



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

**COMMENTS OF**  
**THE INTERNET COMMERCE COALITION**

**CAN-SPAM ACT RULEMAKING**  
**Project No. R411008**

**I. Introduction**

The Internet Commerce Coalition ("ICC") submits these comments in response to the Commission's Notice of Proposed Rulemaking on the "primary purpose" test set forth in the CAN-SPAM Act, Pub. L. No. 108-187, 15 U.S.C. §§ 7702 *et seq.* 69 Fed. Reg 50091, August 13, 2004. ICC members are leading Internet and e-commerce companies and trade associations, including AT&T, BellSouth, Comcast, eBay, MCI, SBC Communications Inc., TimeWarner/AOL, Verizon, the U.S. Telecomm Association, CompTel, and the Information Technology Association of America.

Our members work very hard to protect consumers from spam, suing more than 150 spammers, operating 24x7 response teams to respond to spammer attacks, implementing a wide

range of spam-filtering technologies, working on more secure e-mail systems of the future and, in many cases, offering consumers flexible self-help filters to combat spam.

In these comments, we address three points:

- First, the Commission proposes an over-inclusive and insufficiently clear test in § 316.3(a)(2)(i) for determining whether a “dual purpose” commercial/transactional or relationship message is commercial. The statute does not permit a test that would classify messages as commercial merely if a reasonable recipient “would likely conclude” based upon the subject line that a message advertises or promotes a product or service. For example, if a recipient has contracted to receive information from a sender, then 15 U.S.C. §§ 7702(2)(B) & (17)(A)(i) provide that that information is not a “commercial message” within the meaning of the Act, even if it is commercial in nature.
- Second, in this proceeding, the Commission should clarify that the transactional or relationship message exception in § 7702(17)(A)(i) for e-mails sent to “facilitate, complete or confirm a commercial transaction” and in some cases the service delivery exception in § 7702(17)(A)(v) cover commercial communications within the scope of an agreement between the sender and an existing customer for a “product update,” newsletter, or other electronic mail service that informs existing customers of new products or services with their affirmative consent.
- Third, to provide greater certainty to ISPs, recipients, law enforcement authorities, and senders alike, it is very important that the Commission clarify the other issues addressed in the ANPRM, including, but not limited to, the Act’s effect on joint marketing and newsletter e-mails.

## II. DISCUSSION

In our members’ experience fighting spam, the commercial purpose of spam that subscribers complain about is readily apparent from the subject line of an e-mail (unless the subject line is deliberately falsified), and/or the content of the message. The spam complaints ISPs receive are rarely close calls, and the intent of the sender is the touchstone of whether a message is spam.

As a practical matter, transactional or relationship messages listed in § 7702(17) of the Act are very different from spam that users complain about, and § 7702(2)(B) of the statute

exempts them entirely from the definition of commercial e-mail. The Commission's regulations should be careful to distinguish those messages from commercial e-mail, provided that "the primary purpose" of the message fits one of the categories in § 7702(17)(A).

#### **A. Dual-Purpose E-mail Messages**

The NPRM asks in Question 2(b) whether its primary purpose standard covers any messages that should not be treated as commercial, and whether another primary purpose standard would be more appropriate. See 69 Fed. Reg. at 50105.

The Commission's proposed treatment of both dual-purpose commercial/transactional or relationship messages and dual-purpose commercial/not commercial messages is overbroad. Furthermore, its proposal to focus on the "likely conclusion" of reasonable recipients is too open-ended to provide sufficient guidance as to which messages fall into these categories.

In particular, the Commission's proposal in § 316.3(a)(2)(i) to deem all dual-purpose commercial/transactional or relationship messages commercial if a recipient reasonably interpreting the subject line "would likely conclude" that the message advertises or promotes a product or service cannot be squared with the plain language of the statute. The statutorily mandated test is whether "the primary purpose" of the message is either transactional or relationship or commercial, *not* whether the subject line indicates that the message advertises or promotes a product or service *at all*.

Furthermore, the statutory test requires that the primary purpose of the message *actually be* primarily commercial and not transactional or relationship, *not* whether a recipient reasonably interpreting the subject line "would likely conclude" that. In our ANPRM comments, we urged with regard to the primary purpose test, "Above all, it is important that this test be clear so that

senders, ISPs, and law enforcement know what the statute covers and when it can be enforced.” The NPRM’s “likely conclusion of the recipient” test falls short in this regard, and should be made clearer and more straightforward. Indeed, by choosing the term “purpose,” Congress made the intent of the sender/initiator the central issue in determining whether the an e-mail is commercial. However, the sender’s intent may be determined through objective evidence, such as the subject line and body of the message, the context in which it was sent, how the message compares to other e-mails by the same sender, and other similar factors. Such a test would be far clearer, and much more consistent with the language of the statute than the proposed Rule’s “would likely conclude” test.

The very same problems of overbreadth and lack of clarity also are present in the Commission’s treatment of dual-purpose commercial/noncommercial content in § 316.3(a)(3)(i).

- The Commission should amend §§ 316.3(a)(2)(i) and (a)(3)(i) to include the statutorily mandated primary purpose test, and to provide a clearer, more objective test regarding the intent of the sender as reflected by the actual content of the subject line and content of the message, not the theoretical likely conclusion of a theoretical reasonable recipient.

#### **B. Clarifying the Scope of the Transactional or Relationship Exception and Non-Commercial Messages**

Question q. asks whether, when a recipient enters into a transaction that entitles the recipient to receive future newsletters or other electronically delivered content, those messages should be considered transactional or relationship content. 69 Fed. Reg. at 50105. The answer to this question clearly is yes.

At a minimum, in this proceeding the Commission should clarify that the transactional or relationship message exception in § 7702(17)(A)(i) of the Act for e-mails sent to “facilitate, complete or confirm a commercial transaction” applies to advertising or promotional e-mail communications within the scope of an agreement between the sender and an existing customer for a “product update” service that informs existing customers of new products or services with their affirmative consent. Such e-mails are specifically contemplated by these agreements and are sent to fulfill them. They are, therefore, transactional or relationship messages within the definition in § 7702(17)(A)(i) and may also be a service that the recipient is entitled to receive under the terms of a previous transaction within the meaning of § 7702(17)(A)(v).

The NPRM focuses on the primary purpose test, but does not adequately explain the scope of the transactional or relationship message exception, with which the primary purpose test is directly intertwined.

The Commission should further clarify ways in which the transactional or relationship message exception applies to communications with existing customers who have affirmatively consented to receive communications from the sender. In particular, ICC members engage in frequent one-to-one e-mail communications with large or high-volume current business customers with the customer’s consent. We are concerned that application of a notice and opt-out requirement could significantly impede use of e-mail for such spontaneous one-to-one communications in order to service an existing account because these e-mails would need to be sent through a central server and labeled with the CAN-SPAM notice.

More generally, where the sender has an ongoing, existing business relationship with the recipient involving ongoing payment for a product or service provided by the sender, the sender has a strong incentive to respect customers’ preferences regarding receiving commercial e-mail.

In this context, the Commission should seriously consider clarifying that a transactional or relationship exception applies to e-mail messages sent with the affirmative consent of recipients in this limited context. Consumers always have the ability to withdraw consent and thereby terminate the service, making an opt-out requirement unnecessary in this context.

Finally, the Commission also should provide specific examples of messages sent for business purposes that fall into the non-commercial message third category. For example, these include e-mail messages sent for the purpose of negotiating an agreement with the recipient, or e-mail surveys sent to improve the sender's products or services.

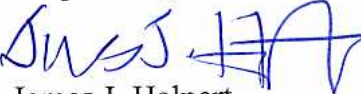
- At a minimum, the Commission should clarify that the transactional or relationship message exception in § 7702(17)(A)(i) and in some cases the service delivery exception in § 7702(17)(A)(v) permit commercial e-mail communications within the scope of an agreement between the sender and an existing customer for a "product update," newsletter, or other e-mail service that informs existing customers of new products or services with their affirmative consent.

### **C. Other Issues in the ANPRM**

Finally, while we understand that the Commission is under a tight statutory deadline to conclude this proceeding, we urge that as soon as practicable it address the other issues raised in the ANPRM, including the critical issue of the meaning of the term "sender," to provide a clearer understanding of the scope of the CAN-SPAM Act for ISPs, senders, recipients, and state attorneys general who share authority to enforce the Act.

\* \* \*

We thank you for considering our views, and would be pleased to answer any questions you may have.

Respectfully submitted,  
  
James J. Halpert

General Counsel  
(202) 861-3938

September 13, 2004