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January 21, 2005

Via E-Mail

Ms. Eileen Harrington  
Associate Director, Marketing Practices  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

Dear Ms. Harrington:

The Direct Marketing Association (“DMA”), on behalf of its members, requests that the Commission staff provide guidance to clarify who is the “sender” under the CAN-SPAM Act for e-mail messages when a single message consists of one or more advertisements from different companies and the recipient has provided permission to receive the e-mail message.

Specifically, we request that the Commission provide guidance indicating that each advertiser in a single commercial e-mail message is not a “sender” under the following circumstances:

1. the recipient has provided permission to receive the e-mail;
2. the e-mail message contains one or more advertisements from a company other than the one to which the recipient provided consent to send the e-mail;
3. the entity receiving permission follows the requirements of the CAN-SPAM Act for the e-mail, including offering and honoring a request to unsubscribe from further commercial e-mail; and
4. the advertiser does not know who specifically will receive the e-mail, but the advertiser does know its advertisements will be included in e-mail to recipients who have provided general interest in receiving such e-mail.

In such circumstances the sender of the message would be the entity that received permission from the recipient to transmit the message.

The need for clarification in the above scenario arises from ambiguity in the Act's definition of the term "sender." A "sender" is defined as "a person who initiates a [commercial electronic mail] message and whose product, service, or Internet web site is advertised or promoted by the message." 15 U.S.C. §7702(16). Consequently to be a sender, an advertiser must both initiate a message and have its product, service, or Internet web site advertised in the message. There is no question that the advertiser satisfies the second part of the definition. It is less clear, however, in what specific instances the advertiser "initiates" an e-mail message.


The term "initiate" means to "originate or transmit such message or to procure the origination or transmission of such message." 15 U.S.C. §7702(9). The term "procure" means "intentionally to pay or provide other consideration to, or induce, another person to initiate such a message on one's behalf." *Id.* at §7702(12). In an e-mail sent pursuant to permission that contains multiple advertisements, we do not believe that the advertiser is a "procurer" of the message under the criteria set forth above, as, the advertiser does not have prior knowledge of the recipients of the e-mail. This interpretation is consistent with the Act's intent concerning the definition of "procure"—to prevent entities from having others send messages that they otherwise would be prohibited from sending under the Act. Here, consumer rights will be fully protected and there will be no avoidance of the Act's requirements.


We do not believe that Congress intended for advertisers and other legitimate actors that are not attempting to avoid the law and who honor consumer opt-outs to become "senders" for every e-mail where the advertiser's product or service is advertised or promoted. The treatment of each advertiser in a single e-mail message containing multiple advertisements as a "sender" would result in extremely complicated compliance obligations under the Act, including an unworkable multiple suppression environment.

We understand that this is a fact-sensitive question, and are requesting guidance at this time solely for the specific factual scenario described above. It is not our belief, however, that a lack of any of the above enumerated characteristics would necessarily result in the advertiser becoming a "sender." We understand there are numerous other interpretive issues surrounding the definition of "sender" and that the Commission will soon address and seek further comment on these issues under its discretionary rulemaking authority under the CAN-SPAM Act. We request guidance for this specific situation at this time to provide clarity in the marketplace.

We greatly appreciate your consideration of this request.

Sincerely,

  
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Jerry Cerasale  
Senior Vice President, Government Affairs  
The Direct Marketing Association, Inc.

  
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