



Division of
Marketing Practices

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

March 8, 2005

Mr. Jerry Cerasale
Senior Vice President, Government Affairs
The Direct Marketing Association, Inc.
1111 19th Street, NW
Suite 1100
Washington, DC 20036-3603

Dear Mr. Cerasale:

This letter responds to your request on behalf of The Direct Marketing Association (“DMA”) for “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.”

As your letter notes, it is a topic of ongoing FTC rulemaking as to whether CAN-SPAM requires each entity to comply independently with the requirements the Act imposes on senders of commercial email messages when advertisements of several entities all appear in a single message. Based on questions on this topic raised with Commission staff shortly after passage of CAN-SPAM by persons seeking compliance advice, the Commission highlighted this issue when it published an advance notice of proposed rulemaking (“ANPR”) last year.¹ Many commenters who responded to the ANPR, including DMA, addressed the impact of the Act’s definition of “sender” and argued forcefully that interpreting the Act to require multiple advertisers to comply with the Act’s requirements for “senders” in a single message would create overwhelming compliance difficulties.

Relevant Aspects of the Legal Background of CAN-SPAM

Preliminarily, it may be useful to review the larger framework of CAN-SPAM within which your request arises. CAN-SPAM imposes requirements on any person who “initiates”² a “commercial electronic mail message.”³ Specifically, the Act prohibits any person from

¹ See 69 FR 11776 (Mar. 11, 2004).

² 15 U.S.C. 7702(9) (“The term ‘initiate’ . . . means to originate or transmit [a commercial] message or to procure the origination or transmission of such message . . .”).

³ 15 U.S.C. 7702(2)(A). Those who initiate “transactional or relationship messages,” as opposed to “commercial” messages, need only comply with CAN-SPAM’s

initiating a commercial message that contains either false or misleading transmission information⁴ or a deceptive subject heading.⁵ In addition, the Act requires any person initiating a commercial message to include “a functioning return electronic mail address or other Internet-based mechanism, clearly and conspicuously displayed, that a recipient may use to submit . . . a reply electronic mail message or other form of Internet-based communication requesting not to receive future commercial electronic mail messages from [the] sender [responsible for the initial commercial message].”⁶ CAN-SPAM also requires any person who initiates a commercial message to provide “clear and conspicuous identification that the message is an advertisement or solicitation; clear and conspicuous notice of the opportunity . . . to decline to receive further commercial electronic mail messages from the sender; and a valid physical postal address of the sender.”⁷

By definition, all “senders” under the Act must comply with CAN-SPAM’s provisions applicable to those who “initiate” commercial messages.⁸ However, under CAN-SPAM, “senders” obligations go beyond those of “initiators.” A sender, or any person acting on a sender’s behalf, must honor recipients’ requests not to receive future commercial messages within ten business days of receipt; and senders, or any other persons who know that a recipient has made a request not to receive future commercial messages, may not “sell, lease, exchange, or otherwise transfer or release the electronic mail address of [a] recipient [who has made a request not to receive future commercial messages] for any purpose other than compliance with [the Act] or other provision of law.”⁹

The Hypothetical Prompting DMA’s Request

Your letter presents a fact pattern with four elements: “(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.”

prohibition on false or misleading transmission information. See 15 U.S.C. 7702(17)(A) and 7704(a)(1).

⁴ 15 U.S.C. 7704(a)(1).

⁵ 15 U.S.C. 7704(a)(2).

⁶ 15 U.S.C. 7704(a)(3)(A)(i).

⁷ 15 U.S.C. 7704(a)(5)(A).

⁸ See 15 U.S.C. 7702(16)(A): A “sender” is “a person who *initiates [a commercial email] message* and whose product, service, or Internet web site is advertised or promoted by the message.” (Emphasis added.)

⁹ 15 U.S.C. 7704(a)(4).

DMA proposes that “in such circumstances the sender of the message would be the entity that received permission from the recipient to transmit the message.” According to DMA, without guidance to this effect, “[t]he 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 suppression environment.”

Discussion

The opinions expressed below in response to your request are those of Commission staff only and are not attributable to, nor binding on, the Commission itself or any individual Commissioner with respect to DMA or any other party. With respect to the hypothetical presented in your request, the record established thus far in the Commission’s rulemaking proceeding leads the FTC staff to the opinion that, when a recipient affirmatively consents to receive commercial email messages after having received clear and conspicuous disclosure that ensuing email messages may contain advertising from other sellers, those additional sellers should not be considered “senders” for purposes of CAN-SPAM compliance and enforcement, provided certain conditions are met.

First, as noted above, at least one of the sellers who contributes commercial content to the email message must receive recipients’ affirmative consent,¹⁰ after clear and conspicuous disclosure that additional sellers may contribute advertising content to subsequent messages arising from that consent.¹¹ Against the backdrop of CAN-SPAM, staff’s opinion is that when recipients’ affirmative consent may result in receipt of subsequent email messages containing advertisements of other sellers not obligated to honor recipients’ opt-out requests, that consequence of providing affirmative consent is material information.

Second, the seller that has received the recipient’s affirmative consent must satisfy the Act’s definition of “sender.” According to that definition, “the term ‘sender,’ when used with respect to a commercial electronic mail message, means a person who initiates such a message and whose product, service, or Internet web site is advertised or promoted by the message.”¹² The advice in this letter rests on the assumption that there will be a “sender,” as defined by CAN-

¹⁰ Although the term “permission” is not defined in the Act, the term “affirmative consent” is defined to mean “the recipient expressly consented to receive the message, either in response to a clear and conspicuous request for such consent or at the recipient’s own initiative.” 15 U.S.C. 7702(1)(A).

¹¹ Sellers relying on the advice provided in this letter would be well advised to ensure that a record of affirmative consent be created and retained. In an FTC investigation, staff likely would recommend to the Commission that a seller be considered a “sender” for purposes of CAN-SPAM enforcement if that seller has contributed content to email messages pursuant to your hypothetical but cannot document that affirmative consent has been received. This does not mean that each seller must keep separate documentation, but documentation must be producible.

¹² 15 U.S.C. 7702(16)(A).

SPAM, who will be obligated under the Act to honor any opt-out request a recipient may assert. This letter does not contemplate or apply to scenarios where the party who receives affirmative consent to receive an email message is not a “sender,” and who, therefore, like the multiple advertisers using the single message, may not be responsible under the Act for honoring recipients’ opt-out requests. A recipient cannot invoke opt-out rights against a seller who is not a “sender.” Thus, there must be a “sender” for the advice in this letter to pertain.

Best Practices

An important principle underlying the advice in this letter is that multiple parties using a single email message to advertise their various products, services, or web sites will take appropriate steps to ensure that this activity does not run counter to consenting recipients’ expectations. In this regard, the FTC staff believes that one way to increase the likelihood that recipients’ expectations will be honored is to provide the sender’s name in the message’s “from” line. Providing the sender’s name in the “from” line gives recipients a clear opportunity at the outset to recognize messages that they have consented to receive and that provide requested content. Therefore, the FTC staff considers this to be a best practice.

A second best practice in email marketing campaigns following your hypothetical is for a message’s multiple sellers to ensure that the designated “sender” provides the message’s recipient list or otherwise determinates who will receive the message.¹³ This best practice will minimize the likelihood that the expectations of recipients may be subverted by receipt of unwanted commercial email messages.

Multiple Sellers Using a Single Email to Advertise Must Still Comply with the Requirements CAN-SPAM Imposes on Those Who “Initiate” Commercial Email

Notwithstanding the opinion outlined above, the FTC staff believes that multiple advertisers contributing to a single message are still considered, under CAN-SPAM, to *initiate* the message, even if they identify as the single *sender* the seller who has received recipients’ affirmative consent. Under the Act, a person “initiates” an email message if that person “procures” the initiation of a message.¹⁴ CAN-SPAM’s definition of “procure” is “intentionally to pay or provide other consideration to, or induce, another person to initiate [a commercial email] message on one’s behalf.”¹⁵ Given the comprehensive breadth of this definition, in staff’s opinion, there is little, if any, possibility that persons seeking to convey their advertisements in a single email would not be considered “procurers.” Thus, we do not agree with the interpretation advanced in your letter that you “do not believe that the advertiser is a ‘procurer’ of the message under the criteria set forth [in sections 7702(9) and 7702(12)], as, the advertiser does not have

¹³ DMA’s request suggests that this is already the case because the additional advertisers “do[] not know who specifically will receive the e-mail.”

¹⁴ See note 2.

¹⁵ 15 U.S.C. 7702(12).

prior knowledge of the recipients of the e-mail.” The definition of “procure” does not require advance knowledge of who will receive a message.

Nevertheless, the compliance challenges that multiple *senders* would face (*e.g.*, requiring each sender to provide a separate opt-out mechanism and honor each recipient’s sender-specific opt-out preferences) are not implicated by the fact that each seller individually “initiates” a multiple-seller message. Thus, notwithstanding the Commission’s guidance on multiple-*sender* liability, the Commission believes that *all* sellers in a single message must continue to comply with the Act’s regulation of those who “initiate” commercial messages, provided that their conduct satisfies the Act’s relevant definitions. Because these sellers are “initiators” but not “senders” –

- All sellers, as “initiators,” must ensure that commercial email messages they initiate do not contain false or misleading transmission information or deceptive subject headings and do contain the disclosures required by the Act, including an opt-out mechanism that will be honored by the single seller who has been designated the message’s “sender” under the terms of this letter;¹⁶
- As parties who are not “senders,” sellers (other than the one designated the message’s “sender”) are not required to provide their own opt-out mechanism or valid physical postal address, or process and honor opt-out requests.¹⁷

Conclusion

Based on the analysis presented above, the FTC staff’s opinion is that, in situations in which a recipient has provided “affirmative consent” in response to a request from one seller to receive commercial messages from that seller, additional sellers advertising their own products or services in that message may not be considered “senders” under the Act, provided the conditions outlined in this letter are met. The opinions expressed above in response to your request regarding CAN-SPAM’s regulation of a single commercial email message containing advertising from more than one seller are those of Commission staff only and are not attributable to, nor binding on, the Commission itself or any individual Commissioner with respect to the DMA or any other party.

Sincerely,

¹⁶ See 15 U.S.C. 7704(a)(1), (2), (3), & (5). Because this guidance presumes “affirmative consent,” CAN-SPAM’s requirement to provide “clear and conspicuous identification that the message is an advertisement or solicitation” does not apply. 15 U.S.C. 7704(a)(5)(B).

¹⁷ See 15 U.S.C. 7704(a)(3), (4) & (5).

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Direct Marketing Association
March 4, 2005 - Page 6

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