

**Before the
FEDERAL TRADE COMMISSION
REGULATORY REVIEW OF THE CAN-SPAM RULE, 16 C.F.R. PART 316
Project No. R711010
COMMENTS OF THE ELECTRONIC RETAILING ASSOCIATION**

**COMMENTS OF:
Electronic Retailing Association
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I. Introduction

The Electronic Retailing Association (“ERA”) respectfully submits these Comments in response to the request by the Federal Trade Commission (“FTC” or “Commission”) in connection with its current review of the Controlling the Assault of Non-Solicited Pornography and Marketing Act (“CAN-SPAM” or “the Rule”).¹ The ERA is the leading international trade association representing the interests of companies engaged in the \$350 billion direct-to-consumer retail marketplace. ERA proudly represents more than 450 companies, from start-ups to Fortune 500 firms, in 45 countries that provide consumers with the ability and convenience to shop at home through television, radio and online. Member companies include some of the world’s most prominent retail merchants.

The ERA shares the FTC’s mission of providing consumers with truthful and fair advertising. In furtherance of this mission, ERA works with the Council of Better Business Bureaus to sponsor the Electronic Retailing Self-Regulation Program (“ERSP”), an important self-regulatory program that provides a quick and effective mechanism for resolving inquiries regarding the truthfulness and accuracy of claims in direct response advertising. ERSP plays an important role in helping the direct response industry comply with existing laws, regulations and industry best practices, and continues to serve its objective of bolstering consumer confidence in electronic retailing.

II. ERA’s Comments

A. The FTC Should Not Revise CAN-SPAM

The ERA believes that no revisions to the current version of CAN-SPAM are necessary, as it is doing an effective job of preventing the flow of unwanted commercial messages without unduly burdening industry and consumers. Since the advent of the internet and the proliferation

¹ 16 C.F.R. Part 316. 82 Fed. Reg. 123, 29254-56 (June 28, 2017) (the “June 28 Notice”).

of personal computers, email has become an increasingly effective and popular mode of disseminating advertisements. Not only are emails delivered to the recipient's inbox within a matter of seconds, but they are relatively unobtrusive and do not incur a cost for the recipient – unlike, for example, telemarketing calls and text messages. In light of this, it makes sense that CAN-SPAM is structured as an “opt-out” regime in which obtaining advanced consent is not required in order to send a commercial message, but it *is* required to provide the recipient with an easy way to unsubscribe from future commercial messages. This allows for the free flow of marketing content that consumers may want to receive, while also providing them with a mechanism to halt unwanted commercial emails with the click of a few buttons.

There may be no better indication of the effectiveness of CAN-SPAM than the cases that the FTC has brought under the Rule. Since the Rule was implemented in 2004, a total of thirty-seven CAN-SPAM-related cases were brought by the FTC, the overwhelming majority of which were brought during the early years of the Rule's implementation. Specifically, thirty-three CAN-SPAM cases were filed between the years of 2004 – 2008, whereas only four CAN-SPAM cases have been brought between the years of 2009 through the present. This steep decline is a strong indication that rigorous law enforcement has had a deterrent effect on spammers, and that businesses are working diligently to comply with the Rule's requirements. In fact, a study that the FTC conducted just a year after CAN-SPAM went into effect showed that 100% of the emailers that were surveyed provided recipients with an opt-out mechanism in their commercial email, and that 89% of the emailers fully complied with all of the opt-out requests they received.² This high rate of compliance is a testament to the effectiveness of the Rule, and demonstrates that changes to the Rule are unwarranted.

B. The FTC Should Not Reduce the Time-Period for Processing Opt-Out Requests

In the June 28 Notice, the Commission specifically requested comments on whether it should modify the Rule to reduce the time-period for processing opt-out requests to less than ten business days.³ The ERA respectfully submits that the opt-out processing requirements should remain the same as they are currently written. As discussed above, the survey that the FTC conducted in 2005 on compliance with the opt-out provisions,⁴ coupled with the decline in CAN-SPAM cases that the FTC has brought over the past several years, indicate that businesses are willing and able to comply with the ten business day time limit for processing opt-out requests. Reducing this time period would not only disrupt a process that has been working well for the past decade, but it would disproportionately affect small businesses and others that may not have the resources to implement a quick, automated mechanism that manages opt-out requests. Some small businesses process opt-out requests manually, or have only part-time staff or volunteer members whose schedules do not allow for processing opt-out requests several times a week. Businesses that have multiple mailing lists or use third party vendors to handle opt-out requests

² “Top Emailers’ Compliance with CAN-SPAM’s Opt-Out Provisions” (July 2005), *available at* <https://www.ftc.gov/sites/default/files/documents/reports/top-emailers-compliance-can-spams-opt-out-provisions-report-federal-trade-commissions-division/050801optoutemailersrpt.pdf>.

³ 82 Fed. Reg. 123, 29256 (June 28, 2017).

⁴ See footnote 2.

may have difficulty complying with a shortened time limit as well, since these usually require additional coordination and synchronization. From the consumers' perspective, it does not appear as though reducing the opt-out time-period would yield a material benefit. Consumers are already familiar with the ten-day processing window, and mail bombing – *i.e.*, bombarding an email address with commercial messages in the nine business days following an opt-out request – is not known to be a common issue. For those who simply do not want to wait until the tenth business day to stop receiving certain emails, there are tools such as Gmail's auto-filter feature and Microsoft Outlook's "block sender" feature that make it easy to divert emails that a consumer may no longer want to receive. For all of these reasons, ERA believes that the time period for processing opt-out requests should not be reduced.

III. Conclusion

Since its implementation in 2004, the CAN-SPAM Act has proved to be an effective tool for regulating the dissemination of commercial email messages. Not only has it enabled the Commission to combat spammers, but its enforcement efforts have had a deterrent effect on unlawful behavior, leading to a sharp decline in the number of complaints alleging violations of the Rule. At the same time, businesses have been able to successfully implement CAN-SPAM's requirements while utilizing the increasingly popular medium to communicate marketing content in a way that is truthful and responsible. The ERA strongly believes that the Rule strikes the proper balance between protecting consumer interests and providing industry with the flexibility needed to conduct legitimate business, and therefore respectfully recommends that CAN-SPAM remain unchanged.