March XX, 2018

The Honorable Ed Chau
Chair, Assembly Committee on Privacy & Consumer Protection
State Capitol, Room 5016
Sacramento, CA 95814

RE: AB 2546 (Chau): Email Service Providers - OPPOSE

Dear Assembly Member Chau:

The undersigned organizations respectfully **oppose AB 2546** because its provisions are either duplicative of federal law specific to commercial email messages, preempted by federal law, or unnecessarily duplicative of existing prohibitions on unfair and deceptive advertising and other trade practices. Consequently, AB 2546 merely benefits the trial bar, without providing consumers with additional protection.

AB 2546 is Unnecessary Because Federal Law Already Regulates Commercial Email Messages. AB 2546 is unnecessary because the prohibitions included in the bill are already addressed by federal law or preempted by it. The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the "CAN-SPAM Act")[1] and its implementing rule[2] create a regulatory framework specific to the transmission of commercial electronic messages. Among other protections at law, the CAN-SPAM Act specifically prohibits sending commercial email messages that contain false or misleading header information and subject lines, in addition to prohibiting the use of automated means to register for multiple email accounts.[3] AB 2546 purports to create new protections for consumers, but instead restates existing law by providing specific examples of practices that are already captured by CAN-SPAM.

***Federal Law Preempts AB 2546 and State Regulation of Commercial Email Messages, Except in Narrow Circumstances*.** In addition to being unnecessary, much of AB 2546 is expressly preempted by federal law. When Congress enacted the CAN-SPAM Act, it did so for the express purpose of creating a national standard for the regulation of commercial email messages, noting the ineffectiveness of state legislation in addressing the problems associated with unsolicited commercial electronic mail.[4]

To prevent confusion and to allow law-abiding businesses to operate under a single standard, Congress preempted state and local laws that regulated the "use of electronic mail to send commercial messages," except for those laws which prohibited "falsity or

[1] 15 U.S.C. § 7701-7713.
[2] 16 C.F.R. Part 316.
[3] *See* 15 U.S.C. § 7704.
[4] 15 U.S.C. § 7701(a)(11).

deception in any portion of a commercial electronic mail message or information attached thereto."[5] Of the prohibitions in AB 2546 that are not covered by existing federal law, the remaining prohibitions are expressly preempted by the CAN-SPAM act because they do not involve the prohibition of false or deceptive commercial email messages and otherwise covered by existing consumer protection laws.

Current Law Provides Tools for Effective Enforcement. The CAN-SPAM Act is actively enforced by the Federal Trade Commission ("FTC"), which has used its authority to shut down illegal spam. Recent enforcement actions have addressed illegal spam practices such as a spammer purporting to be authorized by the FTC to remove spyware from recipients' computers,[6] and a spammer using spam emails to direct consumers to fake news websites.[7] In addition to these recent actions, the FTC has a long track record of curtailing unlawful emailing practices and imposing millions of dollars in civil penalties.[8] In addition to the FTC's enforcement authority, state attorney generals are also granted enforcement powers under the CAN-SPAM Act, including the authority to obtain injunctions and seek damages on behalf of state residents.[9]

Federal and State Laws and Industry Self-Regulation Already Prohibit Unfair and Deceptive Conduct Associated with Commercial Email Messages. In addition to the CAN-SPAM Act's specific regulations, senders of commercial email messages are also subject to laws which generally prohibit engaging in unfair or deceptive trade practices. These laws have been enacted at the federal and state level. Section 5 of the Federal Trade Commission Act prohibits "unfair or deceptive acts or practices" that affect commerce, which includes sending false or misleading advertisements and unfairly taking advantage of consumers in way that causes or is likely to cause harm.[10] Among the many topics the FTC has focused on when enforcing Section 5 is the use of the term "Free."[11] FTC guidance requires the disclosure of all conditions associated with the "free" offer and prohibits merchants from "marking up" an associated product (e.g., in a "Buy 1, get 1 free" offer).

Like federal government, California also prohibits "unlawful, unfair or fraudulent business act[s] or practice[s] and unfair, deceptive, untrue or misleading advertising."[12] These prohibitions on false or misleading conduct also apply to commercial email messages as well as conventional advertisements.[13] These laws provide both consumers and law enforcement authorities in California with the authority to seek redress in the event that any harm results from unfair or deceptive commercial email messages.

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[5] 15 U.S.C. § 7707(b)(1).
[6] *FTC v. Croft,* S.D. Fla., 9:17-cv-80425.
[7] *FTC v. Tachht, Inc.,* M.D. Fla, 8:16-cv-1397.
[8] *See, e.g., FTC v. Sili Neutraceuticals,* N.D.Ill. 1:07-cv-04541 (resulting in default judgment of over $2.5 million); *see also FTC v. Valueclick* C.D.Cal. 08-cv-01711 (resulting in penalty of $2.9 million).
[9] *See* 15 U.S.C. § 7706(f).
[10] 15 U.S.C. § 45(a)(1).
[11] 16 C.F.R. § 251 (1971).
[12] Cal. Bus. & Prof. Code § 17200 et. seq.; *see also* Cal. Bus. & Prof. Code § 17500 (also prohibiting "untrue or misleading" advertising).
[13] *See* Cal. Bus. & Prof. Code § 17500 (prohibiting deceptive advertising by any means, including "over the Internet").

In addition to existing federal and state law, voluntary self-regulation effectively regulates the use of software or other similar technology to initiate deceptive practices. DMA's Guidelines for Ethical Business Practice ("Guidelines") provide meaningful transparency, controls, and accountability to help ensure responsible marketing practices.[14] Article #41 of the Guidelines specifically prohibits the use of software to take control of a computer to relay spam and viruses, in addition to prohibiting other deceptive practices. For more than four decades, DMA has proactively enforced its Guidelines against both DMA members and non-member companies across industries. Such enforcement of the Guidelines by the DMA has occurred in hundreds of marketing cases concerning deception, unfair business practices, personal information protection, and other ethical issues.

Because it is unnecessary for consumers who already receive significant protections under federal and state rules and is preempted by federal law, the above-referenced associations respectfully **oppose AB 2546**.

Sincerely,
Data & Marketing Association
Email Senders & Providers Coalition
Association of National Advertisers

cc: Members, Assembly Privacy and Consumer Protection Committee
Ronak Daylami, Principal Consultant, Assembly Privacy and Consumer Protection Committee

[14] DIRECT MARKETING ASSOCIATION GUIDELINES FOR ETHICAL BUSINESS PRACTICE, available at https://thedma.org/wp-content/uploads/DMA-Guidelines-2016.pdf.