relationship messages” under section 7702(17)(A)(i), and if so, under what circumstances that may or may not be the case.

<sup>94</sup> See, e.g., Mellon; SIA; Wells Fargo.

<sup>87</sup> IAC.

<sup>88</sup> Microsoft.

(2) Section 7702(17)(A)(i) Messages sent to a person for the purpose of selling, offering for sale, or leasing a product, service, or other thing, or for the purpose of promoting the sale, lease, or use of a product, service, or other thing.

Commenters had relatively few suggestions for modification to this category, but NADA requested that the Commission opine that scheduled maintenance notifications be considered safety or security information and covered by this definition.<sup>95</sup> To the extent that scheduled maintenance is designed to ensure the safe operation of a product, the Commission believes that reminders of this nature would be considered safety information under the “transactional or relationship” partial exemption from CAN-SPAM’s requirements. Scheduled maintenance that is necessary for safe operation of a product, however, would not satisfy this “transactional or relationship” category. A message notifying recipients when such scheduled maintenance is due could satisfy section 7702(17)(A)(v)—covering, among other things, delivery of product updates or upgrades—if recipients previously agreed to receive such notices from the sender. Section 7702(17)(A)(v), the fifth “transactional or relationship” category, is discussed below.

Two other comments requested expansion of this category to cover additional messages. First, Ford Motor recommended that “product service” information be expressly included in this category. It is not clear from the comment what kinds of messages might fall outside the existing categories in this section, but within the “product service” category. Nor does the comment contain sufficient evidence that this suggested modification is necessary to accommodate changes in e-mail technology or practices and accomplish the purposes of the Act. As a result, the Commission declines to incorporate this language into the proposed Rule.<sup>96</sup> Second, Countrywide recommended expansion of “security information” to include “security-related notifications or education.” The language of the Act is clear that messages relaying “security information” will be categorized as “transactional or relationship,” and the Commission finds that the comments

<sup>95</sup> NADA.  
<sup>96</sup> If recipients agreed to receive such messages, however, they could satisfy section 7702(17)(A)(v) in the same way that messages reminding recipients of scheduled maintenance could. See discussion of section 7702(17)(A)(v) below.

contain insufficient justification for altering this language.

(3) Section 7702(17)(A)(ii) Messages sent to a person (I) Not for the purpose of selling, offering for sale, or leasing a product, service, or other thing, or for the purpose of promoting the sale, lease, or use of a product, service, or other thing; (II) Not for the purpose of selling, offering for sale, or leasing a product, service, or other thing, or for the purpose of promoting the sale, lease, or use of a product, service, or other thing; (III) Not for the purpose of selling, offering for sale, or leasing a product, service, or other thing, or for the purpose of promoting the sale, lease, or use of a product, service, or other thing.

The Commission received many comments related to the three sub-categories that comprise this provision. Most business commenters recommended expanding these sub-categories or interpreting them broadly to include more (or even all) messages between a sender and any customer with whom the sender has an established business relationship.<sup>97</sup> Some commenters who endorsed this expansion suggested that the proposed Rule require that the frequency with which recipients are contacted must be reasonable.<sup>98</sup> Some consumers expressed concern about the volume of e-mail messages they might receive if this transactional or relationship category were interpreted too broadly.<sup>99</sup>

The recommendations for expansion were couched in a variety of terms. Some commenters requested that any e-mails regarding a transaction that formed the basis of a relationship between the seller and consumer be considered transactional or relationship messages. Others suggested that messages about an ongoing service that the customer has requested or consented to receive be considered “transactional or relationship.”<sup>100</sup> Still others recommended adding a new category for messages “concerning information, products, or services that the recipient has received or will receive from the sender.”<sup>101</sup>

Some of the comments focused on specific elements of the language of section 7702(17)(A)(iii). For example,

<sup>97</sup> See, e.g., Cendant.  
<sup>98</sup> Go Daddy.  
<sup>99</sup> Jensen (noting that merely purchasing a single item from a company should not “allow the company to then inundate the customer with sales pitches, nor should a bank be able to send messages for its many services unrelated to a customers [sic] checking account if that is the only relationship that exists between the parties”).  
<sup>100</sup> MPAA; Lenox.  
<sup>101</sup> Wells Fargo.

<sup>102</sup> See, e.g., MPAA (noting that a “subscription or ‘preferred customer’ loyalty program where special discounts and event opportunities are routinely promoted” often do not involve the exchange of consideration).  
<sup>103</sup> CBA. The Commission believes that if such notices are routinely sent at a certain interval following a transaction that this may well meet the regular interval standard.  
<sup>104</sup> Reed. This issue is addressed in the January 19, 2005, F R Notice, 70 FR at 3117.  
<sup>105</sup> Countrywide.  
<sup>106</sup> Visa.

e-mail messages under the guise of transactional or relationship messages even after a loan is paid off, claiming to be changing the status of the recipient from "paid off" to "inactive."<sup>107</sup> In a similar vein, NCL expressed concern about the use of dual-purpose messages

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<sup>110</sup> SVM ("This definition should be modified to acknowledge that a message is transactional or relationship message, regardless of whether it is sent directly by the employer or with the consent of the employer or on behalf of the employer by a third party or by a service in which the employer of the recipient has enrolled on behalf of the recipient.").

<sup>111</sup> See, e.g., Countrywide.

<sup>112</sup> Ford Motor.

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<sup>107</sup> See, e.g., Ford.

<sup>108</sup> 16 CFR 316.3.

<sup>109</sup> Wells Fargo; CBA; NADA.

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<sup>113</sup> MPAA.



<sup>134</sup> ICFA (arguing that the CAN-SPAM Act “never intended to restrict” messages sent by cemeteries and funeral homes to alert families to special events or services, or changes in cemetery rules).

<sup>135</sup> NEPA. *See also* Comerica; ACB; PMA (“[A]ny e-mail relating to the goods or services which formed the basis of the transaction or relationship between the sender and the consumer should be considered a transactional or relationship message.”).

<sup>136</sup> *See also*, *Visa* (noting that the Commission had included a business-to-business exemption in the Telemarketing Sales Rule); ACLI (noting the definition of “

commenters noted that association members, and others who receive transactional or relationship messages, are afforded the right to “opt out” as part of their membership. *See also*, *AOC*; *AWWA*. There is, however, no legal compulsion for associations to grant this right to members.

<sup>130</sup> SVM.

<sup>131</sup> SVM.

<sup>132</sup> KSUF; UNC (arguing that “CAN-SPAM compliance language” requiring an opt-out mechanism in every message deemed to be commercial would negatively impact the recipients’ view of the message, and “reduce drastically the size” of their e-mail contact list).

<sup>133</sup> *Cendant* (arguing that the primary purpose of these messages, even those offering business seminars, is not to sell such services, but rather to “timely communicate and offer business seminars to our franchisees”).

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<sup>148</sup> *S* NFCU (noting that “such addresses are often used in fraud schemes and effectively shield their owners from identification”). *S* *so* Sachau (“[W]e have too many fly by nights with post office boxes—here today and gone tomorrow.”); ValueClick; ICC.

<sup>149</sup> Gilbert (“P.O. Boxes require identification etc. Many private mailboxes do not.”)

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When a commenter is quoted, however, the term the commenter actually used is reproduced.

<sup>145</sup> 69 FR at 11781.

<sup>146</sup> One commenter suggested requiring that information provided to a domain name registrar be valid and include a confirmed physical address. Vandenberg. Such a requirement is unnecessary as obtaining a domain name by false or fraudulent representations is already prohibited by section 7704(a)(1)(A) of the Act. *S* 15 U.S.C. 7704(a)(1)(A).

<sup>147</sup> A few commenters on either side of this issue were particularly precise, focusing on the value of a valid physical postal address to law enforcement authorities and potential plaintiffs seeking to accomplish service of legal process. *S* AT&T; K. Krueger. *B* *so* DoubleClick (“If the purpose of this provision were to identify where companies could be served with legal process, then the law would have required the listing of a sender’s corporate headquarters or legal ‘place of doing business.’”).

'physical,' Congress intended to authorize the Commission to require a more substantial presence than a mere Post Office box.').

<sup>157</sup> Bahr.

<sup>158</sup> True (noting that "[i]t would be literally impossible for many legitimate mailers to comply with the Act if a PO Box were not acceptable"); AAR; Jaffe; NAA noting that many smaller newspapers are on rural routes, designated as box numbers); NCL ("[T]he only mailing address that some people have is a post office box.")

<sup>159</sup> MIS; Consumer; Lunde; Jaffe; Oldaker; ESPC; Bahr (noting that "junk mailers" are not required



supplied). A recipient who forwards a sender's non-compliant commercial e-mail message to one or more people could also face liability as an initiator under CAN-SPAM. 15 U.S.C. 7702(9).

<sup>168</sup> "It is unlawful for any person to <sup>to</sup> the transmission to a protected computer of a commercial electronic mail message that does not contain a functioning return electronic mail address or other Internet-based mechanism, clearly and conspicuously displayed, that (i) a recipient may use to submit, in a manner specified in the message, a reply electronic mail message or other form of Internet-based communication requesting not to receive future commercial electronic mail messages from that sender at the electronic mail address where the message was received. \* \* \*" 15 U.S.C. 7704(a)(3)(A) (emphasis supplied). A recipient who forwards a sender's non-compliant commercial e-mail message to one or more people could also face liability as an initiator under CAN-SPAM. 15 U.S.C. 7702(9).

<sup>169</sup> K. Krueger; NCL; Go Daddy.

<sup>170</sup> 15 U.S.C. 7702(16)(A) (emphasis supplied).

<sup>171</sup> 15 U.S.C. 7702(9) (emphasis supplied).  
"Routine conveyance"

Internet-based

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<sup>184</sup> S. Rep. 108-102, at 15.

<sup>185</sup> 15 U.S.C. 7704(a)(4).

<sup>186</sup> 15 U.S.C. 7704(c)(1).

to these questions, however, provided only the most conclusory information. For example, commenters who asserted that complex business arrangements or the use of third-party marketers impede many senders from effectuating opt-out requests within ten business days omitted details about how or why these complex arrangements affect the time and procedures involved in processing opt-out requests.<sup>197</sup> Nor did they specifically explain the role of third parties as they relate to maintaining and processing suppression lists. Similarly, several commenters who referred to the use of third-party e-mailers as a reason for extending the opt-out period did not specify how long it takes to transfer opt-out requests to these third parties, or the specific technical procedures involved in such a transfer.<sup>198</sup>

Several commenters indicated that the average time to effectuate an opt-out request “varies” or that it depends on the size and structure of the sender’s business, but did not provide any specific data reflecting the minimum or maximum amount of time it can take to effectuate an opt-out request.<sup>199</sup> Some commenters complained that the Act’s ten-business-day time frame has proven burdensome for small businesses with limited staff and resources, or those who lack an Information Technology department, yet these commenters provided no specific data justifying a longer period.<sup>200</sup>

The Commission received very few comments that addressed how long it takes for each step of the opt-out process.<sup>201</sup> Some commenters indicated that many opt-out requests are effectuated almost entirely electronically; other commenters indicated that senders often must process opt-out requests manually, and argued that such manual processing warranted extending the opt-out period.<sup>202</sup> These commenters did not fully explain the circumstances that would require opt-outs to be processed

<sup>197</sup> *Saa, a., .*, NNA; ABM.

<sup>198</sup> *Saa, a., .*, Visa; ICC; ERA; ABM. *B saa* RDS (suggesting that where third parties are used, three to five days is an appropriate time period for processing opt-out requests); Go Daddy (recommending that five days is an appropriate time frame to allow for companies that utilize third parties).

<sup>199</sup> Experian. Generally, commenters indicated that currently there is no industry standard for effectuating opt-out requests. *Saa, a., .*, Go Daddy; ACLI.

<sup>200</sup> *Saa, a., .*, NNA; BMO.

<sup>201</sup> *Saa* MBNA.

<sup>202</sup> *Saa, a., .*, MPAA; IPPC; KeyCorp; MBA; BMO (suggesting that employees who send out individual commercial e-mail messages often need to collect and circulate opt-out requests manually).

<sup>203</sup> *Saa, a., .*, ESPC; BMO; IPPC; KeyCorp; MBNA.

<sup>204</sup> 15 U.S.C. 7704(a)(4)(A).

<sup>205</sup> *Saa, a., .*, AeA.

<sup>206</sup> 15 U.S.C. 7704(a)(3)(C).

<sup>207</sup> *Saa, a., .*, NetCoalition; Bankers; Chamber.

<sup>208</sup> *Saa, a., .*, Giambra; Go Daddy.

<sup>209</sup> Vandenberg (emphasis in original).

<sup>210</sup> *Saa, a., .*, RDS; NFCU; NetCoalition; ValueClick.

<sup>211</sup> Go Daddy (“There are very little costs associated with deleting a person’s e-mail address from a database, since mailing lists are almost always electronically automated.”).

<sup>212</sup> *Saa, a., .*, MBNA.

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<sup>213</sup> Satchell; K. Kreuger.

<sup>214</sup> *See, e.g.*, Go Daddy.

<sup>215</sup> *See, e.g.*, Wells Fargo; Experian; Coalition.

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<sup>216</sup> Piper.

<sup>217</sup> CBA; DMA.

<sup>218</sup> 68 FR 4640 (Jan. 29, 2003).

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<sup>219</sup> 15 U.S.C. 7704(a)(3)(A).

<sup>220</sup> 15 U.S.C. 7704(a)(3)(B).

<sup>221</sup> *See* 15 U.S.C. 7704(a)(4)(A). As was explained above, the Commission is proposing to shorten the amount of time senders, and those acting on the sender's behalf, have to honor recipients' opt-out

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<sup>222</sup> The concept of opt-out preferences is introduced in section 7704(a)(3)(B). Pursuant to that provision, people who initiate commercial e-mail messages may ask recipients to specify which types of commercial e-mail they do and do not want from a sender.

<sup>223</sup> Hon. W. J. (Billy) Tauzin, Cong. Rec. E74 (Jan. 28, 2004) (Extension of remarks).

<sup>230</sup> "Spoofing" is defined as disguising an e-mail to make it appear to come from an address from which it actually did not originate, such as placing another user's address in the "from" or "reply-to" lines. See *FTC v. GMF*, 162 F.3d 1026 (C.D. Cal. filed Nov. 6, 2002).

<sup>231</sup> Richardson (obscuring origin of e-mail); Csorba (forged headers; invalid opt-out); Calvert (non-functional opt-out); Freese (non-functioning opt-out); Safell (spoofing); Innovation (false identification of sender); NetCoalition (deceptive header information); KALRES (mailing after opt-out request); EDC (automated harvesting); Moerlien; St. Saveur; O'Connor; Rospenda; ClickZ; Jensen; Mead; B. Krueger; Discover (transferring e-mail addresses).

<sup>232</sup> See section 7704(a)(1)(C) (prohibiting header information that "fails to identify accurately a protected computer used to initiate the message because the person initiating the message knowingly uses another protected computer to relay or retransmit the message for purposes of disguising its origin"); section 7704(a)(3) (prohibiting initiation of an e-mail message that does not include a functioning opt-out mechanism); and section 7704(a)(4)(A)(iv) (prohibiting the sale, lease, exchange, transfer, or release of the e-mail address of any person who has opted-out).

<sup>233</sup> "Whois" is an Internet program that allows users to query a database of people and other Internet entities, such as domains, networks, and hosts. "Whois" databases are maintained generally by the registrars. "Whois" data includes the registrant's company name, address, phone number, and e-mail address.

<sup>234</sup> Microsoft; St. Sauveur. See also Truth (suggesting ways that accurate Whois information can be used to prevent fraudulent credit card transactions). The Commission has provided testimony to the U.S. House of Representatives Judiciary Committee; Subcommittee on Courts, The Internet, and Intellectual Property regarding the critical importance of accurate Whois information to the integrity of the Internet. See *Att. Gen. v. HOIS*, 162 F.3d 1026 (C.D. Cal. filed May 22, 2002), available at <http://www.ftc.gov/ftc/2002/05/050501.htm>.

<sup>235</sup> See *FTC v. Galt*, No. 05-1026, 2005 WL 1026 (C.D. Cal. filed Jan. 3, 2005) (alleging that, among other things, the

defendants violated 15 U.S.C. 7704(a)(1) of CAN-SPAM by initiating commercial e-mail containing an originating e-mail address that was obtained through false representations to the e-mail service provider).

<sup>236</sup> St. Saveur; Danko; ClickZ; Lunde; NetCoalition.

<sup>237</sup> The technique of inserting sometimes strangely eloquent nonsense is favored by spammers as an effective way of defeating spam filters that convert e-mail into "hashes" (where characters in words are converted into numbers) (see, e.g., <http://www.spamcop.net>) or spam filters that use Bayesian statistical analysis (see, e.g., <http://www.spamcop.net>). Computer programs, also known as "Chomskybots," can automatically generate such paragraphs.

<sup>238</sup> See *N. v. Do No E- R's*, A R's To Co. Inc., FTC, June 2004, at 8 (spammers use many techniques to hide including: spoofing, open relays, open proxies, and zombie drones). Available at <http://www.ftc.gov/ftc/2004/06/060601.htm>.

<sup>239</sup> A "virus" is a program or piece of code that is loaded onto one's computer without one's knowledge and runs against one's wishes. Computer viruses can replicate themselves and will quickly use all available computer memory. Some viruses are capable of transmitting themselves across networks and bypassing security systems. See, e.g., <http://www.spamcop.net>. Computer viruses comprise a class of "malicious code" that can include Trojan horses and worms. A "Trojan horse" is a destructive program that masquerades as a benign application. Unlike viruses, Trojan horses do not replicate themselves but can be just as destructive. One of the most insidious tyha, Trojan horses 08;0.0hcatation.

10.9 -1r memory

far in this proceeding, these specific practices do not appear to be contributing substantially to the proliferation of commercial e-mail messages that are prohibited under section 7704(a) of the Act. Where appropriate, however, the Commission will challenge these practices under section 5 of the FTC Act.<sup>242</sup>

2. Manual E-mail Address Harvesting

A coalition of four domain name registrars requested that the Commission consider adding as an aggravated violation the manual harvesting of e-mail addresses.<sup>243</sup> The Act itself designates the harvesting of e-mail addresses as an aggravated violation. The record amassed to date does not document that manual e-mail address harvesting is a practice that meets the standard specified in CAN-SPAM to be designated as an aggravated violation

<sup>242</sup> The Commission has alleged, *Register*, that in some instances, pop-ups and Web browser hijacking (a/k/a mouse trapping) may interfere with a user's computer. *Register*, *Register*, *FTC v. Domain Name Services, Inc.*, No. 03-CV-3108 (D. Md. 2003) (pop-ups unfairly interfered with computer use); *FTC v. Computer Professionals' Guild*, No. 99-1367-A (E.D. Va. 1999) (manipulating normal functioning of Web browser is unfair).

<sup>243</sup> Register.

<sup>244</sup> *Register*, *Register*, *Register*. Some Web sites offer a small quantity of "free" open proxies but those open proxies have limited value to spammers. For example, the cited Web site offers ten free, but slow, open proxies. A slow open proxy has marginal value to someone who wants to send bulk e-mail because slow connections use too many computer resources. To obtain a list of quality fast open proxies, one must pay a monthly fee.

<sup>245</sup> Microsoft.

<sup>246</sup> 15 U.S.C. 7704(b)(3).

<sup>247</sup> *Register*, *Register*, *Register*. (most proxies are not supposed to be public).

<sup>248</sup> 15 U.S.C. 7704(c)(2).

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<sup>249</sup> On January 19, 2005, the Commission published a Federal Register Notice promulgating Rule provisions addressing the statutory mandate to establish criteria for determining the primary purpose of an e-mail message.





## 1. Section 316.2—Definitions

a. Does the proposed definition of “person” clarify those individuals and entities that are covered by the Rule and the Act? Should the proposed definition be modified? If so, how?

b. Does the proposed definition of “sender” clarify who will be responsible for complying with the CAN–SPAM Act when a single e-mail contains content promoting or advertising the products, services, or Web sites of multiple parties? Should the proposed definition be modified? If so, how? Do the proposed criteria provide adequate guidance to establish who is the sender when there are multiple advertisers?

c. Should opt-out obligations be extended to third-party list providers who do nothing more than provide a list of names to whom others send commercial e-mails? If so, how could this be accomplished, given the statutory language which defines “sender” in terms of an entity that both initiates a message and advertises its product, service, or Internet web site in the message?

d. Should the Commission adopt a “safe harbor” with respect to opt-out and other obligations for companies whose products or services are advertised by affiliates or other third parties? If not, why not? If so, what would be appropriate criteria for such a safe harbor?

e. Does the proposed definition of “valid physical postal address” clarify what will suffice under the Act’s requirement that a sender include such an address in a commercial e-mail? Should the proposed definition be modified? If so, how?

f. Should CAN–SPAM apply to e-mail messages sent to members of online groups? What types of online groups exist? How are they formed? Does formation typically address the use of unsolicited commercial e-mail with respect to the group? How are e-mail messages transmitted or posted to an online group? Should members be able to opt out of unwanted commercial messages while continuing to receive messages relating to the subject matter of the group? Does this analysis change depending on whether the message is sent by a group member or a source outside the group? Does this analysis change depending on whether the message is unrelated to the subject matter of the online group? Does this analysis change if the online group has a moderator who decides which messages to forward to the group?

## 2. Section 316.2(o)—“Transactional or Relationship Message”

a. If an e-mail message contains only a legally mandated notice, should this message be considered a transactional or relationship message? Which, if any, of the existing categories of transactional or relationship message would such a message likely fit into? If such a message were considered not to have a transactional or relationship purpose, would it be exempt from regulation under the Act?

b. Should debt collection e-mails be considered “commercial”? Or, should debt collection e-mails be considered transactional or relationship messages that complete a commercial transaction that the recipient has previously agreed to enter into with the sender? Such an interpretation assumes that the entity with whom the recipient transacted business is the entity sending the collection e-mail, or that the term “sender” can be interpreted to encompass a third party acting on behalf of one who would otherwise qualify as a sender. Can a third-party debt collector be considered a “sender”?

c. Are there any messages that fall outside of the reach of the proposed Rule that should not? If so, how might this be remedied?

d. Can a “commercial transaction” under section 7702(17)(A)(i) exist even in the absence of an exchange of consideration?

e. If the primary purpose of an e-mail message is to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender, it is a transactional or relationship message under section 7702(17)(A)(i). Should messages from affiliated third parties that purport to be acting on behalf of another entity (the one with whom the recipient transacted) be considered transactional or relationship messages under this provision?

f. Under what, if any, circumstances should an e-mail message sent to effectuate or complete a negotiation be considered a “transactional or relationship message” under section 7702(17)(A)(i)?

g. Is it appropriate to classify messages offering employee discounts or other similar messages as transactional or relationship messages that “provide information directly related to an employment relationship”? Is a relevant factor the employer’s provision of the e-mail address to which such messages are sent to the employee? For example, should all messages sent from an employer to an employee at the employer-provided e-mail address be

considered transactional or relationship under section 7702(17)(A)(iv)?

h. The Commission believes that an e-mail message sent on behalf of a third party, even with the permission of an employer, is not “transactional or relationship.” Is there any such scenario in which the e-mail message at issue could be considered “transactional or relationship”? If so, explain.

i. For purposes of section 7702(17)(A)(iv) of the Act, should “provid[ing] information directly related to an employment relationship” include providing information related to such a relationship after an offer of employment is tendered?

j. Where a recipient has entered into a transaction with a sender that entitles the recipient to receive future newsletters or other electronically delivered content, should e-mail messages the primary purpose of which is to deliver such products or services be deemed transactional or relationship messages?

k. Should the Commission modify the Act’s definition of “transactional or relationship message” to include what some commenters call “business relationship messages,” which are individualized messages that are sent from one employee of a company to an individual recipient (or a small number of recipients)? If so, what changes in e-mail technology and practices warrant this, and is such a modification necessary to accomplish the purposes of the Act?

l. The Commission believes that e-mail messages from an association or other membership entity to its membership are likely “transactional or relationship” in nature, pursuant to section 7702(17)(A)(v). Should messages from such senders to

b. Are there other forwarding mechanisms not discussed in this notice that should be considered "routine conveyance"? Are there other forwarding mechanisms that should be considered "routine conveyance"?

c. Does the Commission's reading of "procure" to mean something that entails either payment of consideration or some explicit affirmative action or statement designed to elicit the initiation of a commercial e-mail message provide sufficient guidance to industry and consumers? Why or why not?

d. Are there circumstances in which a seller could offer consideration to a person to forward a commercial e-mail that should be included within the "routine conveyance" exception?

e. Does the Commission's position on "routine conveyance" provide industry with sufficient guidance concerning Web-based forwarding mechanisms? Does it impose any undue burdens on industry or consumers?

#### 4. Section 316.4—Prohibition Against Failure To Honor Opt-Out Requests Within Three Business Days of Receipt

a. Is three business days an appropriate deadline for effectuating an opt-out request? If not, what time frame would be more appropriate? Does the Commission's proposal that multiple advertisers in a single commercial e-mail message may arrange to have only one of those advertisers be the "sender" affect what time frame would be appropriate? If so, how?

b. Are some commenters' concerns warranted that under the original ten-business-day provision senders would be permitted to bombard a recipient with e-mail for ten business days following his or her opt-out request? Why or why not? Is this a commonly-occurring practice? If so, what is the evidence supporting this? Providing as much detail as possible, explain whether recipients continue to receive commercial e-mail from a particular sender after submitting an opt-out to that sender. For example, are recipients who submit opt-out requests for receipt of additional commercial e-mail? How likely are recipients to continue to receive additional commercial e-mail from a particular sender within ten business days after submission of an opt-out request? How likely for ten business days?

c. Some commenters indicated that there are several software products on the market that can effectuate opt-out requests almost immediately. Are such products widely or currently used by e-mail senders? Are these products affordable for small entities? What are

the costs and benefits of using such products?

d. What specific technical procedures are required to suppress a person's e-mail address from a sender's directory or distribution list? What are the specific time requirements and costs associated with those procedures? What, if any, manual procedures are required to suppress a person's e-mail address from a sender's directory or distribution list? What, if any, costs are associated with the manual suppression of e-mail addresses? How do such costs compare with costs associated with electronic processing? What, if any, circumstances would require manual processing of opt-out requests? How prevalent is the use of manual procedures to suppress people's e-mail addresses from a sender's directory or list? What are the characteristics of senders that use manual procedures to process opt-out requests? What are the characteristics of senders that use electronic procedures to process opt-out requests? Do small entities process opt-out requests manually or electronically?

e. In marketing agreements involving the use of third parties, what typically is the role of each third party in processing an opt-out request? For example, who typically receives the opt-out request and how? If the opt-out request must be transferred to a third party, how is that transfer accomplished, and how long does such a transfer typically take? Once an opt-out request is received by the third party, what procedures are involved in effectuating the opt-out request, and how long do such procedures typically take?

f. Should there be time limits on the duration of opt-out requests? Why or why not? Does the CAN-SPAM Act give the Commission authority to limit the time opt-out requests remain in effect? If so, how?

g. Is an e-mail marketer's suppression list likely to have far fewer entries than the 84 million numbers on the National Do Not Call Registry? How many recipients receive an e-mail marketer's messages in a typical e-mail marketing campaign? How many of those recipients submit opt-out requests?

#### 5. Section 316.5—Receipt of Requests Not To Receive Future Commercial E-mail Messages From a Sender

a. What are the costs to senders and benefits to recipients of proposed 316.5?

b. Does the Commission's proposal regulating how recipients submit opt-out requests accomplish the goal of removing all extraneous encumbrances that could interfere with a recipient's ability to submit an opt-out request? Do

any e-mail senders deprive recipients of any benefit when they submit an opt-out request? Should depriving recipients of a benefit when they opt out be added to the list of encumbrances prohibited by this proposal?

c. Should the Commission's proposal regulating how recipients submit opt-out requests be changed in any way?

#### 6. Aggravated Violations Relating to Commercial E-mail

a. What data are available that would demonstrate that the harvesting of e-mail addresses is contributing substantially to the proliferation of commercial e-mail messages that are prohibited under section 7704(a) of the Act? Are there legitimate uses of manual harvesting that should be preserved?

b. What evidence is there that the sellers of open proxy lists also engage in sending e-mail messages that are prohibited under section 7704(a) of the Act? Are there any legitimate purposes for selling or distributing for consideration open proxy lists? Are there any circumstances in which an open proxy would be used by a third party with permission of the proxy's operator?

c. Are there practices that contribute substantially to the proliferation of unlawful commercial e-mail messages and are not already prohibited by the Act? For example, is harvesting e-mail addresses from peer-to-peer networks already prohibited by the Act? Is that practice contributing substantially to the proliferation of unlawful commercial e-mail messages? Is harvesting e-mail addresses from newsgroups and other similar online forums already prohibited by the Act? Is that practice contributing substantially to the proliferation of unlawful commercial e-mail messages?

#### 7. Renumbering Provisions of the Sexually Explicit Labeling Rule and Integration of Those Provisions Into The Proposed CAN-SPAM Rule

a. Is the Commission's proposal to renumber and integrate into the Proposed CAN-SPAM Rule the provisions of the previously-adopted Sexually Explicit Labeling Rule a good solution? If not, why not? What other approach would be better? Why?

### III. P R

#### L S 16 CFR P 316

Advertising, Computer technology, Electronic mail, Internet, Trade practices.

Accordingly, for the reasons set forth in the preamble, the Commission proposes to amend title 16, chapter 1,

subchapter C of the Code of Federal Regulations as follows:

I. Revise part 316 to read as follows:

#### **PART 316—CAN-SPAM RULE**

Sec.

316.1 Scope.

316.2 Definitions.

316.3 Primary purpose.

316.4 Prohibition against failure to honor an opt-out request within three business days of receipt.

316.5 Prohibition on charging a fee or imposing other requirements on recipients who wish to opt out.

316.6 Requirement to place warning labels on commercial electronic mail that contains sexually oriented material.

316.7 Severability.

A : 15 U.S.C. 7701–7713.

##### **§ 316.1 Scope.**

This part implements the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM Act”), 15 U.S.C. 7701–7713.

##### **§ 316.2 Definitions.**

(a) The definition of the term “affirmative consent” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(1).

(b) “Character” means an element of the American Standard Code for Information Interchange (“ASCII”) character set.

(c) The definition of the term “commercial electronic mail message” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(2).

(d) The definition of the term “electronic mail address” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(5).

(e) The definition of the term “electronic mail message” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(6).

(f) The definition of the term “initiate” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(9).

(g) The definition of the term “Internet” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(10).

(h) “Person” means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.

(i) The definition of the term “procure” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(12).

(j) The definition of the term “protected computer” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(13).

(k) The definition of the term “recipient” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(14).

(l) The definition of the term “routine conveyance” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(15).

(m) The definition of the term “sender” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(16), *o a*, when more than one person’s products or services are advertised or promoted in a single electronic mail message, each such person who is within the Act’s definition will be deemed to be a “sender,” *o a*, if only one such person both is within the Act’s definition and meets one or more of the criteria set forth below, only that person will be deemed to be the “sender” of that message:

(1) The person controls the content of such message;

(2) The person determines the electronic mail addresses to which such message is sent; or

(3) The person is identified in the “from” line as the sender of the message.

(n) The definition of the term “sexually oriented material” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7704(d)(4).

(o) The definition of the term “transactional or relationship messages” is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(17).

(p) “Valid physical postal address” means the sender’s current street address, a Post Office box the sender has registered with the United States Postal Service, or a private mailbox the sender has registered with a commercial mail receiving agency that is established pursuant to United States Postal Service regulations.

##### **§ 316.3 Primary purpose.**

(a) In applying the term “commercial electronic mail message” defined in the CAN-SPAM Act, 15 U.S.C. 7702(2), the “primary purpose” of an electronic mail message shall be deemed to be commercial based on the criteria in paragraphs (a)(1) through (3) and (b) of this section:<sup>1</sup>

(1) If an electronic mail message consists exclusively of the commercial advertisement or promotion of a commercial product or service, then the “primary purpose” of the message shall be deemed to be commercial.

<sup>1</sup>The Commission does not intend for these criteria to treat as a “commercial electronic mail message” anything that is not commercial speech.

(2) If an electronic mail message contains both the commercial advertisement or promotion of a commercial product or service as well as transactional or relationship content as set forth in paragraph (c) of this section, then the “primary purpose” of the message shall be deemed to be commercial if:

(i) A recipient reasonably interpreting the subject line of the electronic mail message would likely conclude that the message contains the commercial advertisement or promotion of a commercial product or service; or

(ii) The electronic mail message’s transactional or relationship content as set forth in paragraph (c) of this section does *o* appear, in whole or in substantial part, at the beginning of the body of the message.

(3) If an electronic mail message contains both the commercial advertisement or promotion of a commercial product or service as well as other content that is not transactional or relationship content as set forth in paragraph (c) of this section, then the “primary purpose” of the message shall be deemed to be commercial if:

(i) A recipient reasonably interpreting the subject line of the electronic mail message would likely conclude that the message contains the commercial advertisement or promotion of a commercial product or service; or

(ii) A recipient reasonably interpreting the body of the message would likely conclude that the primary purpose of the message is the commercial advertisement or promotion of a commercial product or service. Factors illustrative of those relevant to this interpretation include the placement of content that is the commercial advertisement or promotion of a commercial product or service, in whole or in substantial part, at the beginning of the body of the message; the proportion of the message dedicated to such content; and how color, graphics, type size, and style are used to highlight commercial content.

(b) In applying the term “transactional or relationship message” defined in the CAN-SPAM Act, 15 U.S.C. 7702(17), the “primary purpose” of an electronic mail message shall be deemed to be transactional or relationship if the electronic mail message consists exclusively of transactional or relationship content as set forth in paragraph (c) of this section.

(c) Transactional or relationship content of e-mail messages under the CAN-SPAM Act is content:

(1) To facilitate, complete, or confirm a commercial transaction that the

recipient has previously agreed to enter into with the sender;

(2) To provide warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient;

(3) With respect to a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender, to provide —

(i) Notification concerning a change in the terms or features;

(ii) Notification of a change in the recipient's standing or status; or

(iii) At regular periodic intervals, account balance information or other type of account statement;

(4) To provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or

(5) To deliver goods or services, including product updates or upgrades, 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.

**§ 316.4 Prohibition against failure to honor an opt-out request within three business days of receipt.**

(a) If a recipient makes a request using a mechanism provided pursuant to 15 U.S.C. 7704(a)(3) not to receive some or any commercial electronic mail messages from a sender, and does not subsequently provide affirmative consent to receive commercial electronic mail messages from such sender, then it is a violation of 15 U.S.C. 7704(a)(4):

(1) For the sender to initiate the transmission to the recipient, more than three business days after the receipt of such request, of a commercial electronic mail message that falls within the scope of the request;

(2) For any person acting on behalf of the sender to initiate the transmission to the recipient, more than three business days after the receipt of such request, of a commercial electronic mail message with actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that such message falls within the scope of the request;

(3) For any person acting on behalf of the sender to assist in initiating the transmission to the recipient, through the provision or selection of addresses to which the message will be sent, of a commercial electronic mail message with actual knowledge, or knowledge fairly implied on the basis of objective

circumstances, that such message would violate clause (a) or (b); or

(4) For the sender, or any other person who knows that the recipient has made such a request, to sell, lease, exchange, or otherwise transfer or release the electronic mail address of the recipient (including through any transaction or other transfer involving mailing lists bearing the electronic mail address of the recipient) for any purpose other than compliance with this Act or other provision of law.

(b) In any proceeding or action pursuant to the CAN-SPAM Act or the CAN-SPAM Rule to enforce compliance, through an order to cease and desist or an injunction, with subsection (a), neither the Commission nor the Federal Communications Commission nor the attorney general, official, or agency of a State shall be required to allege or prove the state of mind required by subsection (a).

**§ 316.5 Prohibition on charging a fee or imposing other requirements on recipients who wish to opt out.**

Neither a sender nor any person acting on behalf of a sender may require that any recipient pay any fee, provide any information other than the recipient's electronic mail address and opt-out preferences, or take any other steps except sending a reply electronic mail message or visiting a single Internet Web page, in order to:

(a) Use a return electronic mail address or other Internet-based mechanism, required by 15 U.S.C. 7704(a)(3), to submit a request not to receive future commercial electronic mail messages from a sender; or

(b) Have such a request honored as required by 15 U.S.C. 7704(a)(3)(B) and (a)(4).

**§ 316.6 Requirement to place warning labels on commercial electronic mail that contains sexually oriented material.**

(a) Any person who initiates, to a protected computer, the transmission of a commercial electronic mail message that includes sexually oriented material must:

(1) Exclude sexually oriented materials from the subject heading for the electronic mail message and include in the subject heading the phrase "SEXUALLY-EXPLICIT:" in capital letters as the first nineteen (19) characters at the beginning of the subject line;<sup>2</sup>

(2) Provide that the content of the message that is initially viewable by the

<sup>2</sup>The phrase "SEXUALLY-EXPLICIT" comprises 17 characters, including the dash between the two words. The colon (:) and the space following the phrase are the 18th and 19th characters.

recipient, when the message is opened by any recipient and absent any further actions by the recipient, include only the following information:

(i) The phrase "SEXUALLY-EXPLICIT:" in a clear and conspicuous manner;<sup>3</sup>

(ii) Clear and conspicuous identification that the message is an advertisement or solicitation;

(iii) Clear and conspicuous notice of the opportunity of a recipient to decline to receive further commercial electronic mail messages from the sender;

(iv) A functioning return electronic mail address or other Internet-based mechanism, clearly and conspicuously displayed, that—

(A) A recipient may use to submit, in a manner specified in the message, a reply electronic mail message or other form of Internet-based communication requesting not to receive future commercial electronic mail messages from that sender at the electronic mail address where the message was received; and

(B) Remains capable of receiving such messages or communications for no less than 30 days after the transmission of the original message;

(v) Clear and conspicuous display of a valid physical postal address of the sender; and

(vi) Any needed instructions on how to access, or activate a mechanism to access, the sexually oriented material, preceded by a clear and conspicuous statement that to avoid viewing the sexually oriented material, a recipient should delete the e-mail message without following such instructions.

(b) *P o f f t o s e .* Paragraph (a) of this section does not apply to the transmission of an electronic mail message if the recipient has given prior affirmative consent to receipt of the message.

**§ 316.7 Severability.**

The provisions of this Rule are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.

By direction of the Commission,  
Commissioner Leibowitz not participating.

D S C  
S e .

N : Appendix A is published for informational purposes only and will not be codified in Title 16 of the Code of Federal Regulations.

<sup>3</sup>This phrase consists of nineteen (19) characters and is identical to the phrase required in 316.5(a)(1) of this Rule.

APPENDIX A LIST OF COMMENTERS CITED IN NPRM AND ACRONYMS ASSIGNED TO COMMENTERS

Ac -	C -
AAOMS .....	A - ca A ca - O a a d Ma a ca S d -
AAR .....	A - ca A Rac -
ABA .....	A - ca Ba A ca -
ABM .....	A - ca B: M da
ACA .....	ACA I - a - a -
ACB .....	A - ca' C - Ba -
ACLI .....	A - ca C c c - L I -
A A .....	A - ca E c - c A ca -
AOC .....	Ti E c - c Wa a a d I - a - O - a - A ca -
ASA .....	A - ca Sa - A ca -
ASAE .....	A - ca S c - A ca - E c -
A, c .....	A, c D -
ASTA .....	A - ca S c - Ta, A - , I c.
AT&T .....	AT&T C -
AWWA .....	A - ca Wa - W - A ca -
Ba .....	La O c - S: a Ba
Ba / .....	Ba / A - ca C -
Ba / .....	A - ca Ba / A ca -
BMI .....	B adca M: c, I c.
BMO .....	BMO F, a ca G -
Ca .....	Ti a Ca -
CBA .....	C - Ba / A ca -
C - da .....	C - da C -
Cr a b .....	U d Sa - Cr a b - C - c
C c Z .....	C c Z N -
CMOR .....	C c - Ma - a d O - R a d
C a .....	Na - a B: - C a - - E-C - c a d P, ac
C - ca .....	C - ca
C - .....	C - W - d
C - d .....	C - d F, a ca C -

APPENDIX A LIST OF COMMENTERS CITED IN NPRM AND ACRONYMS ASSIGNED TO COMMENTERS Cited

Acronym	Commenter
M&F .....	M. & F. LLP
Maa .....	A. Maa
Ma / a .....	S. Ma / a
Ma Ca d .....	Ma Ca d l a a l c.
MBA .....	M. a Ba A ca
MBNA .....	MBNA A ca Ba , N.A.
M ad .....	B. M ad