

September 13, 2004

Via Electronic Filing

Mr. Donald S. Clark  
Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

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

Dear Secretary Clark:

The signatories to this letter include a wide range of trade associations and business coalitions (hereinafter “Associations”). These Associations collectively represent thousands of companies across a diverse cross-section of industry, all of which are seeking to create a vibrant and consumer-friendly electronic commerce marketplace.

These Associations strongly support efforts to combat spam, as well as preserving the health of e-mail as a medium for commerce and communication. Some of these Associations are submitting comments separately in this proceeding (69 Fed. Reg. 50091, August 13, 2004), but all agree on a set of common principles discussed in this letter. The Associations also collectively submitted comments on the ANPRM (69 Fed. Reg. 11776, March 11, 2004). In addition to the items discussed below, the associations request that the Commission provide clarity to interpretation of the CAN-SPAM Act by addressing in a timely manner the many items that were included in the ANPRM. Specifically, the Associations request that as the Commission’s final rule on “primary purpose”:

1. *Address critical issues raised in the ANPRM that are inextricably linked to the definition of “primary purpose,” including clarifying that, in instances of multiple advertisers in an e-mail, each advertiser is not necessarily a “sender.”*

The NPRM does not address critical interpretive issues surrounding the CAN-SPAM Act (15 U.S.C. §§ 7702 *et seq.*) that are raising concerns in the marketplace. Such issues are inextricably linked to the “primary purpose” of a message and should be addressed in the immediate proceeding. Without addressing such issues, it is difficult for the Associations to evaluate fully the impact of the Commission’s proposed rule. Specifically, the Associations reiterate our request set forth in response to the ANPRM to

clarify that in instances where there are multiple advertisers in an e-mail message, each advertiser is not a “sender” under the Act.

Congress did not intend for advertisers and other legitimate actors that are not attempting to avoid the law and who honor consumer opt-outs to become “senders” for any e-mail in which the advertiser’s product or service is advertised or promoted. Treating each advertiser in an e-mail as a “sender” would: necessitate burdensome and unworkable multiple suppression; require each message to contain multiple opt outs and physical postal addresses that would crowd e-mail and create consumer confusion; and undermine, rather than enhance, privacy by requiring significant transfers of personal information.

2. *Acknowledge that e-mail that is “purely” transactional is excepted from consideration as having a “commercial” primary purpose.*

The Commission should acknowledge that e-mail that solely consists of transactional or relationship content or does not contain any commercial content should not be subject to the CAN-SPAM rules. Such treatment is analogous to that set forth by the Commission for e-mail messages that solely contain commercial content. The Commission should indicate in the final rule that purely transactional e-mail always has a primary purpose that is transactional or relationship. These messages with solely transactional or relationship content or no commercial content represent a unique category of e-mail recognized by the Congress as outside of the scope of the regulations imposed on commercial e-mail.

In addressing this scenario, the FTC should indicate that if e-mail contains commercial content that is within the scope of the transaction or that a recipient would reasonably expect to receive based on the terms of a transaction, the “primary purpose” of the e-mail shall be deemed transactional or relationship, and the dual-purpose tests would not apply.

3. *Identify certain types of e-mail that never should be classified as having a “commercial” primary purpose.*

The Act requires that the Commission issue rules to determine what “constitutes” the primary purpose of an e-mail message. The statute contemplates that the sender of the message determines the primary purpose. Often messages have several purposes, some that are “commercial” and others that are not. By referring to “*the* primary purpose” (emphasis added), the statute is clear that a message can have only one primary purpose. Thus, for messages with multiple purposes, the provisions of the statute that apply to them will be determined by which of the purposes is the primary purpose of the message. In response to the ANPRM, the Associations stated that it is critical that the Commission’s criteria for determining the “primary purpose” provide a clear standard

that allows for the certainty required for senders of e-mail and Internet Service Providers to manage their e-mail operations. The Associations continue to believe that following a “but for” test would provide such a clear standard. The CAN-SPAM Act suggests that the “primary purpose” of an e-mail message should be determined from the perspective of the sender of the message and not that of the recipient.

Rather than following the dictates of the statute to adopt a “purpose test,” the FTC has chosen an “effects” test in adopting a standard determined by the impression of a reasonable recipient. This test creates no certainty for either the consumer or the sender.

In defining criteria for the term “primary purpose,” there are specific types of e-mail that the Commission should clarify do not have a primary purpose that is “commercial” in nature. These categories should include:

- *E-mail sent at the request of the recipient.* If a recipient has requested an e-mail message, then they do not expect to have an opt out in the message. Newsletters, e-magazines, requested advertiser services, and other types of messages requested by the recipient would fall outside of the scope of “commercial messages.” Treatment as non-commercial is critical to avoid issues that would result if multiple advertisers and advertisements in a periodical requested by the consumer were treated as commercial. For such e-mail, a consumer should have the easy ability to terminate such a request.
  - *E-mail messages that contain billing statements and similar transaction confirmations, subscription notifications, or statements of accounts.* The Congress did not intend the CAN-SPAM Act to allow recipients to opt out of bills and similar statements. Nor did they seek to eliminate the ability of merchants or banks to add commercial messages to billing statements.
  - *E-mail messages that provide bona fide editorial content, including newsletters.*
4. *Revise the standard for e-mail messages with content that is “commercial” and “transactional or relationship.”*

As discussed above, the Commission should develop objective criteria that are not based on the reasonable-recipient standard. However, if the Commission retains a “reasonable recipient” test, at a minimum, the Commission should create a “safe harbor” in lieu of what is now contained in section 316.3(a)(2) so that a “dual-purpose” e-mail will be considered to be a transactional or relationship e-mail by evaluating whether:

- 1) the recipient reasonably interpreting the subject line would likely conclude that the message relates to a transaction the recipient agreed to enter into

with the sender, or a product or service the recipient purchased from the sender, or any other ongoing relationship the recipient has with the sender; *or*

2) the transactional and relationship message appears at or near the beginning of the message.

This “safe-harbor” option embraces the perspective of the recipient preferred by the Commission, while not presuming that an e-mail message has a commercial primary purpose. If the safe harbor does not apply in a particular circumstance, then the content of the message would be subject to a “net-impression” test.

5. *Evaluate the reasonable recipient’s expectation to opt out of messages with certain types of content.*

If a reasonable-recipient standard is adopted, the Commission should look first to whether a reasonable recipient could expect to receive an “opt out” prior to evaluating whether the recipient would interpret the message as having a “primary purpose to advertise or promote a commercial product or service.” There are many types of messages, such as e-mail that the recipient has agreed to receive in exchange for receiving a benefit like free e-mail accounts, from which a reasonable recipient would not expect to have the ability to opt out. The Congress did not intend that an opt-out apply to such messages.

6. *When evaluating the subject line of a dual-purpose message, the standard should evaluate the reasonable consumer’s perception of the “primary purpose” of the subject line.*

The CAN-SPAM Act requires that for an e-mail message to be “commercial,” it must have a primary purpose of advertisement or promotion of a commercial product or service. In defining the characteristics for evaluating categories of e-mail, the Commission proposes to evaluate for certain types of e-mail whether the recipient would interpret the message as an advertisement or promotion. In doing so, the Commission is reading the “primary purpose” requirement out of the Act. If the Commission evaluates the perspective of the reasonable recipient’s view of content of the subject line, in addition to evaluating the primary purpose of the content of the body of the message, it should evaluate the reasonable recipient’s view of the primary purpose.

7. *Indicate in the rule that dual-purpose e-mail with a commercial purpose does not need to refer to the commercial component in the subject line.*

The Commission indicates that, depending on the facts of a given situation, a dual-purpose message may use a subject line that is not deceptive and does not refer to commercial content. The Commission should state in the rule that in no instance is a

subject line required to refer to the commercial content of a message. The CAN-SPAM Act prohibits the Commission from promulgating rules that require a reference to commercial content in the subject line. 15 U.S.C. §§ 7711(b). Senders of commercial e-mail should have certainty that the sole fact of not referencing the commercial component in a message would not be considered deceptive.

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The Associations appreciate the opportunity to comment on this proceeding and look forward to continuing to discuss these important issues with the Commission. For additional information, please contact Ronald Plessner, Piper Rudnick LLP, at (202)-861-3900.

*Sincerely,*

American Advertising Federation  
American Association of Advertising Agencies  
American Bankers Association  
Association for Interactive Marketing  
Association of National Advertisers  
American Society of Travel Agents, Inc.  
—National Tour Association  
—Cruise Lines International Association  
Consumer Bankers Association  
Direct Marketing Association, Inc.  
Electronic Retailing Association  
Email Service Provider Coalition  
The Financial Services Roundtable  
Information Technology Association of America  
Interactive Travel Services Association  
Internet Alliance  
Internet Commerce Coalition  
Magazine Publishers of America  
National Business Coalition on E-Commerce and Privacy  
National Retail Federation  
NetCoalition  
Network Advertising Initiative  
Promotion Marketing Association  
U.S. Chamber of Commerce