

FTC Opts Not to Reopen the CAN SPAM

By Lori Beam



I can't help thinking of opening a can of spam when I see the acronym CAN SPAM, referring to the lengthy-worded Controlling the Assault of Non-Solicited Pornography And Marketing Act. But, of course, we all know it as the U.S. law regulating the transmission of all commercial email messages, and requiring senders to give recipients a way to opt out of future messages.

Finding no "bad ham" in the CAN SPAM rule, the Federal Trade Commission on Feb. 12 announced its decision by a vote of 5-0 to let CAN SPAM stand with no changes.

Before making its determination, the FTC reviewed 92 public comments, mostly from individual consumers. Comments largely favored keeping the rule. Eleven commenters criticized the rule as "too weak" or "ineffectual," but did not propose repeal. Six who did urge repeal also then recommended a more effective replacement.

Many comments responded to specific issues on which the FTC requested comment, including whether CAN SPAM should be amended to:

- Modify the type of messages treated as "transactional or relationship."
- Shorten the timeframe for processing opt-out requests to less than 10 days.
- Identify additional practices constituting "aggravated violations."

For example –

- One commenter urged the FTC to specify as an aggravated violation the practice of "snowshoeing" – using "multiple domains and IP addresses (obtained from different ISPs)...[to] keep the volume of emails sent [per domain or IP address] very low...while permitting large aggregate volumes to be distributed across hundreds or thousands of IP addresses and domains."
- The American Bankers Association recommended expanding transactional or relationship messages to include educational messages and event invitations.
- Others proposed:
 - establishing guidelines to meet the requirement for clear and conspicuous opt-out notices.
 - extending opt-out obligations to third-party list providers.
 - blocking all unsolicited spam from servers outside the U.S.
 - giving email recipients a private right of action to enforce CAN SPAM violations.

In rejecting all suggested modifications, the FTC concluded that none of the proposed modifications presented sufficient evidence that any added consumer benefit would outweigh its increased burden on businesses. The FTC did note, however, that many of the suggested modifications could inform industry best practices.

Kicking the CAN SPAM to Congress, the FTC responded to suggestions it modify the rule to switch from an opt-out approach to an opt-in or double opt-in approach by saying it “would be beyond the text and scope of the Act.”

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