



International Pharmaceutical  
**PRIVACY CONSORTIUM**

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April 20, 2004

***By Hand***

Michael Goodman, Esq.  
Division of Marketing Practices  
Bureau of Consumer Protection  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

**Re: Comments on Advance notice of proposed rulemaking; Definitions,  
Implementation, and Reporting Requirements Under the CAN-SPAM  
Act (69 Federal Register 11776; 11 March 2004)**

Dear Mr. Goodman,

We enclose herewith the Comments of the International Pharmaceutical Privacy Consortium on the advance notice of proposed rulemaking concerning “Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act.” We appreciate the opportunity to participate in this rulemaking.

Sincerely,

Stanley W. Crosley  
Chair

# I. Introduction

The International Pharmaceutical Privacy Consortium is an association of research-based pharmaceutical companies formed for the purpose of addressing privacy issues as they affect the core activities of member companies. Its members include AstraZeneca Pharmaceuticals, Aventis Pharmaceuticals, Eli Lilly and Company, GlaxoSmithKline, Hoffmann-La Roche, Johnson & Johnson, Merck & Co., Novartis Pharmaceuticals, Pfizer, Sanofi-Synthelabo, Schering-Plough, Takeda Pharmaceuticals, and Wyeth. On behalf of the above-mentioned members, the Consortium is pleased to submit these comments on the advance notice of proposed rulemaking concerning “Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act” (69 Federal Register 11776; 11 March 2004) (ANPR).

## II. Comments

### A. Determination of the “Sender” of a Commercial Email Message Concerning a Brand Name Product

The CAN-SPAM Act requires that all commercial email messages clearly and conspicuously display a functioning return email address or other internet-based mechanism to allow recipients to opt-out of receiving further messages from the sender at the address where the message was received.<sup>1</sup> “Sender” is defined as the entity whose product, service, or internet web site is promoted by the message and who transmits or procures the transmission of such message.<sup>2</sup> However, if an entity operates through separate lines of business or divisions and holds itself out to the recipient as that particular line of business or division rather than the entity of which such line of business or division is a part, then that line of business or division is treated as the “sender.”<sup>3</sup>

The CAN-SPAM Act does not define what constitutes a separate line of business or separate division. The IPPC requests that the FTC recognize in future commentary that “separate lines of business or divisions” can include separate brand name product lines. It is common in the pharmaceutical industry for a company to organize its operations around individual brand name products. When a customer receives a promotional email message concerning a brand name product, the customer is likely to associate the message sender with the brand name rather than the company that sells the product. Indeed, the customer may not even be aware of what company markets the product. Therefore, it should be permissible for an opt-out request received in

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<sup>1</sup> CAN-SPAM Act, § 5(a)(3).

<sup>2</sup> Id. § 3(16)(A).

<sup>3</sup> Id. § 3(16)(B).

response to an email message to apply only to the specific brand name product promoted in the email message. If companies were required to interpret an opt-out request as applying more broadly than to the specific brand name product promoted in a particular email message, consumers could be deprived of important health-related information that they expect to continue to receive. Moreover, companies that are organized primarily by brand are also likely to maintain separate customer databases, which could make applying opt out requests more broadly very burdensome.

## B. “Tell-A-Friend” Email Messages

The IPPC requests that the FTC recognize in future commentary that a company that maintains a web site that enables individuals to email articles, web site pages, and other materials to friends (“tell-a-friend” messages) does not meet the statutory definition of “sender” as long as the company does not induce the mailing of such messages through payment or other consideration. To meet the Act’s statutory definition of “sender,” an entity must meet both of the following conditions: (i) have a product, service, or internet web site promoted by an email message, and (ii) initiate such a message.<sup>4</sup> “Initiate” means to originate or transmit a commercial email message, or to procure the origination or transmission of such a message.<sup>5</sup> “Initiate” excludes, however, “actions that constitute routine conveyance of such message,”<sup>6</sup> meaning “the transmission, routing, relaying, handling, or storing, through an automatic technical process, of an electronic mail message for which another person has identified the recipient addresses.”<sup>7</sup> “Procure” means “intentionally to pay or provide other consideration to, or induce, another person to initiate such a message on one’s behalf.”<sup>8</sup>

Recipient email addresses of “tell-a-friend” messages are provided by the web site user, not the company that maintains the web site and transmits the message through an automatic technical process. This technical process constitutes “routine conveyance” and is excluded from the meaning of “initiate.” As long as a company does not induce the mailing of a message by users of its web site through payment or other consideration, the company does not meet the condition of having initiated an email message. The company is no more the initiator of such a message than it is the initiator of a message that contains text from the company’s web site that a user has copied into an email message created by the user in connection with the user’s own email program. “Tell-a-friend” messages simply allow private individuals to conveniently share web site content.

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<sup>4</sup> Id. § 3(16)(A).

<sup>5</sup> Id. § 3(9).

<sup>6</sup> Id.

<sup>7</sup> Id. § 3(15).

<sup>8</sup> Id. § 3(12).

It would be very difficult from a technical perspective for companies to honor opt-out requests received in response to “tell-a-friend” messages. Most companies do not collect the recipient email addresses provided for “tell-a-friend” messages and do not use them for any purpose other than to transmit the original message. Moreover, if the company that maintains the web site is deemed a “sender” that company would now have to begin collecting recipients’ email addresses in order to comply with the suppression requirement under CAN-SPAM. However, companies’ current systems are designed to suppress opt-out addresses at the point of determining message recipients, not once an email address has already been entered and the email is in the process of being automatically routed. Most companies’ current system capabilities do not enable such real-time filtering of “tell-a-friend” messages.

### **C. Other Comments**

The IPPC’s position on several other issues addressed in the ANPR are summarized below:

- The CAN-SPAM Act authorizes the FTC to modify the 10 business-day period prescribed in the Act for honoring a recipient’s opt-out request.<sup>9</sup> The IPPC believes that 10 business-days is too short a period for large organizations to process opt-out requests. In large organizations, opt-out requests may be received at a number of different company entry points. Once received, these requests must then be routed to the relevant database manager, who must in turn route such requests to all affiliates and vendors who have email programs already underway. Suppression of recipient addresses across multiple affiliates and vendors can consequently take up to 45 days, or even longer when requests arrive by postal mail or other means that require manual entry.
- An organization that advertises, such as through placement of a banner ad, in an email message that is sent by another party should not be deemed the “sender” of the message unless the advertiser has actual control over the dissemination of the message. Where an advertiser does not provide recipient email addresses or otherwise control the list of recipients, it would be impossible for the advertiser to ensure that individuals on its opt-out suppression list are not sent a message by the third party. The Commission should therefore use its authority under § 13 to clarify who meets the definition of “sender” under the Act.

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<sup>9</sup> CAN-SPAM Act, § 5(c)(1).

### **III. Conclusion**

**The International Pharmaceutical Privacy Consortium appreciates this opportunity to participate in the FTC's rulemaking on the implementation of the CAN-SPAM Act. We look forward to the Commission's response to these Comments.**