

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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In the Matter of Notice of : CAN-SPAM Act Rulemaking
Proposed Rulemaking and Request for : Project No. R41108
Comments Relating to the CAN-SPAM Act :
“Primary Purpose” Standard :
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COMMENTS OF THE ELECTRONIC RETAILING ASSOCIATION

Introduction

On behalf of the Electronic Retailing Association (“ERA”), we are pleased to submit additional comments in response to the Commission’s Notice of Proposed Rulemaking (“NPRM”), 69 F.R. 50091-01 (August 13, 2004), relating to the promulgation of proposed criteria to be used in determining the “primary purpose” of an electronic mail (e-mail) message.

ERA is the leading trade association representing the electronic retailing industry. Its mission is to foster the use of various forms of electronic media - television, Internet, telephone, radio - to promote goods and services to consumers. ERA has over 450 member organizations throughout the world, approximately 275 of which are domestic companies. Members include a wide range of entities, such as advertising agencies, direct response marketers, telemarketers, Internet and “brick and mortar” retailers, fulfillment service providers and television shopping channels.

Executive Summary

As noted in our previous comments, ERA supports the Commission’s efforts to respond to the growth of unwanted commercial e-mail messages. However, we believe that the regulations promulgated pursuant to the CAN-SPAM Act must not be unduly restrictive of

legitimate e-mail messages comprising editorial and/or relationship or transactional content. We also note that the primary purpose issue is linked at a fundamental level with the multiple sender issues addressed in our previous comments. We respectfully submit that it is difficult to fully assess and comment upon the impact of the Commission's primary purpose proposal without a resolution of the multiple sender issue and request that the Commission address both issues as part of the same rulemaking so that the full impact on marketers can be determined.

Notwithstanding the foregoing, as set forth in greater detail below, ERA believes that the Commission's proposed standard for assessing the primary purpose of so-called "dual purpose" messages containing transactional or relationship content or other non-commercial, non-transactional or relationship content, in addition to commercial content, is inappropriate. We continue to believe that a "but for" standard, rather a "net impression" test, should be applied in evaluating such e-mails. Even if a net impression standard were to be applied, however, the Commission's proposed primary purpose criteria for dual purpose messages fail to comport with traditional net impression analysis. Rather than viewing such e-mail messages in their entirety, the Commission has improperly placed its focus on particular aspects or components of the message: the subject line and the placement of the commercial content within the body of the message. If the Commission wishes to employ the proposed primary purpose criteria for dual purpose messages, we respectfully suggest that it do so by modifying the criteria so as to create a safe harbor for marketers whereby e-mail messages which contain the particular criteria are deemed not to be commercial.

Finally, we believe that e-mail messages that (i) are sent at the request of the recipient, or (ii) contain billing or account statements, renewal notices or similar transaction confirmations are fundamentally transactional or relationship in nature and should be deemed to fall outside the

scope of the CAN-SPAM Act, regardless of the inclusion of any advertising content therein.

Comments

I. Multiple Sender E-mails Issues Inextricably Intertwined with Primary Purpose Analysis

As a preliminary matter, we submit that there cannot be a meaningful analysis of the Commission's primary purpose proposal without a simultaneous discussion of the "multiple sender" issues raised in our earlier comments to the Commission's Advance Notice of Proposed Rulemaking (ANPR).

It is standard practice in the industry for commercial e-mail messages to be sent on behalf of multiple parties and for electronic newsletters to include multiple advertisements. As noted in our previous comments, the CAN-SPAM Act appears to contemplate that more than one person could be viewed as the sender of a single e-mail message without specifically addressing each person's obligations in such a scenario.

ERA believes that it would be extremely burdensome on industry, and potentially confusing for consumers, to treat each of the multiple advertisers within a single e-mail message as a "sender." This would require that the message be scrubbed against multiple suppression lists and that each advertiser be bound by the internal opt-out list of each of the other advertisers. Scrubbing against multiple lists would not only be very costly and burdensome (as advertisers would incur additional costs communicating and honoring the opt-out requests of other affected marketers), it would prevent consumers from receiving communications from parties to whom they had not intended to send opt-out requests. Moreover, the frequent sharing of suppression lists between marketers could create privacy concerns.

Accordingly, as noted previously, we believe that the “sender” of a commercial e-mail message, as defined by and subject to the provisions of the Act, should be limited to the primary sender of such message – i.e., the entity whose message predominates and which is primarily responsible for creating and controlling the message.

This threshold issue is inseparable from the primary purpose proposal that is the subject of the current NPRM. Indeed, we do not believe that it is possible for ERA and other industry members to fully weigh and comment upon the potential impact of the proposed primary purpose test unless the Commission simultaneously addresses the multiple sender issue as part of this same rulemaking.

II. Proposed “Primary Purpose” Test for Dual Purpose Messages is Fatally Flawed

The Commission has proposed a three-pronged “primary purpose” test which includes the following standards for assessing the primary purpose of so-called dual purpose messages which contain, in addition to commercial content, either relationship or transactional or other non-commercial (e.g., editorial) content:

- A. if the e-mail message contains commercial and transactional or relationship content, the purpose of the message will be deemed to be primarily commercial if either: (i) a recipient would reasonably interpret the subject line as signaling a commercial message, or (ii) the transactional or relationship content does not appear at or near the beginning of the message; and
- B. if the e-mail message contains commercial and editorial (or other non-commercial, non-transactional or relationship) content, the primary purpose of the message will be deemed to be commercial if either: (i) a consumer would

reasonably interpret the subject line as signaling a commercial message, or (ii) a consumer would reasonably interpret the body of the message as primarily commercial. This determination would be made based on factors such as placement of the commercial content, the proportion of commercial versus non-commercial content, and the type size, graphics, color, etc. of the non-commercial content.¹

We believe that both of these proposed dual purpose message standards are inherently problematic in that they are based upon the recipient's interpretation of why the message was sent, rather than looking at the intent or rationale of the sender. By establishing a primary "purpose" standard, Congress clearly indicated that the sender's intent, rather than the recipient's impression, should be determinative of whether an e-mail message is primarily commercial. Moreover, even if an impression analysis were appropriate, the proposed dual purpose tests are inconsistent with the Commission's traditional net impression analysis in that they look mechanically at portions of the message (e.g., subject line and placement of the commercial content within the message) rather than assessing the message in its entirety.

To the extent that the Commission wishes to retain the proposed criteria as part of its primary purpose analysis, we suggest that it modify the proposed test so as to create a safe harbor for marketers seeking to ensure compliance with the CAN-SPAM Act.

Finally, we respectfully submit that any "dual purpose" analysis, regardless of the test adopted, is inappropriate for e-mail messages: (a) containing billing statements, statements of account or other transaction statements or confirmations, or (b) sent at the recipient's request.

¹ The third prong of the Commission's proposed test, which relates to messages which contain commercial content only, is not addressed in these comments.

Such messages, by their very nature, are “per se” transactional or relationship irrespective of the extent and manner in which such messages also contain advertising content.

A. Sender’s Intent Should Determine
Primary Purpose of E-mail Message

In our previous comments to the Commission’s ANPR, ERA (along with many other industry groups) argued that a “but for” test — pursuant to which an e-mail would not be deemed to be primarily for a commercial purpose unless it would not have been sent but for the advertising component — would be an appropriate standard for assessing the primary purpose of an e-mail message. A “but for” standard would be consistent with the Congressional purpose in enacting CAN-SPAM and would provide clear guidance to the industry in terms of compliance with the Act.

In the current NPRM, however, the Commission has expressly rejected the “but for” approach and, instead, has proposed a “net impression” standard focused the recipient’s reasonable interpretation of the e-mail message’s primary purpose. In so doing, the Commission noted that it has historically evaluated advertising messages on a net impression basis and that its proposed “net impression” test for dual purpose e-mail messages was “rooted firmly in traditional Commission legal analysis.” 69 F.R. at 50096. ERA urges the Commission to reconsider this position, as we strongly believe that the proposed net impression test is contrary to the clear Congressional mandate found in the CAN-SPAM Act itself.

The Commission’s long standing use of the net impression test to evaluate advertising arose not from the CAN-SPAM Act, but rather from its authority to prohibit misleading or deceptive advertising under Section 5 of the FTC Act. 15 U.S.C. § 45(a). Clearly, the effect or impact that an advertisement makes on a consumer (and his or her purchasing decisions) is

central to the determination of whether the ad is misleading or deceptive. Thus, a net impression analysis is appropriate for advertising review focused on the issue of deception.

Under CAN-SPAM, however, the issue is whether the e-mail message is sent for a primarily commercial purpose, not whether its content is misleading or deceptive. In this context, the focus is on “why the sender sent the e-mail” rather than on the recipient’s reasonable impression of the sender’s rationale for sending the e-mail. We respectfully submit that by expressly establishing a primary purpose standard in the CAN-SPAM Act itself, Congress clearly indicated its intention that the determination of whether a particular e-mail message is commercial be focused on the intent of the party sending the message and not on the impression the message made on the recipient.

B. Proposed Primary Purpose Test for Dual Purpose Messages is Inconsistent With Traditional “Net Impression” Analysis

The Commission proposes that e-mail messages containing both commercial and transactional or relationship content would be deemed to have a commercial primary purpose if either (i) a recipient would reasonably interpret the subject line of the message as signaling a commercial message, or (ii) the message’s transactional or relationship content does not appear at or near the beginning of the message.

While, again, ERA strongly believes that “net impression” is the incorrect standard for assessing the primary purpose of such e-mail messages, the proposed test set forth above is inconsistent with (and, in fact, contrary to) the Commission’s own traditional net impression analysis. Thus, even if the Commission were to adopt a net impression standard, this proposal would be flawed.

By its own admission, the Commission, when evaluating the net impression of particular advertising, “assesses claims . . . by among other things evaluating the entire document.” NPRM, 69 F.R. at 50096. However, rather than viewing an e-mail message containing both commercial and transactional or relationship in its entirety, the Commission has put forth a plan which calls for a mechanical evaluation of discrete components of the message: the subject line and the position or placement of the transactional or relationship content within the message.

ERA recognizes that the Commission’s intention in setting forth such specific factors may well have been to provide senders with easily understood guidelines and objective criteria for determining the primary purpose of an e-mail message. However, such a rigid and formulaic approach runs directly counter to the essence of a net impression test – an evaluation of the message in its entirety, with no specific element(s) determinative of the message’s purpose. We respectfully submit that, rather than examining a dual purpose e-mail message in its entirety, as the net impression analysis requires, the Commission’s proposal is arbitrarily fixated on only a few isolated elements.

Take, for example, an online dating service that sends e-mails to existing members informing them that their memberships are about to expire and, in the same e-mail message, offers them the opportunity to renew their memberships at a discounted rate. Under the Commission’s proposal, the e-mail message could lose its “transactional or relationship” status if the renewal offer were mentioned in the subject line of the e-mail or at or near the top of the body of the message, regardless of whether the net impression of the message, when viewed in its entirety, is that it is primarily “transactional or relationship” in nature.

A similar analysis applies to the factors proposed for determining the primary purpose of a message containing both commercial and non-commercial, non-transactional or relationship

content. A newsletter containing bona fide editorial content could be deemed to be commercial, regardless of the overall net impression and content of the message when viewed in its entirety, if the subject line referred to a product or service or if advertising content were prominently included near the top of the message.

C. The Current Proposed Primary Purpose Criteria for Dual Purpose Messages Should be Adopted as a Safe Harbor

For the reasons discussed above, ERA does not believe the Commission should employ a “net impression” analysis in determining whether e-mails containing transactional or relationship or other non-commercial content as well as commercial content have a commercial primary purpose. If a net impression standard is adopted, however, ERA urges the Commission to convert the proposed criteria for dual purpose messages set forth in the NPRM into a safe harbor for marketers seeking to ensure compliance with the CAN-SPAM Act.

Under a traditional net impression analysis, the determination as to the primary purpose of a dual purpose e-mail message would be based upon an assessment of the message in its entirety and not focused on any single factor such as the subject heading or the placement of commercial versus non-commercial content. Factors relevant to the net impression assessment would include, but not be limited to, the proportional importance of the commercial and non-commercial or transactional or relationship content, the relative prominence and placement of these elements within the e-mail message, and whether the recipient would reasonably expect to be able to opt out of the message in question.

By its very nature, the net impression standard is somewhat subjective and indistinct and, therefore, poses concerns for industry members who prefer more objective measures for

compliance reasons. Therefore ERA recommends that the Commission modify its proposed criteria for assessing dual purpose messages so as to create compliance safe harbors.

For e-mail messages containing both commercial and transactional or relationship content there could be a safe harbor whereby the message would be deemed not to have a commercial primary purpose if either: (i) the subject line of the e-mail referred to the transactional or relationship content, or (ii) the transactional or relationship content appeared at or near the beginning of the e-mail message. Similarly, e-mail messages containing both commercial content and non-commercial, non-transactional or relationship content could be deemed not to have a commercial primary purpose if a recipient would reasonably interpret either (i) the subject line as signaling a non-commercial message, or (2) the body of the message as primarily non-commercial, based on the placement of the non-commercial and commercial content, the proportion of non-commercial to commercial content and the color, graphics, type size, and style of the non-commercial content.

This would constitute a middle ground between the Commission's current proposal and the more objective "but for" standard favored by ERA and other industry members. The primary purpose of the e-mail message would ultimately be judged on a net impression basis, but there would be a more objective mechanism in place whereby marketers could ensure that their communications would not be deemed to be primarily commercial based upon the layouts and/or subject lines of their e-mail messages. In the event that a marketer opted not to take advantage of the safe harbor, its dual purpose e-mail messages would be viewed on the basis of the net impression of the message as a whole on the reasonable consumer.

D. Certain Messages Are Fundamentally “Transactional and Relationship” in Nature and Should Not be Subject to a Dual Purpose Standard

In our view, there are two categories of e-mail messages the character and make up of which are fundamentally “transactional and relationship” in nature: (i) those sent at the request of the recipient, and (ii) those containing billing or account statements or transaction confirmations. We believe that the Commission should exercise its authority under the CAN-SPAM Act not only to expressly classify these messages as transactional or relationship e-mails, but also to clearly state that such messages retain that status regardless of whether, and the extent to which, they also contain advertising content.

The current definition of a transactional or relationship e-mail message includes one the primary purpose of which is to facilitate, complete or confirm a previously agreed to commercial transaction with the recipient. In our view, this definition encompasses e-mail messages sent at the request of the recipient, as such messages, by their very nature, facilitate or complete a previously agreed to commercial transaction – i.e., the transaction being the recipient’s request for the e-mail in question and the sender’s fulfillment of that request by sending the e-mail message. Thus, an e-mail message sent at the request of the recipient should be deemed as always falling within the scope of a transactional or relationship message, regardless of the inclusion or placement and prominence of advertising content, so long as the e-mail is within the scope of the recipient’s request and until such time as the recipient terminates the request.

Likewise, we believe that account and billing statements, renewal or subscription notices and other similar confirmation e-mails relating to continuing or previously agreed to commercial transactions are “per se” transactional and relationship messages whether or not such messages also contain commercial content. This is consistent with manner in which such messages are

viewed in the off-line context. Billing statements, statements of account and renewal notices sent via traditional “snail mail” frequently contain additional advertisements. However, the inclusion of such solicitation materials does not alter the fundamental nature or primary purpose of the mailing.

We also note that a primary purpose of the CAN-SPAM Act is to allow recipients to opt out unwanted commercial e-mail messages. With billing statements, statements of account or other similar transaction confirmation e-mails, recipients cannot reasonably expect to have the right or ability to opt out. As such, the provisions of the Act should simply not apply to such messages.

Conclusion

ERA appreciates the opportunity to submit these comments on behalf of our membership. We look forward to continuing to work with the Commission to ensure that any regulations which are ultimately adopted strike a balance between the needs of e-mail senders and recipients alike. Please feel free to contact us with any questions or concerns regarding the foregoing comments.

Respectfully submitted,

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