

**Before the  
FEDERAL TRADE COMMISSION  
Washington, D.C. 20580**

**COMMENTS  
of the  
CONSUMER BANKERS ASSOCIATION**

**Responding to the Notice of Proposed Rulemaking re: “Primary Purpose”**

**CAN-SPAM Act Rulemaking, Project No. R411008**

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## **I. Introduction & Summary**

The Consumer Bankers Association (“CBA”) appreciates the opportunity to comment on the Federal Trade Commission’s (“Commission”) request for public comment on the “primary purpose” of an electronic mail message. “CAN-SPAM Act Rulemaking, Project No. R411008, 16 C.F.R. Part 316, 69 Fed. Reg. 50091, August 13, 2004.

CBA is the recognized voice on retail banking issues in the nation’s capital. Member institutions are the leaders in consumer financial services, including auto finance, home equity lending, card products, education loans, small business services, community development, investments, and deposits. CBA was founded in 1919, and provides leadership, education, research, and federal representation on retail banking issues such as privacy, fair lending, and consumer protection legislation/regulation. CBA members include most of the nation’s largest bank holding companies, as well as regional and super community banks that collectively hold two-thirds of the industry’s total assets.

In enacting the CAN-SPAM Act, Pub. L. No. 108-187, 15 U.S.C. §§ 7702 *et seq.* Congress recognized that e-mail has become an extremely popular and important means for Americans to communicate for both personal and commercial purposes, but that an avalanche of unwanted spam now threatens the reliability and usefulness of this channel of communications. CBA wholeheartedly agrees. Our members, in particular, often use e-mail to communicate with corporate clients as well as customers in order to exchange messages regarding interest rates, market research, mortgage costs, and other financial information that is critical to the proper functioning of our capital and other markets.

CBA believes that the Commission’s approach, which is based in large part on the reasonable recipient’s interpretation of a message, is not consistent with the requirements set

forth by the Congress in the CAN-SPAM Act. The CAN-SPAM Act sets forth a “purpose” test to determine whether a message is commercial. In contrast, rather than setting forth criteria to determine the purpose, the Commission has proposed an “effects” test. The Commission’s approach leaves considerable ambiguity for businesses that send e-mail, because the reasonable-recipient standard is subjective and the Commission has provided very little guidance as to how a reasonable recipient would interpret different types of e-mail messages. CBA continues to believe that the Commission should follow a “but for” standard as set forth in our comments to the ANPRM. Such an approach is required by the Act and will provide certainty to senders of e-mail.

If the Commission ultimately elects to follow the approach taken in the NPRM to determine the primary purpose, the Commission should provide more specificity in defining objective standards to businesses that send e-mail. The NPRM is entirely focused on determining the primary purpose of a message depending on whether the message includes purposes that are “commercial,” “transactional or relationship,” other content that does not fit into either of these categories, or a combination of these categories.

The Commission sets forth criteria to determine the primary purpose once the types of purposes of a message are identified. The Commission, however, provides little guidance as to what types of messages have “commercial” or “transactional or relationship” content, necessary to make such a determination. In order for businesses to be able to apply the Commission’s proposed criteria to e-mail, the Commission should expand and clarify the types of content that are “transactional or relationship” in nature. Without such clarification, businesses will not know whether some messages have transactional or relationship content and the Commission’s proposed criteria will prove difficult to apply.

CBA offers the following suggestions on the Commission’s proposal, discussed in more detail below, which we believe will provide more certainty for businesses in determining the primary purpose of a message:

- Specifically identify types of e-mail, including e-mail that contains billing statements, that never have a primary purpose that is commercial.
- Clarify that certain messages are transactional or relationship messages.
- State in the rule that the subject line does not in any instance require an indication that the message is commercial or transactional or relationship in nature.
- In developing its criteria, the Commission has read “primary purpose” out of the statute. If the Commission proceeds in adopting a reasonable recipient standard, the standard should evaluate the reasonable consumer’s perception of the “primary purpose” of the subject line.
- E-mail with content that is “commercial” and “transactional or relationship” should have a commercial primary purpose only if **both** (1) the message has a subject line that a reasonable consumer would determine has the primary purpose of advertisement or promotion **and** (2) the message’s transactional or relationship content does not appear at or near the beginning of the message.
- Clarify that in instances when e-mail contains content from multiple businesses that each business is not a “sender” under the Act.

## **II. Types of Messages that Have a Primary Purpose that is Not Commercial**

The Commission should identify specific types of messages that have a primary purpose that is not “commercial,” including: (1) e-mail messages that contain billing statements; (2) e-mail messages where the recipient has requested the e-mail or the e-mail delivers products or services that the recipient is entitled to receive under the terms of a transaction; (3) e-mail that contains primarily editorial content; (4) one-to-one e-mail sent in a business capacity by individual employees; and (5) e-mail containing legally required content.<sup>1</sup> Such messages should

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<sup>1</sup> See 15 U.S.C. § 7702(B).

not be evaluated based on the reasonable recipient's interpretation of the body of the message. These messages are too critical to business communications to leave their classification ambiguous such that they could be classified as "commercial." Each of these additional categories will provide helpful guidance to CBA's members regarding these types of messages, allowing business operations to continue without unnecessarily burdensome changes in the manner in which we communicate using e-mail.

*A. E-mail that includes billing statements should never be classified as having a "commercial" primary purpose*

E-mail messages that contain billing statements and other similar messages that cannot be opted out of or are legally required should always be considered to have a primary purpose that is "transactional or relationship" in nature. Under the Commission's proposal, if either the billing statement is not at or near the beginning of the message, or the reasonable recipient would interpret the subject line of the message to be for an advertisement or promotion, even if the e-mail is a bill, the Commission would deem the e-mail to have a commercial primary purpose, thus allowing customers to opt out of billing statements. This is contrary to the intent of Congress. The alternative is for the sender to not include any promotional material in bills. This also is not the intent of Congress.

The Commission should not evaluate an electronic billing statement under its proposed criteria because a reasonable consumer would never expect to be able to "opt out" of a bill. Similarly, if a bank is required by law to send certain information, a reasonable recipient should not expect to be able to opt out of the receipt of such a message. Financial institutions also use e-mail, which may be combined with commercial messages, to send their account holders notices and other information required by law, including disclosures under the Federal Reserve Board's Regulations E and Z and privacy notices that are required under the Gramm-Leach-Bliley Act.

E-mail that includes such content also never should be deemed to have a “commercial” primary purpose.

*B. E-mail sent to “deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender”*

The statute enumerates this category within the types of e-mail that has a primary purpose that is transactional or relationship. CBA believes that in any instance where the message falls within this category and the message is sent within the scope of the terms that the recipient has agreed to, the message always has a primary purpose that is transactional or relationship in nature. This is consistent with the statute and is particularly important for messages where the recipient has agreed to receive commercial e-mail in exchange for receiving a benefit like a free e-mail account. Under the Commission’s proposal, recipients would be able to opt out of contractual agreements. This also is the case for newsletters that contain advertisements that are sent pursuant to an agreement with the recipient. Recipients should not be able to opt out of the advertisements that support such newsletters.

*C. E-mail sent at the recipient’s request*

The Commission should add messages that are sent to recipients at the recipient’s request to the list of e-mail that is “transactional or relationship” in nature. Under the CAN-SPAM Act, there may be situations where an individual has provided consent that does not fit within the existing types of messages considered to be “transactional or relationship” messages. For example, many of our member financial institutions, when requested by a consumer, send consumers who are in the process of purchasing or refinancing a house e-mail that includes the latest interest rates.

Clearly, if an individual has requested the material, a relationship exists in which the requester expects and deserves a response. The Act was not intended to prevent this type of e-mail communication. If these types of e-mail are not considered transactional or relationship, it is possible that individuals may not receive e-mail that they have asked to receive. This could be the case if an individual requests a specific message from an entity whose commercial e-mail the individual had previously opted out of. This is not a result that either senders or recipients desire. Thus, the Commission should indicate that any e-mail requested by a consumer has a “primary purpose” that is transactional or relationship in nature. In order to ensure that recipients maintain the ability to terminate their request, the Commission could require the following additional criteria:

- the sender may only send e-mail within the scope of the request; and
- upon termination of the request, the sender will not initiate messages within the scope of the original request.

*D. E-mail that contains primarily editorial content*

The Commission should clarify that e-mail that contains primarily editorial content does not have a commercial primary purpose. The primary purpose of such messages is not the commercial advertisement or promotion of a particular commercial product or service, but rather the provision of editorial content. Such communications provide recipients with important content regarding developments in the marketplace. The sole factor that the sender is a commercial entity with the ultimate goal of selling goods or services should not cause editorial content to be treated as commercial e-mail.

*E. E-mail sent in a business capacity by individual employees*

Like e-mail sent pursuant to the recipient’s request, one-to-one e-mail that is sent by employees in the business-to-business context should not be treated as “commercial” e-mail.

Both large and small businesses engage in corporate-to-corporate e-mail exchanges that involve complex transactions with a lot of e-mail flowing both ways. For example, in the commercial real estate business, e-mails are sent to brokers by individual representatives of lenders to inform them of current mortgage rates. In addition, in the context of the equipment leasing industry, it is typical for lenders to e-mail equipment vendors a rate sheet that describes the amount of interest a lender would charge on a given piece of equipment. One interpretation of the Act could require that such e-mail contain an opt out and be run against the business's suppression list prior to transmission. CBA believes that such a result would be very difficult for businesses to administer and was not intended by Congress.

Business e-mail systems are not designed to scrub each e-mail sent by an employee against the business's suppression list. Such a requirement would result in the need to redesign numerous businesses' e-mail systems and would be extraordinarily burdensome and expensive. In addition, such a requirement would interfere with legitimate practices that are critical to business relationships and operations and e-mail that provides information critical to developing the financial marketplace. Moreover, regulating this type of e-mail would restrict legitimate e-mail without addressing the spam problem.

### **III. Modification and Clarification of Existing Categories**

In addition to indicating that the above types of e-mail do not have a commercial primary purpose, the Commission should make modifications to the existing categories to provide clarity to businesses that certain types of content are "transactional or relationship" in nature. These modifications should include as being "transactional or relationship" in nature e-mail: (1) sent to a recipient as part of an ongoing relationship concerning products or services that the recipient has received or will receive from the sender; (2) relating to the provision of goods or services



received as a result of the opening of a service relationship with the sender; (3) negotiating transactions; and (4) sent by a company, or a commonly managed group of companies, to employees regarding products or services available to the employees, including products or services of affiliates and third parties.

*1. E-mail sent to a recipient as part of an ongoing relationship concerning products or services that the recipient has received or will receive from the sender*

The Commission should extend 15 U.S.C. § 7702(17)(A)(iii) of the Act to include information related to products or services that a client or customer will often expect as a part of an ongoing relationship. The current category classifies as “transactional or relationship” messages that provide “(I) notification concerning a change in the terms or features of; (II) notification of a change in the recipient’s standing or status with respect to; or (III) at regular periodic intervals, account balance information or other type of account statement with respect to a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender.” The FTC should amend this provision by adding a new (IV) “concerning information, products, or services that the recipient has received or will receive from the sender.” § 7702(17). This section, as currently drafted, is limited to account statements or a change in terms of a customer’s account. It should be expanded to include information that a customer expects to receive, such as a prospectus, inventory, research, and information about seminars.

Additionally, CBA believes that the Commission should eliminate the words “at regular periodic intervals” from § 7702(17)(A)(iii)(III). Often there are account statements that are sent following a transaction, rather than on a “regular” temporal schedule. Such messages clearly are transactional or relationship in nature. Thus, this section should allow for the sending of account information even if it is not “regular.”

2. *E-mail sent pursuant to the terms and conditions of an agreement.*

The Commission should clarify or, if necessary, expand the scope of § 7702(17)(A)(v) of the Act so that it is clear that e-mail sent pursuant to consent obtained in account opening or other documents that establish the terms of an agreement, are “transactional or relationship” messages. This section currently includes e-mail that has a primary purpose “to deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender.” The Commission should clarify that if an e-mail is sent pursuant to consent obtained at the establishment of the relationship, such e-mail constitutes “services” that the recipient is entitled to receive under “the terms of a transaction that the recipient has previously agreed to enter into with the sender.” Alternatively, the Commission should expand the scope of § 7702(17) and add a new (vi) in order to include messages sent pursuant to the terms and conditions of an agreement.

3. *E-mail negotiating transactions*

The use of e-mail has greatly facilitated the ease and efficiency of negotiating transactions and should not be restricted. Section 7702(17)(A)(i) of the Act should be modified to include situations where parties are negotiating a transaction. The subparagraph should state: “to negotiate a commercial transaction or to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender.”

4. *E-mail sent by a company, or a commonly owned group of companies, to employees regarding products or services available to the employees, including products or services of affiliates and third parties.*

Section 7702(17)(A)(iv) covers messages that have a primary purpose “to provide information directly related to an employment relationship or related benefit plan in which the

recipient is currently involved, participating, or enrolled.” The Commission should clarify the scope of this provision so that a company’s communications with employees concerning products and services available to them are considered to be “directly related to an employment relationship or related benefit plan.” In this regard, because of the way that modern companies in the financial services industry are structured, the final rule should recognize that such companies traverse legal vehicles and the concept of “company” often means a commonly managed group of companies.

#### **IV. E-Mail that Contains Both “Commercial” Content and “Transactional or Relationship” Content**

The Commission proposes that, if e-mail messages contain both “commercial” content and “transactional or relationship” content, the primary purpose will be deemed commercial if either: (1) a recipient reasonably interpreting the subject line of the message likely would conclude that the message advertises or promotes a product or service; or (2) the message’s transactional or relationship content does not appear at or near the beginning of the message.

CBA believes that the criteria set forth by the Commission for this category of dual-purpose messages only begin to create a bright-line standard that will prove useful for businesses that send e-mail. In addition, CBA believes that this standard will result in some e-mail whose primary purpose is not the “advertisement or promotion of a commercial product or service” being treated as a “commercial.” For these reasons, CBA suggests several changes to the Commission’s proposal that we believe will adhere to the intent of Congress that a commercial message must have a primary purpose that is commercial. First, CBA believes that a reasonable-recipient standard must evaluate the reasonable recipient’s view of the “primary purpose” of the subject line rather than solely whether the e-mail is an advertisement or promotion. Second, in order for a message to be deemed “commercial,” the message should satisfy both criteria, rather

than the current proposal that satisfying either one of these criteria would result in classification of the message as having a primary purpose that is commercial. Finally, as discussed above, e-mail that contains billing statements, even if the e-mail also contains advertisements or promotions, should not be classified as having a primary purpose that is commercial. When a bill is included in an e-mail, the e-mail always has a primary purpose that is “transactional or relationship” in nature.

*A. If the Commission adopts its proposed criteria for determining the primary purpose of an e-mail message, it should ensure that the reasonable consumer evaluate the primary purpose of the subject line*

In determining whether an e-mail has a “commercial” primary purpose, one criterion the Commission has proposed in the categories of dual-purpose messages would look to whether the reasonable recipient’s interpretation of the subject line is that the e-mail is an advertisement or promotion. In proposing this standard, the Commission has omitted the statutory requirement of evaluating the “primary purpose” of the message.

The statute, by stating “**the**” primary purpose, indicates that an e-mail message can have only a single primary purpose. Many messages sent by CBA members have multiple purposes. The Commission’s proposed criteria would evaluate the reasonable consumer perception of whether the message includes an advertisement or promotion. In a multiple purpose e-mail where one of the purposes is “commercial,” the reasonable recipient could interpret the e-mail subject line to include an advertisement when, in fact, the reasonable recipient may not interpret the **primary purpose** of the e-mail to be an “advertisement or promotion.” If the Commission

proceeds with this reasonable-recipient approach, the standard should be revised to include the reasonable recipient's perception of the **primary purpose** of the subject line.<sup>2</sup>

*B. Dual-purpose e-mail with content that is commercial and transactional or relationship has a primary purpose that is "commercial" only if both (1) it has a subject line from which a reasonable recipient would conclude that the message is an advertisement and (2) the message's transactional or relationship content does not appear at or near the beginning of the message.*

The Commission's proposed criteria will lead to a result that an e-mail message that solely has transactional or relationship content that is not near the beginning of the message will cause the message not to be a "transactional or relationship" message. There may be instances where the transactional or relationship content is near the end of a message, yet the message has a primary purpose that is transactional or relationship. By requiring both of these criteria rather than one for the message to be determined to have a commercial primary purpose, the Commission will increase the potential for having a result intended by the Congress.

*C. Multiple-Purpose E-mail Does Not Need to Affirmatively Indicate the Primary Purpose of the Message in the Subject Line*

The CAN-SPAM Act prohibits the Commission from issuing regulations that would require reference to content in the subject line.<sup>3</sup> The Commission should state explicitly in the rule that an e-mail message is not deceptive because the subject line does not indicate the type of content that is in the body of the message. Otherwise, the result would have the effect of requiring that the subject line indicate whether the message is commercial or transactional or

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<sup>2</sup> Category (2) should read: (1) a recipient reasonably interpreting the subject line of the message would likely conclude that the primary purpose of the message is to advertise or promote a product or service; ....

Category (3) should read: (1) a recipient reasonably interpreting the subject line of the message would likely conclude that primary purpose of the message is to advertise or promote a product or service; ....

<sup>3</sup> 15 U.S.C. § 7711(b); 69 Fed. Reg. at 50093 n.17.

relationship in order to avoid violating the rule. Such a result would be inconsistent with the plain meaning of the statute.

**V. The Commission Should Clarify that in Instances when E-Mail Contains Content from Multiple Businesses that Each Business is Not a “Sender” Under the Act.**

In this rulemaking, the Commission should attempt to address the issues surrounding whether there can be multiple “senders” and corresponding “opt outs.” This issue is inextricably linked with the “primary purpose” of a message. This is a complicated issue, and the lack of clarity is creating confusion in the marketplace. As indicated in CBA’s ANPRM comments, some interpretations of the Act suggest that multiple parties whose products and services may be promoted in an e-mail are all senders. Such an interpretation would require multiple opt outs, suppression against multiple lists, and inclusion of multiple physical addresses in such e-mail. We do not believe that this is what the Congress intended, and the Commission should address this issue in this rulemaking. By clarifying that each provider of commercial content is not a “sender,” the Commission will clarify that only the business that is actually sending the message will be impacted by the determination of the “primary purpose” of the message.

**Conclusion**

The Consumer Bankers Association appreciates this opportunity to comment in this proceeding. We look forward to continuing to work with the Commission on these issues.

Respectfully submitted,

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