



001029



April 19, 2004

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

Re: Definitions, Implementation, and Reporting Requirements
Under the CAN-SPAM ACT
68 FR 11776 (March 11, 2004)

Dear Sir or Madam:

America's Community Bankers ("ACB")¹ appreciates the opportunity to comment on the Federal Trade Commission's (the "Commission") Advanced Notice of Proposed Rulemaking regarding key definitions and other implementing aspects of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the "CAN-SPAM Act").²

Specifically, the Commission is seeking input for its mandatory rulemaking on the factors it should consider in defining the relevant criteria to facilitate the determination of the "primary purpose" of an electronic mail message, which, in turn, will determine whether a message is a commercial electronic message subject to the restrictions and prohibitions of the CAN-SPAM Act. The Commission also seeks input on four areas of discretionary rulemaking that were established in the CAN-SPAM Act.

ACB Position Summary

- ACB believes that the "primary purpose" of an electronic mail message that is subject to the restrictions and requirements of the CAN-SPAM Act should be defined to include those messages where the commercial or promotional aspect is more important than all other aspects combined.

¹ America's Community Bankers represents the nation's community banks. ACB members, whose aggregate assets total more than \$1 trillion, pursue progressive, entrepreneurial and service-oriented strategies in providing financial services to benefit their customers and communities.

² 69 Fed. Reg. 11776 (March 11, 2004).

- We also encourage the Commission to take account of good faith compliance efforts in its rulemaking.
- The “transactional and relationship messages” exception category should be expanded to include all communications that occur as part of a regular, ongoing business or customer relationship.
- ACB opposes any rulemaking that defines “sender” to include several persons or entities simultaneously.
- We urge the Commission not to undertake any rulemaking to require a mandatory subject line label for all non-adult commercial email messages.

Defining “Primary Purpose”

ACB recommends that the Commission define the “primary purpose” of a commercial electronic mail message generally to mean that the commercial advertisement or promotional aspect of the email message is more important than all of the email’s other purposes *combined*. This standard represents the more balanced approach to determining when an electronic mail message should be considered a commercial electronic message subject to the CAN-SPAM Act’s restrictions. This standard should serve to strike a balance between regulating unsolicited, deceptive or misleading emails while avoiding the disruption of the regular flow of electronic business communications between businesses, associations, other organizations and their constituencies, which may include some legitimate marketing and advertising components.

At the same time, ACB believes the Commission must consider the good faith efforts of senders of electronic mail messages in meeting their compliance obligations under the CAN-SPAM Act. As with any subjective standard, compliance is easier to determine after the fact. And, given the intensely fact-based nature of determining whether an electronic mail message has a commercial primary purpose under either of the Commission’s possible standards, it will be extremely important to recognize the good faith compliance efforts of legitimate originators of electronic mail messages.

With respect to other standards for determining “primary purpose,” ACB believes that the use of some of the alternative standards would cause unnecessary confusion and disruption in the use of regular and legitimate communications between organizations and interested customers, members and clients. For example, ACB believes that using the Commission’s alternative “net impression” standard as the determining factor for determining the “primary purpose” of an electronic mail message would establish a vague and arbitrary standard that would render compliance with the CAN-SPAM Act extremely difficult and unnecessarily complicated. Such a standard potentially could subject all electronic communications to after-the-fact compliance determinations. We would oppose adoption of any such standard.

Transactional and Relationship Messages

The Commission also has requested comment with respect to certain discretionary rulemakings, including whether to amend the definition of the category of excepted email communications defined as “transactional and relationship messages.” ACB recommends that the Commission expand this current definition to include all communications that occur as part of regular, established ongoing business or customer relationships.

By way of example, in the area of financial services, the ways in which customer relationships are conducted has evolved exponentially since the advent of email, the Internet and other mediums, and the Commission should recognize these important technological and practical changes as it contemplates new regulations. For example, one third of respondents to the 2003 *American Banker*/Gallup Consumer Survey said they are writing fewer checks than they did five years ago, and the same survey found that nearly 24 percent of all respondents are paying their bills online through their primary financial institution. These existing relationships also are being conducted – and expanded – via email. In one instance, a long-time customer of a financial institution may want to receive email communications regarding more favorable credit card rates, or learn more about a new product that the bank is offering.

Community banking, at its core, is a relationship business, built upon layers of transactions with customers, supported by regular communications and developed over an extended period of time. So, as new products and services augment or replace current products and services, email is an increasingly important medium for this type of legitimate business communications. Today’s technology allows consumers and businesses to conduct transactions via email and the Internet, and more and more consumers and business simply prefer to eliminate paper communications altogether. By recognizing the evolving nature of these relationships, the Commission can achieve a balanced regulation that works to eliminate fraudulent and deceptive email communications without disrupting important and legitimate business relationships.

To look at another business type, a trade association also operates in a very relationship-intensive environment where frequent and timely email communications with its membership on a variety of topics is critical. Whether the association is alerting its membership about pending – and fast-moving – legislation or announcing an important teleconference about just-adopted regulations, association members need this information quickly in order to react. These types of electronic mail can and do contain both membership updates and some promotional aspects. ACB believes this is another important example of why the Commission should expand the current “relationship and transaction” definition to include all communications that occur as part of regular, established ongoing business or customer relationships.

Defining Sender

The Commission has asked for input on whether it should adopt regulations that define “sender” to include several persons or entities simultaneously. ACB strongly opposes a rulemaking that would define “sender” so broadly because we believe this action could, in effect, impose liability on a third party for the originating party’s actions, over which the third party would have no control. This could result in an untenable situation, in which a legitimate provider of information faces liability for actions over which that party had no control. In practical reality, there is only one originator of any email communications, and one entity that controls the actual distribution of this communication. While parties can and should review content attributed to their organization, the reality of this scenario makes it extremely difficult for parties other than the transmitter of the electronic mail message to exercise any practical control over an email distribution.

In addition, by defining “sender” so broadly, the Commission would raise significant privacy issues for email originators that are insured depository institutions. Under a multiple sender scenario, financial institutions in question would have to grapple with potentially conflicting requirements, such as how to comply with the CAN-SPAM Act opt-out requirements while maintaining the privacy of their customers’ non-public information. Ongoing compliance for the non-transmitting party would be extremely difficult, if not impossible, in some instances.

Subject Line Labeling

We do not believe that the Commission should undertake any rulemaking to require a mandatory subject line label for non-adult commercial electronic mail messages. ACB recognizes that one of the chief purposes of the CAN-SPAM Act is to allow consumers to easily identify unsolicited, adult-oriented email and to detect non-adult, SPAM email for deletion. As noted earlier, however, there are legitimate marketing and advertising activities conducted by reputable businesses and other organizations that are accomplished through email communications. The Commission should consider the legitimate role email plays in marketing and advertising as it considers whether or not to require subject line labeling. By imposing a rigid form to include in email subject lines, the result may be that legitimate companies that utilize electronic mail for business purposes will be hampered significantly in their efforts while true “spammers” will simply – and quickly – develop an end-run around such labeling requirements. ACB encourages the Commission to reject any suggestion of such a requirement.

Conclusion

ACB appreciates the opportunity to comment on this very important matter. We look forward to working with the Commission to adopt final regulations that recognize the legitimate business purposes accomplished by electronic mail communications as it implements the requirements of the CAN-SPAM Act.

Definitions, Implementation, and Reporting Requirements

Under CAN-SPAM Act

April 19, 2004

Page 5

Should you have any questions about this letter, please do not hesitate to contact the undersigned at (202) 857-3122 or via email at mbriggs@acbankers.org, or Charlotte M. Bahin, Senior Vice President, Regulatory Affairs, at (202) 857 3121 or cbahin@acbankers.org.

Sincerely,

A handwritten signature in black ink that reads "Michael W. Briggs". The signature is written in a cursive style with a large, prominent initial "M".

Michael W. Briggs
Chief Legal Officer