

September 13, 2004

Federal Trade Commission
Office of the Secretary
Room 159-H
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: CAN-SPAM Act Rulemaking, Project No. R411008

Gentlemen:

MBNA America Bank, N.A. (“MBNA”) is pleased to respond to the Notice of Proposed Rulemaking (“NPRM”) issued by the Federal Trade Commission (“FTC” or “Commission”) (69 Fed.Reg. 50091, (2004)).

The NPRM contains a proposed rule “defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message,” in accordance with §3(2)(C) of the CAN-SPAM Act (the “Act”). The Commission proposes to codify the rule at 16 CFR §316.

We welcome the opportunity to comment on this proposal. As a reputable company and legitimate marketer, we believe that it is in the best interest of all to market only to those customers or members who wish to hear from us. We are deeply concerned about the problem of false or misleading e-mail messages. As well, we are hopeful that the Commission will draft and adopt regulations that provide clear guidance to marketers to enable them to comply in good faith with the CAN-SPAM Act.

Overview

In our view, the proposed rule fails, in significant part, to meet the paramount goal of providing clear guidance to marketers to enable them to comply in good faith with the CAN-SPAM Act. It fails to provide a bright-line for marketers in designing their electronic communications and it sets up a standard that we believe is not warranted by the statute. In our comments below, we will recommend that the Commission adopt a more objective standard that comports with the statute and gives clearer guidance to senders and initiators. We will also address other issues that are inextricably linked with the “primary purpose” issue. Specifically we recommend that:

- In determining the primary purpose of a dual-purpose message, the criteria used should be objective and provide marketers with clear compliance guidelines;
- The categories of transactional or relationship messages should be revised and expanded to recognize the differences in communication intended for customers and non-customers; and
- In any multi-party commercial e-mail, there should be only one sender.

Dual-Purpose Messages – Transactional or Relationship

In subsection 316.3(a)(2) of the proposed rule, the Commission addresses a dual-purpose electronic mail message that contains both: (1) advertising/promotional content, and (2) transactional or relationship content. It provides that “the ‘primary purpose’ of such a message shall be deemed to be commercial if:

- (i) A recipient reasonably interpreting the subject line of the electronic mail message would likely conclude that the message advertises or promotes a product or service; or
- (ii) The electronic message’s content pertaining to one of the functions in paragraph (b) of this section [i.e., transactional or relationship message] does not appear at or near the beginning of the message [.]”

In paragraph 316.3(a)(2)(i), the Commission proposes a “reasonable recipient’s interpretation” test to determine “primary purpose.” We respectfully suggest that this test is not appropriate. The plain meaning of “purpose” relates to the intent of the initiator of the message, not the recipient. Congress specified an “intent” test and the Commission has substituted an “effects” test. In addition, this effects test is also highly subjective. It does not give marketers clear direction on how to comply with the Act.

It would be desirable to develop criteria that are predominantly objective in order to provide clear guidance to initiators of e-mail and to reduce the likelihood of innocent confusion that leads to regulatory action and litigation. The Commission should define criteria that minimize ambiguity and vagueness and that facilitate objective determinations. A subjective standard does neither.

A further complicating factor in the Commission’s approach is that the recipient’s interpretation of the subject line would serve as a determination of the primary purpose of the entire message. This would virtually guarantee that any e-mail message that refers to product information in the subject line would be deemed “commercial,” irrespective of the full content of the message.

We recommend that the Commission change paragraph 316.3(a)(2)(i) from a subjective effects test to an objective guideline so that marketers can, in good faith, comply with the Act. We suggest that this paragraph only require the initiator to refer to the transactional or relationship message (“TRM”) in the subject line.

The Commission’s guideline in paragraph 316.3(a)(2)(ii) is more appropriate because it is more objective. By requiring that the TRM content be located “at or near the front of the beginning of the message,” the Commission gives clearer, more objective guidance to marketers for compliance. [We assume that when the Commission refers to the “beginning of the message,” it means the beginning of the body of the message, i.e., the content that comes after the heading and subject line. It would be helpful to clarify this.]

It is unlikely that a spammer attempting to use the dual-purpose message as a ruse would want to put the non-commercial content at the beginning of the message.

If the Commission regards our revised paragraphs 316.3(a)(2)(i) and 316.3(a)(2)(ii) as insufficient separately, it could make both of our suggested objective guidelines applicable to the dual-purpose message by changing the “or” to “and” between the revised paragraphs 316.3(a)(2)(i) and 316.3(a)(2)(ii). The net effect of our suggested changes would be to shift the presumption from favoring a commercial content finding to one more favorable to a finding of TRM. This is appropriate because it gives marketers a clear compliance guideline and it protects the TRM exemption that Congress clearly intended in §2(17) of the Act.

Dual-Purpose Messages – Other Content (Not TRM)

In subsection 316.3(a)(3) of the proposed rule, the Commission addresses a dual-purpose electronic mail message that contains both: (1) advertising/promotional content, and (2) other content that is not transactional or relationship content. It provides that “the ‘primary purpose’ of such a dual-purpose message shall be deemed to be commercial if:

- (i) A recipient reasonably interpreting the subject line of the electronic mail message would likely conclude that the message advertises or promotes a product or service; or
- (ii) A recipient reasonably interpreting the body of the message would likely conclude that the primary purpose of the message is to advertise or promote a product or service.

Both of these tests suffer from the same defect as discussed above: (1) the Commission has substituted its own effects test in place of the statutory intent test, and (2) the reasonable recipient test is vague and subjective, failing to give marketers clear guidance on how to comply with the Act.

The Commission also offers some objective “factors illustrative of those relevant to this interpretation”:

- The placement of the content that advertises or promotes a product or service at or near the beginning of the body of the message;
- The proportion of the message dedicated to such content; and
- How color, graphics, type size, and style are used to highlight commercial content.

We recommend that the Commission revise this subsection in a manner similar to our recommendations for the previous subsection, i.e., provide marketers with clear guidelines for compliance when the primary purpose of the message is to convey the “other content.” Paragraph 316.3(a)(3)(i) should require that the other content be referenced in the subject line and paragraph 316.3(a)(3)(ii) should require that the other content begin to appear at or near the beginning of the message. We recommend “begin to appear” because the structure of electronic messages is not monolithic. Marketers need to be able to separate various parts of materials to different pages. But as long as the recipient sees the first material in the body of the message is “other content,” the recipient will be alerted to its primary purpose. This would be the most objective standard, because it gives the initiator a bright-line requirement for displaying the two types of content.

If the Commission finds that it is more difficult to identify “other content” than TRM, it may want to add a further requirement, such as a new paragraph 316.3(a)(3)(iii). The “factors” could be revised to provide a clearer separation between the commercial content and the “other content.” For example, the message would not be deemed commercial if the majority of the content is “other content.” Also, the Commission could specify that some difference in color, graphics, type size, placement, or separation should be applicable to the two different types of content.

Although the term “other content” is very broad and useful in this context, it would be helpful if the Commission also stated some typical examples of “other content,” such as newsletters, educational materials, advice, data, security alerts, legal or business developments, new product or service announcements (in general, informational content of any kind).

If the Commission chooses not to adopt bright-line compliance guidance, it should, in the alternative, consider the adoption of a “but-for” test in determining the initiator’s primary purpose. An electronic newsletter is a good example of a message that has a high informational content compared to its advertising content. Newsletters are commonly funded by the advertising within the newsletter; however, the advertisers do not “initiate” the newsletter because they do not “procure” its transmission. The publisher of the newsletter would continue to publish the newsletter in most cases even if a particular advertiser were to terminate its advertising. The only way that a newsletter would become a commercial message is if the advertiser procures its transmission. The question should be, “But for this advertisement, would the publisher transmit the newsletter?” If the publisher will only transmit the newsletter if the advertisement is provided, then it would be commercial. But if the publisher would transmit the newsletter without the advertisement, then it would not be commercial.

In addition to newsletters, there are many other types of e-mail messages that have much informational content, many of which the recipients must “subscribe” for or consent to receive, such as product updates, legal or business developments, financial advice, schedules, new product offerings, price lists and discounts, etc. The “but-for” test would be useful in evaluating the nature of a dual-purpose or multi-party message. A sender’s obligation to provide disclosures and opt-out under the CAN-SPAM Act would only occur when the transmitting party would not transmit but for the sender’s advertisement.

Transactional and Relationship Message

The Commission has also adopted a definition of “transactional and relationship message” (“TRM”) in subsection 316.3(b), which is the statutory definition in section 2(17)(A) of the Act. In section 3(17)(B) of the Act, “Modification of Definition,” Congress delegated power to the Commission to “expand or contract the categories of messages that are treated as transactional and relationship messages ... to the extent that such modification is necessary to accommodate changes in electronic mail technology or practices and accomplish the purposes of this Act.”

The treatment of “primary purpose” is incomplete without addressing the TRM issues. We urge the Commission to recognize the important differences between communications sent to existing customers and those sent to non-customers. We believe it is necessary to expand and revise some

of the categories of TRM to provide for reasonable and necessary communications with customers.

Ongoing Commercial Relationship

The Commission should provide an expanded exemption for an “ongoing commercial relationship,” which is currently referred to in subsection 316.3(b)(3)(iii) of the proposed regulation.

Clause (iii) should be expanded to recognize current beneficial marketplace communications. The Commission should expand the exemption to include messages containing information on usage, features, benefits, services, or changes relating to any product, service, subscription, membership, or account that is part of an ongoing commercial relationship between the sender and the recipient. There should be a broad exemption for these types of servicing messages to existing customers.

An ongoing commercial relationship consists of more than a transaction or two. It is a series of mutually beneficial exchanges and service communications over time, during which the recipient is often benefited by the timely receipt of information relating to factors outside the current wording of this clause. Customers expect this kind of servicing and promotional communication, and they benefit from it. If customers want it, it should not be deemed “spam.”

Ongoing commercial relationships are consensual and interactive. Quality of service and customer satisfaction depend heavily on the timely communication of potential benefits to the recipient during the course of the relationship. Many customers are unaware or only vaguely aware of the different features, benefits, and uses of a product or service that he or she has obtained from the sender. Senders should be able to initiate this type of message without risking a global opt-out. It is in the sender’s interest to limit such messages to essential and targeted communications of the most probable utility to the customer. Legitimate marketers must avoid “over-communicating” with customers, which can have counterproductive effects, such as the failure to provide important customer information. It is in the customer’s interest to be made aware of new benefit offers, opportunities for lower rates and prices, incentives for additional usage or purchases, etc., that are characteristic of a continuing commercial relationship.

We recommend that the Commission expand clause (iii) as follows:

(3) To provide-

(iii) at periodic intervals account balance information or other type of account statement, or at various other times messages containing information relating to the usage, features, benefits, services, offers, or changes with respect to

Employment Relationship - Private Intranets

In subsection 316.3(b)(4), the definition of “transactional or relationship message” should be expanded and clarified to distinguish between the public Internet and private intranets. Many

companies, agencies, and organizations have private intranets (LANS, WANS, MANS), which are designed, built, purchased, and owned by a company for exclusive use by the management and employees of the company to conduct the business and private communications of the company. Even though e-mail messages can be sent from outside the company and received at an in-house network, the network is typically protected by security barriers, firewalls, and spam filters to insulate it from improper use by outside users of the Internet. The e-mail addresses for such a private network are typically in a single domain or other unitary distribution protocol and are, in fact, company property, and are so understood by the employees.

There should be an explicit exemption in the Regulation for employers or any owner of a private network to send e-mails to its employees or authorized users of its proprietary network. A regulation to this effect could expand clause (4) as follows:

Any electronic mail message initiated by the owner, employee, or authorized user of a private intranet network to any electronic mail address owned by the owner but provided to an individual employee or authorized user of the owner shall be deemed a transactional and relationship message.

Or the Commission could issue a regulation interpreting the definition of “electronic mail address” (§3(5) of the Act) to exclude any e-mail communications between users of a private or in-house network:

“Electronic mail message” shall not include an electronic mail message initiated by the owner, employee, or authorized user of a private intranet network to any electronic mail address owned by the owner but provided to an individual employee or authorized user of the owner.

It is unlikely that the drafters of the statute intended to ensnare private, proprietary, and internal e-mail networks within the scope of the statute.

Individual B2B Communication Exemption

The problem of spam is basically bulk-mail abuse. An individual communication containing a promotion from a salesperson to a prospect the salesperson has just met is not a spam problem. Numerous business communications by e-mail take place each day in each organization - responding to requests for information, negotiations, notices of product upgrades, etc. It would be burdensome and unreasonable to require CAN-SPAM disclosures and opt-out mechanisms for every business communication. It would be inordinately burdensome to have to police every such e-mail at the organization’s gateway.

The Commission should adopt a de minimis rule that provides that any e-mail communication that has fewer than, say, 50 recipients should be exempt from CAN-SPAM. This would provide a realistic and reasonable zone of business communications without adding substantially to the burden of unsolicited commercial e-mail.

Single Sender

Although the Commission has solicited comments on its proposed new section 16 CFR 316, the definition of “primary purpose” affects several other key parts of the Act, including the question of “sender.” Section 316.3 addresses dual-purpose messages, which frequently arise in a multi-party message. As we proposed in our previous response to the Commission’s ANPR, only one party to a multi-party e-mail should be deemed the “sender.”

In addition to the plain meaning of the words of the Act, it is useful to look at the application of these terms to a multi-party message. If an entity transmits a message to its customers or members, and the message includes advertising from 10 other companies, must the entity transmitting the message include disclosures and opt-out mechanisms for all 11 parties? It would be an absurd result, one Congress could not have intended. It would cause confusion to the recipients. It would add prohibitive burdens to all initiators because they would be required to match all of their suppression lists. It would add significant security and privacy risks. Even if there were fewer parties, it would be reasonable to require only one sender for a CEM, as discussed in the following joint marketing arrangement.

We urge the Commission to adopt a regulation that requires only one party to a multiple-party message to provide the CAN-SPAM disclosures and opt-out mechanism, i.e., only one sender per e-mail.

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Thank you for this opportunity to provide comments. If you have any questions, please contact the undersigned.

Respectfully submitted,

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